Australian National University

Regenerating law or hastening war? Evaluating the impact of police reform on the rule of law in Afghanistan during the ISAF deployment

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June 2026

A thesis submitted for the degree of Doctor of Philosophy of The Australian National University

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Student statement of original work

This thesis is wholly original and created exclusively by David Emmet Healey, except where indicated otherwise. This research has not been conducted jointly with any other person and all sources have been acknowledged.

Word count: 99064

Acknowledgements

I would like to thank my supervisors, Professor Jeremy Farrall and Professor Rob McLaughlin, for all of their support, their guidance and their ongoing encouragement in what has been a long journey.

I would like to thank my professional editor Kate Leeson for copy editing an earlier version of this thesis and for editing the references in the current version.

I would like to thank the brave men and women of the Afghan National Police who had the courage to finish their training and go out beyond the wire to police Afghanistan in some of the most dangerous environments in the world. You taught me what courage really was.

Lastly but never least, I would like to thank my wife Anthea and children Jake, Abbey and Angus who have at various times had an absent husband, father and dad while I pursued this monumental task. Your unconditional love and support are the true reason why I got through this.

Abstract

This thesis develops a new framework for evaluating United Nations (UN) and international efforts to promote the rule of law through police reform in post conflict situations. The thesis examines the scholarly and policy literature on the rule of law along with deliberately focused case studies, with a view to developing a rule of law approach that is specific to the current needs of Afghanistan in a post-conflict policing context. This framework aims to be pragmatic, useable and realistic in ensuring that the rule of law can be restored through proper consultation with customary and statutory law.

This thesis explores the history of policing and its associated components in the legal system in Afghanistan. It then seeks to provide a rule of law blueprint for the policing and law reform elements of a (future) UN-led intervention, noting the following five significant developments in Afghanistan:

1. The withdrawal of the majority of coalition forces in 2014
2. The signing of a peace deal between the US and the Taliban in March 2020
3. The final and total withdrawal of all coalition troops in September 2021
4. The takeover of the Afghanistan government by the Taliban; and
5. The subsequent establishment of the Islamic Emirate of Afghanistan by the Taliban.

Afghanistan's rule of law problems have been exacerbated by its past experiences, in that international interventions to date have failed to create any lasting and meaningful effect for the rule of law, peace, security and stability in Afghanistan. Indeed, the Taliban were once again simply able to walk into Kabul and take leadership of the country, seemingly with little opposition. The so called 'peace pact' signed between the Taliban and the US could only be described as a tacit agreement to hand over governance rather than anything of any substance, once again placing Afghanistan at the mercy of the brutal dictatorship of the Taliban.

This thesis argues the ISAF approach to post conflict policing served to weaken rather than strengthen the rule of law in Afghanistan and therefore advances a new theoretical model of the rule of law designed to increase the capacity of future post conflict policing interventions to promote the rule of law, both in Afghanistan and elsewhere.

The policing intervention component of ISAF post-2001 was disorganised, wayward and disconnected. It did little to set the foundation that was required to reinstate the rule of law and provide security for the citizens of Afghanistan. Rather, ISAF in fact laid the foundation for what would become a failed and weakened state, allowing the Taliban to simply take control as coalition

forces abandoned unfinished business in 2014 and then permanently in 2021. The thesis critically examines international efforts to promote the rule of law of Afghanistan with a view to providing suggested revisions not only to the criminal law but to the way in which it is enforced and the interim assistance that Afghanistan may require to achieve this.

The thesis is set out in eight chapters. Chapter 1 examines the research question, the focus of this analysis and the literature gap that the thesis seeks to fill. Chapter 2 examines the rule of law elements as it applies to policing and conducts a literature review of the existing scholarly material on rule of law models in post conflict situations, and describes the methodology adopted. As part of establishing the methodology, Chapter 3 road tests two post-conflict situations in Timor Leste and Iraq with a view to assessing the rule of law approach proposed, and lessons that could be gained from these past occasions. Chapter 4 explores the history of policing in Afghanistan through the lens of a turbulent recent history 'The Great Game' with a view to gaining insight into the structure of policing and how police enforce the law. Chapter 5 explores the history of policing in Afghanistan in the Soviet era and the emergence of the Taliban. Chapter 6 examines the effectiveness of policing endeavours of the International Security Assistance Force and its partners in Afghanistan. Chapter 7 examines the findings distilled from Chapters 2, 3, 4, 5 and 6 and analyses the legal architecture for a more effective policing mission. Chapter 8 provides conclusions and recommendations to resolve the criminal justice and legal issues identified in the thesis. The thesis provides an appendix of recommendations for any future international police mission deployed to Afghanistan, with a view to assisting the population in an overhaul of the criminal justice system and the application of a new rule of law mandate.

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Abbreviations

AFP	Australian Federal Police
ANA	Afghan National Army
ANCOP	Afghan National Civil Order Police
ANDS	Afghan National Development Strategy
ANDS	Afghan National Defence and Security Forces
ANP	Afghan National Police
ANSF	Afghan National Security Forces
ANU	Australian National University
AWS	Autonomous weaponry systems
CCC	Commonwealth Criminal Code
CIA	Central Intelligence Agency (US)
COIN	Counter-insurgency
CPA	Coalition Provisional Authority
CPC	Criminal Procedure Code 2014
CPN	Criminal patronage networks
CTH	Commonwealth
DPR	Democratic police reform
DPO	Department of Peacekeeping Operations
DEA	Drug Enforcement Agency
DRA	Democratic Republic of Afghanistan Army
EU	European Union
EUPOL	European Union Police Mission in Afghanistan
FBI	Federal Bureau of Investigation
FLEA	Foreign law enforcement agencies
GIRoA	Government of the Islamic Republic of Afghanistan
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTA	International Criminal Tribunal for Afghanistan
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	Improvised explosive device
IEoA	Islamic Emirate of Afghanistan
IHL	International humanitarian law
IHR	International human rights law
IOCC	Interagency Operations Coordination Cell

IPCB	International Police Coordination Board Afghanistan
ISAF	International Security Assistance Force
ISI	Inter-Services Intelligence (Pakistan)
ISIL	Islamic State of Iraq and Levant
ISIS	Islamic State of Iraq and Syria
ISIS-K	Islamic State in Khorasan Province
JSU	Judicial Security Unit
KGB	Komitet Gosudarstvennoy Bezopasnosti (Soviet secret intelligence)
KhAD	Khadamat-e Aetla'at-e Dawlati (Afghan secret intelligence)
M16	UK Secret Intelligence Agency
NATO	North Atlantic Treaty Organization
NDS	National Directorate of Security
NGO	Non-government organisation
NIAC	non-international armed conflict
NTM-A	NATO Training Mission Afghanistan
P5	Permanent five (members of the UN)
PDPA	People's Democratic Party of Afghanistan
PNTL	National Police of East Timor
POMLT	Police Operational Mentoring and Liaison Teams
PTC	Provincial training centre
PVSV	Promotion of Virtue and Suppression of Vice
OROLSI	Office of Rule of Law and Security Institutions
QST	Quetta Shura Taliban
TTP	Tehrik-e-Taliban Pakistan
TWAIL	Third World Approach to International Law
UIFSA	United Islamic Front for Salvation of Afghanistan
UN	United Nations
UNAMA	United Nations Mission in Afghanistan
UNAMI	United Nations Mission to Iraq
UNCAC	UN Convention against Corruption
UNDP	United Nations Development Programme
UNMIT	United Nations integrated Mission in Timor Leste
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNSC	United Nations Security Council
UNITAD	United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL

UNTAET	United Nations Transitional Administration in East Timor
US	United States
USSR	Union of Soviet Socialist Republics
WPA	*Witness Protection Act*

'We should walk slowly forever, not just run for an instant.'

Afghan proverb

Chapter 1
Introduction

The withdrawal of all International Security Assistance Force (ISAF) troops from Afghanistan in September 2021, and the takeover of Afghanistan by the Taliban once again, posed a new set of problems in Afghanistan, particularly in relation to basic security stability.[1] It has never been more critical to have a reliable police force and police stations in the communities and provinces of Afghanistan, in order to improve security and perceptions of safety amongst the population.[2] The withdrawal of the main body of ISAF troops in 2014 was alarmingly premature.[3] It was motivated more by a question of cost, not only financially but human, rather than the completion of the task of handing back a country that could manage its own security issues.[4] The withdrawal led to the collapse of the Afghan National Defence and Security Forces (ANDSF) due to the dependency on US military forces, which destroyed ANDSF morale.[5]

The need for a more principled and effective policing has become even more critical with the total withdrawal of all troops, and an approach of 'watch and see' from the air by previous ISAF contributing States, following the takeover of Afghanistan by the Taliban in 2021. While other unstable states might have become a greater concern for countries like Australia and the United States (US), this erosion of international engagement in and support for Afghanistan will likely promote an increase in Islamic State of Iraq and Syria (ISIS) and Al Qaeda activity as well as a spike in transnational crime, with significant global consequences. Pakistan, despite some recent crackdowns,[6] has previously supported the Taliban, which is alarming given the total withdrawal of coalition forces.[7] This was previously a frustration to coalition forces, as no amount of political intervention

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[1] Cornelius Friesendorf, 'Paramilitiarisation and Security Sector Reform: The Afghan National Police' (2011) 18(1) *International Peacekeeping* 79.
[2] Rosa Affleck et al, 'Sustainable Infrastructure in Conflict Zone: Police Facilities' Impact on Perceptions of Safety in Afghan Communities' (2019) 11(7) *Sustainability* 2113:1–20.
[3] James Dobbins et al, 'Consequences of a Precipitous U.S. Withdrawal from Afghanistan' (Expert Insights, No PE-3256-RC, RAND Corporation, 16 January 2016) 12.
[4] 'Pushing for a U-Turn in Afghanistan', *International Crisis Group* (Web Page, 17 September 2015) <https://www.crisisgroup.org/imp/asia-pacific/afghanistan/pushing-u-turn-afghanistan>.
[5] Special Inspector General for Afghanistan Reconstruction, *Collapse of the Afghan National Defense and Security Forces: An Assessment of the Factors That Led to Its Demise* (22-22-IP Evaluation Report, May 2026) 2 <https://www.ecoi.net/en/file/local/2073824/SIGAR-22-22-IP.pdf>.
[6] Yama Bariz, 'Pakistan Expels Tens of Thousands of Afghans', *BBC News* (online, 20 April 2025) <https://www.bbc.com/news/articles/c74z19pl7wgo>.
[7] Shashi Tharoor, 'Pakistan's Taliban Monster', *Australian Strategic Policy Institute* (Web Page, 9 June 2021) <https://www.aspistrategist.org.au/pakistans-taliban-monster/>.

seemed to stem the flow of Taliban fighters into Afghanistan.[8] However, recent reports indicate a deterioration in the relationship between Afghanistan (the Taliban) and Pakistan.[9] The current feud is linked to the Taliban's inaction against the Tehrik-i-Taliban Pakistan (TTP) militants, who are operating from Afghan soil and aim to overthrow the Pakistan Government. A retaliatory attack by Pakistan against the TTP in late 2024, resulted in the deaths of 46 Afghan civilians including women and children.[10]

The thirteen years preceding the 2014 ISAF withdrawal took a toll on the coalition forces and the civilian population. The effort was crippling for the US government and coalition military budgets, especially given the emerging complexity and cost of the simultaneous operation in Iraq and the multinational deployment there. The decade since 2014 has also seen an increase in civilian deaths in Afghanistan and an unravelling or regression of some of the progress made in the years prior to withdrawal. This thesis explores why and how this occurred through the lens of policing: whilst there may have been some over-reliance on coalition support by Afghan authorities, there was poor judicial governance, administration of criminal law, and planning and continuity.

One example of these discontinuities and shifting definitions of success is that of the mission objective of the US-led coalition forces, which constantly changed and finally settled on the philosophy of counterinsurgency (COIN) in 2008, which has not always complemented the laws of armed conflict.[11] This position was confirmed by the then US Secretary of Defence Robert Gates, who stated: 'over the long term, we cannot kill or capture our way to victory'.[12]

Similarly, the 2010 introduction of the Afghan National Development Strategy (ANDS), the basis of which was the 'handing back' of Afghanistan to the Afghan people, was premised on the assumption that Afghanistan would achieve security and diminish the threat of the Taliban forces, to the point where the Afghan National Security Forces (ANSF) could control any emerging threat. This presented a convenient 'out' for the coalition in a country that had a history of unwinnable wars. But of course, this 'control' by the incumbent Afghan government did not manifest.

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[8] Owen Bennett Jones, *Eye of the Storm* (Yale University Press, 2002) 2.
[9] Asfandyar Mir, 'Pakistan's Twin Taliban Problem', *United States Institute of Peace* (Web Page, 4 May 2022) <https://www.usip.org/publications/2022/05/pakistans-twin-taliban-problem>.
[10] Najma Sambul, 'Once Firm Friends, Afghanistan and Pakistan Are Now at Each Other's Throats. Here's Why', *ABC News* (Web Page, 2 January 2025) <https://www.abc.net.au/news/2025-01-02/pakistan-afghanistan-relations-at-low/104777310>.
[11] David Petraeus, *The US Army and Marine Corps Counterinsurgency Field Manual* (Field Manual 3-24, Wiley, December 2006).
[12] 'Military Must Focus on Current Wars, Gates Says', *NBC News* (online, 14 May 2008) <https://www.nbcnews.com/id/wbna24600218>.

While US and coalition forces emptied out of Afghanistan in 2014, a new outbreak of global human atrocity and cruelty unfolded in Iraq and Syria, inspired by a brand-new terrorist group Islamic State of Iraq and Levant (ISIL), who were motivated to rid the earth in historic Caliphate and Islamic lands of the 'infidels' and the unclean. This new breed of terrorist group is now also active across Afghanistan and is known as Islamic State in Khorasan Province (ISIS-K). This is yet another challenge for Afghanistan under post-Taliban rule, and under any future governance regime. Consequently, it is not only appropriate to ask why and how the ISAF law enforcement and policing project failed, it is necessary to ask these questions, as the international community will likely have to intervene again one day.

1.1 The central argument

The central argument of the thesis is that the ISAF approach to post conflict policing served to weaken rather than strengthen the rule of law in Afghanistan.

The thesis therefore advances a new theoretical model of the rule of law designed to increase the capacity of future post conflict policing interventions to promote the rule of law, both in Afghanistan and elsewhere

1.2 The research questions

My animating research question is in two parts:

1. What impact did the ISAF policing program have on the rule of law in Afghanistan?
2. What lessons can be drawn from the ISAF policing experience to guide future efforts by international actors to promote the rule of law through policing?

During the period of the ISAF (2001–2014), the international policing community provided and delivered significant financial and training assistance.[13] However, that training led to the creation of an uncoordinated, disorganised, dependent and disloyal agency, rather than producing a national police force with a capability to investigate and prosecute crime and protect the population.[14]

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[13] Tonita Murray, 'Police-Building in Afghanistan: A Case Study of Civil Security Reform' (2007) 14(1) *International Peacekeeping* 108, 116.

[14] Karl Nicolas Lindenlaub, 'Afghanistan's Policing Failure and the Uncertain Way Forward', *Strategy Bridge* (Web Page, 20 October 2020) <https://thestrategybridge.org/the-bridge/2020/10/20/afghanistans-policing-failure-and-the-uncertain-way-forward>.

Therefore this thesis seeks to construct a more effective and responsive framework of the rule of law, to increase the capacity of a future police-led intervention into Afghanistan is coordinated, accountable and transparent, to ensure consistency across the provinces.

Of course, it is with a great deal of caution that criticism should be directed towards foreign law enforcement agencies (FLEAs) and their training curriculum of Afghan National Police (ANP)[15] recruits, as the insurgent environment necessitated a shift in objectives to keeping police alive rather than traditional police training. It is therefore critical that this thesis positively identifies the landscape and hostility that the Afghanistan landscape is likely to present to an intervention. The rule of law framework that this thesis proposes includes extra-legal measures to ensure greater oversight of any interim administration and ongoing accountability of the UNSC.

The 'Extra-Legal Measures Model', discussed in this thesis in detail in chapter 2.2.1 - *Elements of a policing-focused rule of law assessment methodology that can be distilled from the literature,* creates the possibility that public officials can act extra-legally when they believe that it is necessary to protect the public from a threat or threats.[16] When taking this extra-legal action in the face of an obvious threat to public safety, public officials must be transparent and open with the public about what actions they take.[17] Any proposed actions, under the extra-legal measures model by public officials to combat grave dangers, must be openly communicated under this model to the public who then may decide on whether those actions are appropriate.[18]

Surprisingly, few of the FLEAs that deployed to Afghanistan conducted coordinated training with the ANP, particularly at the recruitment level.[19] The Australian Federal Police (AFP) worked closely with US Marines when training recruits in Tarin Kowt, in a coordinated effort involving classroom lectures with translators, fire and movement, instruction with mock AK-47s, and a live firing range. However, US Marines are trained in military rather than police operations and there was a large knowledge gap between AFP and US Marine Corp personnel.[20] ANP recruits were aware that, following a successful

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[15] Note: the Afghan National Police as referred to in this thesis is interchangeable with the words 'former Afghan National Police', due to the takeover of Afghanistan by the Taliban in 2021. The status of the ANP at the point of writing this thesis is unknown.

[16] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 111.

[17] Ibid 112.

[18] Ibid.

[19] Inam Ul Haque, 'Miscoordination, Training, Ownership Problems and ANDSF Collapse', *The Express Tribune* (online, 6 July 2023) <https://tribune.com.pk/story/2424851/miscoordination-training-ownership-problems-and-andsf-collapse>.

[20] Brendan Nicholson, 'AFP Team to Help Train Afghans', *Sydney Morning Herald* (online, 12 March 2009) <https://www.smh.com.au/national/afp-team-to-help-train-afghans-20090311-8vb8.html>.

graduation from police training, there was a high mortality rate for ANP Graduates in the provinces and checkpoints.[21] This was reflected in occasional cavalier behaviour, and in some instances drug use while in training, as observed by the author. Nevertheless, the AFP trainers believed in their methodology and their commitment to the ANP. The training model was consistent with the federal continuum of the AFP training in Australia, with the exception that most, if not all, graduate police would be posted to remote police stations and checkpoints.[22] These police stations and checkpoints were often rudimentary and required paramilitary skills to survive the constant threat of the Taliban, as well as a steely resolve to avoid desertion and corruption.[23] The rule of law framework suggested by this thesis will need to be road-tested in relation to the Timor-Leste and Iraq interventions in order to identify lessons from those conflicts, in terms of how a new police intervention will look, and how wide it should stretch, to meet a consistent continuum and application of the rule of law.

This raises the critical challenge of how to increase the retention of the ANP (or a future ANP). This challenge is complicated by the fact that the previous Afghan Government did not seem to place sufficient value on either the training or remuneration of its national police force.[24] These challenges, in turn, raise a series of important questions: How has this environment changed since the coalition withdrawal? Is it possible for a new post-Taliban Afghan National Army (ANA),[25] to provide a protection force to enable a new Afghan Police Force to be police, or is there still a tension between the two? Is it possible to create a witness protection branch within the Afghan Police to ensure that complainants and witnesses of serious criminal offences are protected? Who or what organisation can facilitate the professional training required to equip the new Afghan Police with the necessary skills to provide the essential safety platform to launch a concerted and sustained containment and prosecution program against criminal networks and terrorism?

The security situation in Afghanistan remains highly unstable and it is ambitious to expect the former ANP to do much other than remain vigilant and stay alive. This thesis argues that traditional policing models taught by the European Union Police Mission in Afghanistan (EUPOL) and the NATO Training Mission Afghanistan (NTM-A) were largely ineffective, due to the inconsistency of the approach to training and a distinct lack of attention to an animating rule of law model to assist these

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[21] Anthony Cordesman, *Military Developments in the Afghan War* (Report, Center for Strategic and International Studies, 13 August 2019) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190910_Military_Progress_Afghanistan.pdf>.
[22] John Sopko, *Police in Conflict: Lessons from the US experience in Afghanistan* (Special Inspector General for Afghanistan Reconstruction, 2022) 115.
[23] Affleck et al (n 2) 3.
[24] Jerome Starkey, 'Confronted by Danger and Poor Pay, Police Go Over to the Taleban', *The Times* (London, 23 October 2009) 52.
[25] This army is now known as the Army of the Islamic Emirate of Afghanistan.

training missions in the delivery of police training to the ANP. This conclusion results from the analysis of the following secondary research questions:

- What was the approach by ISAF to the rule of law in Afghanistan and was it effective?
- Did the UNSC provide a clear enough mandate to enable the roll out of an effective rule of law model?
- What training and qualifications did ISAF have to enforce a rule of law mandate in Afghanistan?
- Why did coalition forces withdraw from Afghanistan in 2014 and was it premature?

1.3 The challenge of evolving context

While the focus of this thesis shifted following the 2021 takeover by the Taliban and the emergence of ISIS-K and other similar threats, the prime focus of this study remains the post-conflict survival of Afghanistan and the enforcement of criminal laws to facilitate peace and security. The thesis has consequently become more complicated, as it is difficult to assess how the Taliban will enforce criminal laws, and the extent to which it will rely solely on Sharia law. The thesis will therefore proceed on the premise that the criminal laws are still extant and able to be enforced.

To this end, any future policing intervention into Afghanistan must have a strong rule of law mandate, which will be the focus of Chapter 2. This thesis will seek to draw upon existing rule of law concepts and past case studies in order to construct a new theoretical framework that will strengthen the rule of law in order to enable those entrusted with enforcing it to have properly laid foundations, which may include, in the near future the need for an international peacekeeping force to assist the Afghan National Security Forces (ANSF).

1.4 Research methods

This thesis adopts the following methods in order to provide adequate responses to the research question and the creation of the four-step approach to the rule of law:

- Assessment of the history of policing in Afghanistan
- Analysis of scholarly articles
- Analysis of specific statutes
- Road testing cases (Timor vs Iraq) (Abu Ghraib vs Gitmo)
- Analysing existing frameworks and capabilities in Afghanistan
- Comparing other like states

- Assessing multiple approaches to post conflict policing

1.5 Where the analysis in this thesis is intended to 'fit' within the wider literature

There has been little research conducted into the history of policing in Afghanistan, and less into the criminal laws of Afghanistan or the application of those laws by the police and the judiciary. In preparing this thesis the main sources of information were drawn from a literature review and from practical professional experience in two war zones and policing duties.

1.5.1 What gap in the literature am I seeking to fill?

The main sources of literature derive from authorities on the rule of law such as Bleiker, who provides insights into the complex relationship between the rule of law and security sector reform.[26] Others, such as Durch, Farrall, Maley and Whittle, provide useful insights into the application of the rule of law to post conflict situations,[27] while Kilcullen, Giustozzi, Harris, Mason and McLeod provide specific examples of conflicts and the application of policing and counterinsurgency.[28]

Whilst this literature is dealt with in more detail in Chapter 2, the key point to initially note on this important body of scholarship is that none of the sources focus on policing reforms or post-conflict policing in Afghanistan. The existing literature, while helpful, does not focus on the type of rule of law mandate and subsequent implementation required to empower Afghanistan. Nor does it focus on policing in Afghanistan or those laws that enable and empower police to perform their roles. That is, these directly relevant studies are useful, but do not generally provide detail as to a deliberate

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[26] Christoph Bleiker and Marc Krupanski, *The Rule of Law and Security Sector Reform: Conceptualising a Complex Relationship* (Ubiquity Press, 2012).

[27] William J Durch et al, *Enhancing United Nations Capacity to Support Post-Conflict Policing and Rule of Law* (Stimson Center, 2010); Jeremy Farrall, Hilary Charlesworth and Alan Ryan, *Strengthening the Rule of Law through the United Nations Security Council: Policy Proposals* (Australian Civil–Military Centre, 2016); William Maley, 'The Rule of Law and the Weight of Politics' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 61; Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26(3) *European Journal of International Law* 671.

[28] David J Kilcullen, 'Deiokes and the Taliban: Local Governance, Bottom-Up State Formation and the Rule of Law in Counter-insurgency' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 35; Antonio Giustozzi and Mohammed Isaqzadeh, *Policing Afghanistan: The Politics of the Lame Leviathan* (Oxford University Press, 2013); Andrew Marriott, 'The Legal Profession in Timor-Leste's Justice Sector Reconstruction: Opportunities and Constraints' in Vandra Harris and Andrew Goldsmith (eds), *Security, Development and Nation-Building in Timor-Leste: A Cross-Sectoral Assessment* (Routledge, 2011) 103; Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011); Travers McLeod, *Rule of Law in War: International Law and United States Counterinsurgency in Iraq and Afghanistan* (Oxford University Press, 2014).

approach to establishing a blueprint for a rule of law policing led mission in the future in Afghanistan. This is the gap this thesis seeks to fill.

Consequently, the analysis here employs a number of additional processes designed to mitigate this parity of sources. One is direct comparison of Afghanistan and Australian laws, in order to fully understand the weaknesses in the logistical capability of the ANP. Another is the focus on the mechanisms of the United Nations Security Council (UNSC) and the sanctions it has enforced against Afghanistan commencing in the latter part of the last century. A third is to examine research into the use of international criminal courts, insofar as this allows for some testing as to whether such hybrid mechanisms are something that could be implemented in Afghanistan.

1.5.2 Practical professional experience as a resource source

While I commenced this thesis at the Australian National University (ANU), I did so following a three-rotation deployment to Afghanistan between 2010 and 2011. I was deployed as an Australian Federal Police officer and lawyer. While deployed in Afghanistan, I completed a Master's Degree in International Customs Law and Administration, focused entirely on customs and trade law in Afghanistan. This enabled me to fully appreciate the embedded systems and practices of Afghanistan's government and its people.

At the beginning of the deployment, I was embedded with the Australian Army to recruit and sustain ANP into the provincial training centre in Tarin Kowt. This was important as part of our role was to train the ANP in police powers and criminal laws as well as tactics and use of force. Following this, I deployed to Kabul in the Interagency Operations Coordination Cell (IOCC) in counter-narcotics and worked alongside the Central Intelligence Agency (CIA), Drug Enforcement Agency (DEA), Federal Bureau of Investigation (FBI) and the UK Secret Intelligence Agency (MI6), representing the position of the AFP. I worked in the rule of law cell alongside coalition partners as a lawyer to assist in returning Afghanistan back to the Afghani people via the ANDS.

1.6 Why the policing component of 'rule of law' is the relevant core concept to inform this analysis

This thesis advances a pragmatic rule of law framework along with changes and adaptations to the current criminal justice system designed to better empower law enforcement and judiciary officials and to provide security across Afghanistan with the assistance of an international peacekeeping and mentoring force. The framework will be built around Afghanistan's current system of law but will

focus on the inclusion of customary law in order to unite provincial Afghanistan and decentralise the current system, which is, for all intents and purposes, ruled from Kabul.

Afghanistan has a complex history of conflict. It is essential for this thesis to survey that history in order to determine the type of rule of law mandate and leadership required to navigate, unite, fund and protect, an effective judiciary and law enforcement agency to combat crime and terrorism across Afghanistan. This has become increasingly important with the emergence of ISIL and the re-establishment of Al Qaeda in Afghanistan. Afghanistan will struggle to prosper or emerge from two hundred years of war without security for its people provided by both its police and military forces.

Afghanistan's organised military forces have a long history of repelling invaders, dating back to at least the British invasions of the 19th century. But what of the police force? The dominant expatriate narrative suggests that an effective national police force was not properly formed until 2002, when a German policing mission was invited to help develop the Afghan National Police (ANP) by the Afghan Government through ISAF.[29] Whilst this mission did provide some basic organisation of police, it did not create a professional and competent policing agency, as observed in the developed countries. Two decades later the police force can barely manage traffic duty, let alone complex terrorism offences against the nation or serious organised crimes. There is simply not the logistics or funding to sustain the ANP. The mentoring and training delivered by coalition forces was largely uncoordinated and inconsistent, often done by contractors without a policing background.

This then is the focus of this thesis: how might the ANP police Afghanistan post-Taliban rule? Are the current criminal laws sufficient to enable the ANP to investigate and ultimately prosecute alleged offenders? Were the ISAF plans on policing in post-conflict Afghanistan sufficient? What lessons can a future Afghanistan mission take from this? What legislative reforms are required in order to better equip police to deal with everyday crimes? What of customary or tribal law? Is there some way to incorporate it into a national system that will meet the needs of the population as a whole? Does an international policing mission need to be maintained over a longer term in order to help the next generation of Afghan Police to become more capable and to restore the rule of law?

Ultimately, this thesis concludes that a policing centred rule of law approach is essential. This approach must incorporate the necessary tools and strategies to comprehensively understand the needs of the Afghan people and to win the trust of a population that has endured hundreds of years of war

[29] Judy Dempsey, 'Germany Criticized for its Training of Afghan Police – Europe – International Herald Tribune', *The New York Times* (online, 15 October 2006) <https://www.nytimes.com/2006/11/15/world/europe/15iht-germany.3551337.html>.

and conflict. One of those tools must be the protection of witnesses and victims in the criminal justice system from retribution by criminal groups operating within Afghanistan, who are often connected to those possessing political power. With recent developments in Afghanistan, including the takeover of governance by the Taliban, this process may appear a more distant proposition, but it is essential to contemplate, nonetheless. Ultimately, the question as to whether the criminal justice system can be sustained, and justice delivered not only by the judiciary but by the law enforcement agencies that investigate offences, including acts of terrorism, once an effective government has been restored, is both the context and the aim of this study. That is, this study is historically informed but intended to be future focused.

The new approach to policing in Afghanistan must consider the 'dynamic of difference' between European and non-European cultures and ensure that any new mission does not attempt to 'civilise' the Afghan population, especially those provinces that still practise customary law.[30] Rather, a new mission must seek to understand the needs of the people whom it will assist in rebuilding the rule of law. This new mission must engage deeply with the views of Afghans as to their own condition and its causes.[31]

The Third World Approach to International Law (TWAIL) is well explained by Anghie to have been founded on the basis of creating a system of international law that furthered the interests of the Third World.[32] The TWAIL approach must be viewed through the lens of colonialism and imperialism, in that the establishment of international law was simply a perpetuation of the marginalisation of non-European cultures, given that international law was established by European cultures based on European ideals.[33] These ideals were at odds with TWAIL, as will be seen through some of the case studies in this thesis.

A new UN police-led mission to Afghanistan cannot be achieved without engaging deeply with the views of the people of Afghanistan as to their own condition and its causes to ensure that racial minorities and Indigenous peoples, for instance, do not suffer from discrimination and exploitation. A new UN police-led mission must move away from a narrow focus on state building to a people-

[30] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly* 739.
[31] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34(1) European Journal of International Law 7.
[32] Ibid 8.
[33] Ibid 107.

centred approach to help local Afghan communities and societies strengthen their own capacities to prevent conflict and sustain peace.[34]

While this thesis proposes what is essentially a westernised approach to policing, it will seek to ensure that the development of any policing model in Afghanistan is one that best suits the Afghan people. It would be entirely incongruent to propose a further UN police-led mission that is not based on westernised models given the donor countries will be mostly First World. Such a policing model, however, will seek the views of both a centralised administration along with customary practices to ensure that a model is developed that is able to engage with marginalised communities. It must be made clear that Afghanistan has a constitution and a number of modern codified criminal laws that would complement a westernised approach to policing. This approach must be made with some caution, as a new policing mission to Afghanistan must take into account the customary practices of provincial Afghanistan and the practice of Sharia law.

This thesis acknowledges some views that democratic police reform (DPR) in non-western contexts has previously failed in Georgia, Kyrgyzstan and Russia. This is because of low state capacity and a desire of leaders to resist DPR due to a reliance on police to maintain their political and economic positions (corruption).[35] This thesis also acknowledges that there are other views that a westernised approach to indigenous populations can result in over-incarceration, deaths in custody and a barrier to self-determination, particularly for minority groups.[36] Despite these views, this thesis maintains that a westernised approach to policing in Afghanistan can be successful so long as the policing model is tailored to the needs of the population and takes stock of historical failures by police to indigenous populations. One way this can be achieved is through a better understanding of local social, cultural and political circumstances and needs. A new policing mission will need to understand that the security priorities between police reformers and the general population will differ, and that it will be essential to find the right balance to ensure that the population is heard and engaged.[37]

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[34] Jennifer Giblin, *United Nations Peacekeeping and the Principle of Non-Intervention: A TWAIL Perspective* (Routledge, 2024).

[35] Liam O'Shea, 'Why Democratic Police Reform Mostly Fails and Sometimes Succeeds: Police Reform and Low State Capacity, Authoritarianism and Neo-patrimonial Politics (in the Former Soviet Union)' (2023) 33(3) *Policing and Society* 245.

[36] *Royal Commission into Aboriginal Deaths in Custody* (Report Vol 1, 15 April 1991) 22–3 <https://apo.org.au/sites/default/files/resource-files/1991-04/apo-nid30017.pdf>.

[37] Sinclair Dinnen and Danielle Watson, 'Police Reform in a Post-Conflict Context: The Case of Solomon Islands' (2021) 15(1) *Policing* 387; International Committee of the Red Cross, *The Roots of Restraint in War* (Report, June 2018) <https://www.icrc.org/en/publication/4352-roots-restraint-war>.

1.7 The forward-looking focus of this analysis

This thesis examines recent policing training delivered by international partners, in order to determine what style of policing works for Afghanistan, measured against what types of policing have failed and why. The focus is to examine why it has been so difficult to undertake effective policing, and to advance recommendations seeking to strengthen the capacity of Afghanistan to promote effective and principled policing. Therefore, this thesis proposes reform in policing and the laws that the ANP seeks to enforce on behalf of the judiciary and the post-Taliban government of the day.

This objective is complicated by the fact that the issue of policing in Afghanistan has evolved over the course of writing this thesis, in particular since the departure of the ISAF in 2014, the uncontested takeover of the government by the Taliban, and the final departure of international troops in 2020 and 2021. With the takeover of government by the Taliban, policing entered a new phase that might be understood as a 'caretaker' mode, noting the instability of the Taliban and that they are not freely elected by the population.

1.8 The path ahead: thesis structure

This thesis seeks to ask uncomfortable questions about why policing reform over the last two decades has failed. It will endeavour to expose barriers to the advancement of criminal justice, identify areas of law that need reform and provide suggestions on what type of international intervention will be required to assist a future, more legitimate government in Afghanistan to regain control. It is therefore anticipated that all of this would be done with the cooperation of the government of the day, noting that historically the Taliban have been an obstacle to progress and human rights in Afghanistan, particularly those of women.[38]

The objective of this thesis and the propositions contained within it are therefore anchored in the expectation and hope that Afghanistan will ultimately be led by a democratically elected government that represents, where practicable, the collective interests of the people of Afghanistan. Further, this thesis is animated by the expectation that such a freely elected government will initially require collective international assistance to rebuild Afghanistan. Those first steps will need to include ensuring that security is established and insurgent groups that have traditionally defied and stood in

[38] Zalmai Nishat et al, 'Why Do People in Afghanistan Object to Taliban Rule?', *Tony Blair Institute for Global Change* (Web Page, 22 September 2022) <https://www.institute.global/insights/geopolitics-and-security/why-do-people-afghanistan-object-taliban-rule>.

the way of progress will be suppressed and brought to justice.[39] This thesis however is designed to assist a future government of Afghanistan and thus its conclusions, therefore and recommendations may lie latent but adaptable for when a legitimate government is elected and supported by the international community and more importantly, the people of Afghanistan.

This chapter has introduced the key elements and approach of this thesis. Chapter 2 provides an assessment of relevant rule of law models from a scholarly and UNSC point of view, in order develop an original model of the rule of law to guide the future promotion of policing in post-Taliban Afghanistan.

Chapter 3 then road tests the original model developed in chapter 2 by applying it to two case studies – Timor Leste and Iraq – in order to examine the rule of law approach adopted in those interventions and how successful or otherwise those approaches were.

The scholarly and case study approach to the rule of law will enable a focus on how the UNSC, drawing on insights from the UN Secretariat, should mandate a rule of law resolution on Afghanistan, with a view to better managing the application of resources to the mandate for any future mission. This process will, in short, explain how the thesis arrived at the methodology employed, and why a specifically tailored model was required to best suit the needs of Afghanistan. This selection of a rule of law model and approach to Afghanistan also takes into account the growing humanitarian and security crisis emerging in current-day Afghanistan, due in large part to ISIL 'terrorist refugees' flooding into Pakistan and Afghanistan following comprehensive defeats in Iraq and Syria and deteriorating trade relationships between the Taliban and other states. The Taliban reportedly have no time for ISIS-K and this issue will likely lead to a turf war that the Taliban will win. Unfortunately, Al Qaeda is less selective and more inviting to those who share their vision, and this will be where the real problem will rest for Afghanistan in the longer term as it attempts to quell conflicts and push towards the eventual re-establishment of a government for the people.

Chapter 4 and 5 explore the history of conflict and policing in Afghanistan with a view to gaining insight into how Afghanistan was governed in times of unrest, what model of policing had been used, and how it evolved over time. These chapters identify various lessons learned through the many invasions that Afghanistan has endured along with the implementation and almost inevitable unravelling of many post conflict policing projects.

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[39] Amnesty International, *'Your Sons Are in the Mountains': The Collective Punishment of Civilians in Panjshir by the Taliban* (Report ASA 11/6816/2023, June 2023).

Chapter 6 then assesses the efforts of ISAF, the UN and coalition partners in relation to the application of the rule of law in Afghanistan post 2001. It focuses in particular on the failures to provide a cohesive outcome, for it is these failures that prove most instructive as to what a reformed policing intervention model should address. Based on the model elements developed in Chapter 2, and the historical survey in Chapters 3, 4, 5 and 6 of what occurred previously. Chapter 7 then proposes a legal architecture for a more effective policing model in Afghanistan. In order to do so it assesses existing institutions and laws with a view to proposing amendments and additions to support an effective judicial system in Afghanistan. Finally, Chapter 8 concludes with ideas for the implementation of change through any future policing intervention, from the general rule of law model to be adopted through to the specific legal reforms to be implemented. The thesis also contains an appendix with thirteen specific recommendations flowing from the research findings.

Chapter 2
Developing a new theoretical framework for evaluating policing in Afghanistan

2.1. Introduction

As noted in the Introduction to this thesis, any assessment of failures in policing projects in Afghanistan, and of proposals to structure a future policing project for Afghanistan, should be based on a structured and methodologically defensible anchor point. This chapter therefore seeks to do four things The first is to review existing rule of law strengths weaknesses and gaps. The second is to develop an original theoretical framework model of rule of law to guide critical analysis. The third is to develop a methodology based on these concepts, which then structures the analysis in this thesis. The fourth to conduct an initial 'road-test' of the methodology against two more comprehensively assessed policing interventions: Iraq and East Timor

2.2. The central concept: The 'rule of law'

In 2005, the Danish Foreign Ministers stated that efforts to define and implement the rule of law are needed in three different fields:

1. the policy field, in which the country in question must be encouraged to take ownership of their own future;
2. the institutional field, which calls for greater coordination, knowledge and communication between the United Nations in the field and in the headquarters and
3. the funding field for long-term successful peace building.[40]

These three 'fields of necessity' seem quite simple concepts on paper: give the post-conflict state ownership, ensure there is sufficient knowledge in the field and the office of the UN, and be in it financially for the long term. In the same meeting the Minister for Foreign Affairs and Trade of New Zealand emphasised that for peacebuilding to be successful it must be a long-term commitment.

So much of the premise of the rule of law therefore relies upon a legitimate, principled and effective government that is able to fulfil the role required by the people. As Farrall discusses, sanctions 'can

[40] *Letter Dated 28 July 2005 from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council*, UN Doc S/2005/500 (28 July 2005) 8.

be used to strengthen, reinforce and promote the rule of law'.[41] This could be an important and potent tool for the UNSC against the Taliban for its poor governance, strict enforcement of a brutal Sharia law and the emerging humanitarian disaster unfolding in Afghanistan as a result. It is apparent that many countries and international organisations have already frozen assets and suspended aid to Afghanistan since it came to power.[42]

Similarly, a United Nations report by Kofi Anan, the then UN Secretary-General in 2004, states that the rule of law is

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[43]

This is a helpful definition but perhaps is more focused upon understanding the parameters – and limitations – around how the UN would apply the rule of law to a mandate. It is a useful definition in assisting in the examination of rule of law options that promote extra-legal measures and above all else, human rights. That is, it is perhaps not as useful to establishing what a rule of law mandate in the field of policing might look like, but it provides a useful foundation. Therefore, for the purposes of this thesis, it is proposed that a better definition of the rule of law as a general start point for the development of a methodology is that of Durch who describes the rule of law as 'an operational goal that therefore requires a clear meaning to provide a clear end state'.[44] Positing the rule of law as on operational goal is important for this thesis and the development of a rule of law mandate as a new policing intervention will be required to implement and mentor the rule of law on the ground in Afghanistan, in a hands-on approach.

That end state must be one that can be easily followed by many official and unofficial international actors. It is this approach to the often-elusive conceptualisation and definition of 'rule of law' that holds most relevance to any pragmatic assessment of police deployments and mandates in Afghanistan as it provides the necessary road sign for intervention actors to provide a consistent

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[41] Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007).
[42] 'Harsh Winter Fuels Ongoing Humanitarian Crisis in Afghanistan', *UN News* (Web Page, 4 January 2022) <https://news.un.org/en/story/2022/01/1109122>.
[43] Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (Report, 2004) <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>.
[44] Durch et al (n 27).

mandate across Afghanistan. That is, for Afghanistan to have any opportunity to make progress in law and order and subsequently security, a rule of law mandate must be so clear and unambiguous, so end state defined, and so structured to that end that a UN mission can action a police-led deployment that can be followed on a step by step 'blueprint' basis. UNSC Mandates are not always going to be clear as often this will depend on the proper inclusion and contribution of members States. Member states have in recent years called for the UNSC to be more inclusive and there are concerns about divisions within the law society.[45]

While the UNSC issues the mandates for a peacekeeping operation following vigorous stakeholder negotiation,[46] the oversight of those mandates is managed through the UN Secretariat and supported by the UN Department of Peacekeeping Operations (DPO). The UN Secretariat, through the DPO, must provide a future mission to Afghanistan with clear political and executive direction and maintain contact with the Security Council and parties to the conflict in the implementation of Security Council mandates.[47] This should be coordinated through the DPO's Office of Rule of Law and Security Institutions (OROLSI), which can assist a UN Mission to Afghanistan with work to protect civilians, extend state authority, and re-establish law and order. The OROLSI could provide expertise and integrated guidance in the key areas of police, justice, corrections and security sector reform in Afghanistan.[48]

For the UNSC to meet its own definition of the rule of law as a proactive voice of the membership it must be focused on the end state of the mandates it issues. That is, this 'end-state' focused rule of law definition – in which mandates are to promote an end-state, rather than be the end-state – is the animating concern of this thesis. This end-state approach to the rule of law then has a direct influence on the granular elements to be employed in assessing past policing interventions, and designing future policing interventions, and it is to this distillation that the analysis now turns.

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[45] 'Security Council Must Be More Transparent, Inclusive to Address Conflicts, Crises, Speakers Stress in Open Debate on 15-Nation Organ's Working Methods' (Media Release SC/15401, 5 September 2023) <https://press.un.org/en/2023/sc15401.doc.htm>.

[46] Jeremy Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict' in Brett Bowden et al (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, 2009) 134.

[47] 'Department of Peace Operations', *United Nations Peacekeeping* (Web Page, 2 May 2026) <https://peacekeeping.un.org/en/department-of-peace-operations>.

[48] Ibid.

2.2.1. Elements of a policing-focused rule of law assessment methodology that can be distilled from the literature

There have been a number of scholarly contributions on conceptualising and evaluating rule of law promotion interventions in the peacekeeping context. Some of the more relevant contributions to this thesis (cited in this thesis) include those from authors such as Farrall, Durch, Whittle and Maley, who look to balance the professional attributes of deploying members with the accountability of the UNSC and the proper dispersion of an intervention force to properly address the mentoring and implementation of the rule of law. One of these was the responsive rule of law model for peace operations elaborated by Farrall et al.[49] This model, suggested for use by the UNSC, consists of four key components as summarised below:

1. Transparency – requires that power should be exercised in a transparent manner and that decisions be clear and accessible to those affected.
2. Consistency– requires that power should be exercised in a predictable manner and decisions promote stability to promote positive adherence by those affected
3. Accountability -requires the decision maker to remain accountable to both the actors for whom they exercise that power and those that they exercise power against. And
4. Engagement – requires decision makers to take into account the core interests for those actors whom the decision affects.[50]

These components are an intentional and deliberate approach by Farrall et al to assist the UNSC in its decision-making processes for the creation and deployment of peace operations. These four measures are the four 'Elements' employed in the assessment processes in this thesis. However, given their generalised and non-policing specific nature, it is essential that these four elements be further contextualised and given policing 'granularity' in order to be of real utility in assessing and designing policing interventions. It is to this issue that I now turn, in order to identify some specific, policing project relevant indicia for each of these four elements.

In essence, the broad four element model noted above, in support of the Durch 'end-state' approach to rule of law, seeks to have the UNSC deliver greater transparency on central rule of law objectives. What is also important for this thesis from this model is the reference by Farrall et al to police reform as an example of an antithesis to the generally broad non-specific approach to rule of law mandates:

[49] Farrall, Charlesworth and Ryan (n 27).
[50] Ibid.

> the Council has provided greater detail relating to a peace operation's rule-of law components, including those supporting the reform and restructuring of the police and of court and corrections facilities. Where possible the Council should provide greater transparency around the central rule of-law objectives to be pursued by its peace operations.[51]

This advice resonates with the objectives of this study in terms of how the UNSC should approach a rule of law mandate for a future Afghanistan. It is essential for Afghanistan that a mandate is meticulously laid out for a redeployment to ensure that all contributing partners are operating consistently and collaboratively across all the machinery of the rule of law. Hence, the central rule of law objectives must be clearly identified for Afghanistan by the UNSC. The mandate should be consistent in terminology to avoid confusion from those who are vested in enforce it.

In this light, the discussion by Farrall et al on strengthening the UNSC and a UN-led mission on the point of accountability, certainly once the Taliban regime has lost power, is also on point for the ANP, given the history of corruption and lack of trust by the population. This will mean that the Afghan law enforcement institutions will have to undergo a complete restructure to avoid undermining the rule of law. That is, the key attribute this thesis takes from the Farrall et al model, is the transparent and consistent approach from the UNSC in terms of any mandates it applies to Afghanistan. The transparent and consistent approach is one that must apply to both the UNSC and Afghanistan to ensure absolute accountability to the rule of law in Afghanistan. Durch et al also argue that the costliest deficit to countries in the transition from war to peace is ineffective rule of law mandates.[52] This is because an ineffective mandate harms the goals of contributing partners who seek to promote sustainable peace and development. The first element in any methodology for assessing past policing interventions, and designing a future policing intervention, is therefore '*a meticulous and detailed step by step mandate focused specifically on policing*'. This is, in short, the first element of *Consistency*.

The key factors identified by Durch that must form part of a blueprint for a rule of law approach to a future UN policing include:

- Early provision of public security by the international community while local security forces are reformed and rebuilt.
- International support for effective border controls, both to curtail illicit trade and to promote legitimate commerce and government customs revenues.

[51] Ibid 21.
[52] Durch et al (n 27).

- Curtailment of regional smuggling rings and spoiler networks that traffic in arms and commodities to finance war and, afterwards, to sustain war-time political and economic power structures.
- Strict legal accountability for those who participate in peace operations, lest their actions reinforce the very cynicism and resignation with regard to impunity that their work is intended to reverse.
- Recognition that corruption can drain the utility from any assistance program and undermine the legitimacy of post-war governments in the eyes of their peoples.

Durch thus suggests that a rampant and dysfunctional police force poses an unacceptable risk that would undermine public confidence in interim or nascent governments which could in turn lead to renewed hostilities or conflicts.[53] However he further argues that part of the problem is the UN's inability to recruit and deploy highly skilled officers to the field in a timely manner. This argument seems to be central to Durch rather than the lack of specificity in mandates by the UNSC. Durch helpfully addresses the types of personnel and experts required to help enforce and address the deficits in the rule of law. This will be addressed later in this chapter in the case study of Timor-Leste, where a special UN Envoy to that mission recommended sweeping changes to the expertise of the police in that mission and to the shortfall in training of indigenous police forces in the outer regions of Timor Leste.[54] These recommendations will feature in the rule of law model that this thesis seeks to propose for any future international assistance mission to Afghanistan. However, the key point to be drawn from this model and Durch's comments on failure is that close attention must be paid to recruitment of both international trainers and local police if a policing mandate is to have any chance of success. This is a component of the element of Accountability, which connects with the fourth element of engagement.

In another analysis of post-conflict intervention mandates, Whittle calls for restraint of what he assesses to be an almost unfettered UNSC Chapter VII power stating that the UNSC is currently in danger of becoming a Schmittian executive.[55] A Schmittian executive, named after the German jurist, political theorist, and prominent member of the Nazi Party, Carl Schmitt, is one in which the ruler of a particular state (or organisation in the case of the UNSC) is vested with authority to circumvent the

[53] Ibid.
[54] *Letter Dated 16 May 2008 from the Secretary-General to the President of the Security Council. Annex: Report of the Expert Mission to Timor-Leste on Policing, 17 to 27 March 2008*, UN Doc S/2008/329 (16 May 2008).
[55] Whittle (n 27).

law in order to effectively deal with threats.[56] While this analysis is not specifically on a particular rule of law model, it nevertheless does highlight a solution to what is an unfettered and concentrated power of the UNSC, through the 'Extra-Legal Measures Model'.[57]

The 'Extra-Legal Measures Model' was introduced by Oren Gross who described the model as one that creates the possibility that public officials can act extra-legally when they believe that it is necessary to protect the public from a threat or threats.[58] The extra-legal measures model proposes that, while the normal law of the state continues to apply during emergencies, violations of the law by an executive or an interim administration may be ratified after the fact through a non-legal process that would void the usual consequences of unlawful conduct.[59] The extra-legal measures model acts like a mitigation defence, absolving the executor of any wrongdoing due to an overriding moral or political justification for the act.[60] The extra-legal measures model draws its foundation from the John Locke theory of prerogative powers, preserving those powers of the government or administration that fall outside the usual legal order.[61]

Gross adds that in taking this extra-legal action in the face of an obvious threat to public safety, public officials must be transparent and open with the public about what actions it takes.[62] Such action could amount to violations by public officials of otherwise accepted constitutional principles in order to tackle grave national dangers. In any event, proposed actions by public officials to combat grave dangers must be openly communicated under this model to the public who then may decide on whether those actions are appropriate.[63] The danger of the extra-legal measures model is the obvious potential for an abuse of power of an administration acting outside the usual powers invested in it to enforce law and order. Therefore, the main disadvantage of the extra-legal measures model is that it can, by effect, place public officials in a 'black hole' that constitutes a lawless void.[64]

Consequently, an approach that involves the Extra-Legal Measures Theory of Whittle, along with the approaches of Durch and Maley to both professionalising and involving existing entities in the

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[56] Ahmad Chehab, 'The Unitary Executive and the Jurisprudence of Carl Schmitt: Theoretical Implications for the War on Terrorism' (Research Paper, Wayne State University Law School, January 2007).
[57] Ibid.
[58] Gross and Ní Aoláin (n 16) 111.
[59] Whittle (n 27).
[60] Ibid.
[61] Ibid.
[62] Gross and Ní Aoláin (n 16) 112.
[63] Ibid.
[64] Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 60.

criminal justice system, is crucial. In this regard, much of the heavy lifting in terms of decision making in relation to the enforcement or maintenance of the rule of law comes from the UNSC, which most obviously is empowered by the UN member states to enforce peace and security through peace operations, sanctions and force. In a meeting conducted at the UNSC on post-conflict peacebuilding on 26 May 2005, the Minister for Foreign Affairs of Denmark made remarks that are pertinent to this thesis on the need for security prior to development, stating that 'the greatest danger of insufficient efforts in the post-crisis phase, particularly in Africa, result[ed] in relapse into conflict'.[65]

However, in addressing this component of analysis it is also essential to recognise the insight evident in Whittle's call for restraint and control over UNSC decisions. His concern is that an extra-legal measures model would assist those States that may be too heavy handed in the implementation of a rule of law mandate, which in the case of Afghanistan, should be a strong consideration given the history of governance and war that I will touch on throughout the thesis. That is, the extra-legal measures model, if used, must be well ring-fenced and subject to external oversight.[66] It may well be that the Afghanistan will once again become a state of emergency and will require a level of extra-legal measures. Those measures should be granted to an initial administration either led by a UN police-led intervention or a suitably identified Afghan administration that is able to be monitored closely by the UNSC by way of a rule of law mandate that provides two-way scouting and accountability.

2.3 Case examples of the use of the extra-legal measures model

2.3.1 Abdelrazik

An example of a judicial refusal of the use of the extra-legal measures model is the Canadian case of *Abdelrazik*.[67] In this case the Municipal Court, through Justice Zinn, was able to publicise the UNSC action, identify those values of the community that may be violated and issue an authoritative view on those violations.[68] This case involved a dual citizen of Canada and Sudan who was acquainted with two alleged terrorists in Canada. He was imprisoned twice in Sudan in 2003 when he visited and his Canadian passport had expired. His attempts to return to Canada were eventually thwarted on 3 April 2009, with the Minister of Foreign Affairs declaring that he would not be issued with an emergency passport. This led to Abdelrazik applying for a declaration that the Minister had violated his rights

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[65] *Letter Dated 28 July 2005 from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council*, UN Doc S/2005/500 (28 July 2005) 8.
[66] Whittle (n 27) 671.
[67] *Abdelrazik v Canada (Minister of Foreign Affairs) et al* (2009) 346 FTR 186 (FC).
[68] Whittle (n 27) 692.

under s 6(1) of the *Canadian Charter of Rights and Freedoms* (the Charter). Canada responded to this application by stating that that the United Nations Security Council 1267 Committee had listed Mr Abdelrazik as an associate of Al-Qaida, which meant that his assets were to be frozen and his travel banned. The Court ordered Canada to return Abdelrazik to Canada as it found that Canada had breached Mr Abdelrazik's rights under s 6(1) 'Every citizen of Canada has the right to enter, remain in and leave Canada', hence playing a role in rejecting the use of the extra-legal measures model in this instance.[69]

2.3.2 The NATO intervention in Kosovo 1999

A contrary example to the *Abdelrazik* case is the NATO campaign in Kosovo in 1999. This was a foundational case example known as the 'Kosovo Principle' where an unauthorised UNSC intervention was carried out in order to protect Kosovar Albanians (given Milosevic's past record of war crimes). Hence the reliance on force as an extra-legal measure was reasonable given that it was done in order to prevent further war crimes and genocide. It was a good example of where it was not feasible to act within the UN in order to effectively protect the Kosovar civilian population.[70]
The relevance of this model and these case examples to this thesis is that it is difficult to predict what a post-Taliban government will look like, and a well-fenced extra-legal measures model may be necessary to ensure that such a government, be it interim or elected, does not overstep in its efforts to restore order in emergency situations but may do what is reasonably necessary to protect the civilian population. The extra-legal measures model allows the UNSC to step in and act swiftly but the key, as identified by Whittle, is that the actions of the UNSC and or any public official are carried out with due thought and proper consideration, especially in the context of this thesis where a deliberate and well considered rule of law mandate is required to help deliver law and order in Afghanistan in a manner that is consistent with adherence to human rights. Therefore, the extra-legal measures model is likely a good fit for Afghanistan. As Whittle points out, the model is not just primarily focused on the law but helps to protect higher order values and is more imaginative and innovative in constraining the UNSC. As per Farrall's approach to engagement of the UNSC, Whittle would also suggest that there is a greater need for domestic knowledge (specific to an Afghanistan Administration) and oversight of UNSC action, which could – indeed should – apply to any mandate made by the UNSC including one made in accordance with peace keeping which prioritises the rule of law. This level of inclusion and education could indeed lead to greater compliance and cooperation by the population. However, I do not necessarily agree with Whittle's view of encouraging lobbying groups in terms of holding the UNSC to account in the context of this thesis. This is because inclusion

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[69] *Abdelrazik v Canada (Minister of Foreign Affairs)* (n 67).
[70] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000).

of tribal groups in terms of a mandated rule of law proposal is sensible, but Afghanistan remains deeply divided and therefore care should be taken not to privilege or preference certain groups over others.[71]

The third element of my assessment methodology to thus be drawn from this theme in the literature is as follows: A policing mandate should include an in-built, well signposted, ring-fenced, and continuously and publicly explained extra-legal measures model subject to review by external authority. This is a key component of the element of transparency.

Maley, who has significant field and scholarly experience in Afghanistan, wrote in his piece on 'The rule of law and other trajectories',[72] that the challenge for Afghanistan (post 2001) was how the rule of law could be expected to prevail 'when the weight of power and politics is so heavy'.[73] Like Durch, Maley argues that for there to be an effective judiciary (in Afghanistan) a rule of law mandate must take into consideration the more complex institutional environments, in which it is absolutely necessary to 'coordinate policing, witness protection, adjudication, enforcement of judgments, and penal and corrections policy' and any weakness or failures in these areas is likely to stifle progress.[74] Maley also points to the fact that another obstacle to the rule of law in Afghanistan was the impunity granted to international personnel as regards to Afghan law which places ordinary citizens lives at risk when foreign militaries are excused from abiding by the laws of Afghanistan. Maley, like Whittle, seems to be an advocate for the extra-legal measures model in Afghanistan where he observes abuses of power at state, central and local levels. He argues that it was this level of the failure to rebuild the rule of law that ultimately led to the compromise of the transition process. So, in other words Maley would look at constraining the powers of local, state and central areas and provide a more heavy-handed approach from the UNSC and the central coordinating in-country authority (such as an Envoy in conjunction with an interim government) on a very watchful hands-on rule of law mandate.

In a similar vein, the seminal 2000 UN Peace Operations report known as 'The Brahimi report', has provided frank, specific and realistic recommendations for ways in which to enhance peace operations effectively.[75] The United Nations Peace Operations panel in this report was tasked by the Secretary-General 'to assess the shortcomings of the existing system and to make frank, specific and realistic recommendations for change'.[76] While there were recommendations that were focused on politics and

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[71] Jonathan L Lee, *Afghanistan: A History from 1260 to the Present Day* (Reaktion Books, 2019) 689.
[72] Maley, 'The Rule of Law and the Weight of Politics' (n 27).
[73] Ibid 61.
[74] Ibid 71.
[75] *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305–S/2000/809 (21 August 2000).
[76] Ibid viii.

strategy, the focus of this thesis will be on those recommendations that address operational and organisational areas of need in respect of policing.

Of those recommendations in operational and organisational areas of need in respect of policing, the following are particularly apposite to developing an approach to the rule of law and the way forward for policing interventions in Afghanistan:

a. A recommendation for a doctrinal shift in the use of civilian police, other rule of law elements, and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments;[77]
b. Member States to be encouraged to each establish a national pool of civilian police officers that would be ready for deployment to United Nations peace operations on short notice, within the context of the United Nations standby arrangements system [UNSAS];[78]
c. Member States to be encouraged to enter into regional training partnerships for civilian police in the respective national pools, to promote a common level of preparedness in accordance with guidelines, standard operating procedures, and performance standards to be promulgated by the United Nations;[79]
d. Member States to be encouraged to designate a single point of contact within their governmental structures for the provision of civilian police to United Nations peace operations;[80]
e. The Panel recommended that a revolving list of about 100 police officers and related experts be created in UNSAS to be available on seven days' notice with teams trained to create the civilian police component of a new peacekeeping operation, train incoming personnel, and give the component greater coherence at an earlier date:[81]
f. The Panel recommended that parallel arrangements to recommendations be established for judicial, penal, human rights, and other relevant specialists, who with specialist civilian police will make up collegial 'rule of law' teams.[82]

The key element of method to be drawn from this theme in the literature is, consequently, that *implementation of a policing mandate must – initially at least – be intensively centrally managed and*

[77] Ibid 8.
[78] Ibid 21.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.

coordinated. The 'centre', in terms of the management and coordination of Afghanistan, is Kabul. This is not least so that the use of extra-legal measures is limited to the highest authority and is appropriate to tacking regional and local authority delinquency. This is a component of the element of *engagement*.

Unfortunately, the UNSC missed an opportunity to incorporate the report's recommendations into an Afghanistan rule of law mandate. More specifically, the UNSC could have mandated the use of civilian police to combat human rights abuses in Afghanistan by introducing human rights experts and other rule of law elements to assist in the post conflict situation that presented to coalition forces post-2001. This thesis revisits many of the Brahimi reports' operational and organisational recommendations given the situation in Afghanistan. Afghanistan has a history of human rights abuses and the idea of incorporating human rights experts into a rule of law mandate would be sensible.

Therefore, in terms of specific features to inform the rule of law approach taken in this thesis, *the corroboration and cooperation of member state police forces in pre-emptive or pre conflict planning* is a singularly important notion. The ISAF approach in terms of the rule of law and policing, as will be discussed, was disjointed and disconnected. There was little to no curriculum consistency across policing coalition partners in the manner in which they trained the ANP. This could be easily addressed through intra-state police training involving different post conflict scenarios that in turn require differential treatment in terms of the rule of law. The Brahimi report's recommendation for the deployment of specialist civilian groups from the criminal justice sector made up of judicial, penal and other areas of specialised police forces is intensely valuable.[83] I will expand more on this recommendation towards the end of the thesis. That is, the key to a successful policing intervention should be that *the intervention is planned, and critical leadership is staffed prior to deployment and implementation*, precisely so that the mission objective is not defeated by piecemeal and inappropriate contributions or ad hoc 'orphan' inputs. This is a second key component of the element of *Consistency*.

The third recommendation in the Brahimi report,[84] relevant to a rule of law model, is that it be properly enforced by the UNSC who Farrall et all argue should be held accountable to rule of law mandates which should be transparent, consistent and made with the engagement of the state at conflict to facilitate this. Durch argues correctly that rule of law mandates must be clear and effective and those actors that rub against an effective rule of law must be addressed immediately including

[83] Ibid.
[84] Ibid.

criminal groups, corrupt officials and dysfunctional police forces. The lesson to be drawn from this theme in the literature is that a *policing intervention model should prioritise, as a very early project, action in relation to corruption and organised crime* so as to create a level of transparency that promotes trust in the rule of law project more broadly, and also in the people involved, including local police. This is a second key component of the elements of transparency and of accountability.

Finally, Maley calls for greater constraint at the state level and more specificity in the UNSC mandates is essential. This is not inconsistent with the extra-legal measures approach which, as mentioned above, not only helps to protect higher order values but acts to constrain the UNSC, which serves to provide greater accountability at not only the State level but the UNSC level. This will provide fertile ground for greater inclusion of customary law through ensuring the voice of elders from the provinces are heard in relation to any rule of law mandate that is issued by the UNSC. This is essential in the Afghanistan situation because, as will be seen in the subsequent chapters of this thesis, the delayed and centralised attempts at post conflict Afghanistan rule of law from 2002 to 2021, were, on the whole, a failure. This thesis argues that in order for a post conflict rule of law to succeed in a future Afghanistan, it needs to include customary law and by virtue of that concept to engage with a diversity of actors from of all the provinces.

This then, is the final component against which past experience and future prospects must be measured: *Incorporation of customary mechanisms must be a central component of the implementation program for any policing and rule of law endeavour*. This provides not only a feed-back loop and a ready-made implementation partnership option but also provides a trusted means through which to establish transparency and promote growth in policing institutional and programmatic acceptance. This is a second key component of the element of *Engagement*.

2.4 Summary

In order to achieve an end-state focused, policing-sensitive blueprint that incudes these essential criteria, this thesis will argue that a future rule of law model include the four pillars of transparency, consistency, accountability and engagement, as identified by Farrall et al, but with policing-specific indicators as distilled from the rule of law literature as examined above. This will increase the likelihood that the UNSC mandates have greater specificity, as identified by Maley with regard to the rule of law requirements for a pragmatic, end-state focused policing mandate, as opposed to a generalised rule of law mandate. The theoretical model of this thesis on the rule of law will seek to critically evaluate policing, which in turn will generate empirical findings which will then advance police reform recommendations.

That is, the assessment and design method adopted in this thesis is therefore based on the following four elements and component indicia as drawn from the literature:

1. Transparency, with a focus in policing project implementation on (a) an in-built, well signposted, ringfenced, and continuously explained extra-legal measures model subject to external review, and (b) early action against corruption and organised crime, so as to facilitate transparency within the policing project and the rule of law endeavour specifically.
2. Consistency, with a focus in policing project implementation on (a) a meticulous and detailed, step-by-step mandate, and (b) accompanying prior planning and resource integration before deployment and implementation.
3. Accountability, with a focus in policing project implantation on (a) recruitment of trainers and local police, and (b) early priority on action against corruption and organised crime so as to model a broad rule of law endeavour across the population and the country's institutions *generally*.
4. Engagement, with a focus in policing project implementation on (a) intensive central management of implementation and also of the extra-legal measures option), and (b) incorporation of customary processes and mechanisms within the project scheme.

Applying these four critical elements, and their indicators, as drawn from the literature, it is now possible to use these measures in order to test the schematic elements considered central to my thesis, as to whether the UNSC provided enough clarity and specificity on the rule of law in relation to policing in other conflicts. A UN Policing intervention will be more likely to promote the advancement and implementation of the rule of law with these elements are present (and conversely less likely to promote rule of law when they are not present).

The next chapter road tests this framework by undertaking a brief analysis of how it might apply in the cases of Timor-Leste and Iraq.

Chapter 3
Road testing the rule of law framework through the Timor-Leste and Iraq interventions

This chapter provides a road test of the application of the rule of law in Timor-Leste and Iraq with a view to assessing whether lessons can be gained on how each intervention approached the rule of law in relation to policing and security. The thesis will analyse these interventions with a close assessment against the four-element approach to the rule of law as developed in Chapter 2.

3.1 The Timor Leste experience

Timor-Leste provides a helpful example of a post conflict UN police peacekeeping mission where the UNSC attempted to mandate on the rule of law in combination with some granular policing mandate measures.[85] To explain this, it is firstly necessary to examine the resolution that the UNSC passed prior to the 1999 intervention. The 1999 UN Timor Leste intervention, entitled The UN Transitional Administration in East Timor (UNTAET), was authorised by UNSC resolution 1272 (1999),[86] which endeavoured to control the justice system in Timor by way of interim measures. UNTAET's rule of law responsibilities were:

a. To provide security and maintain law and order throughout the territory of East Timor;
b. To establish an effective administration.[87]

The resolution also established that the new United Nations Transitional Administration to East Timor (UNTAET) would have structure and objectives in accordance with part IV of the report of the Secretary General titled 'Report of the Secretary-General on the situation in East Timor'.[88] These objectives were, broadly speaking, aimed at transitional administration of East Timor by the United Nations.

The report of the Secretary General proposing a concept of operations for the new deployments including the required powers to be afforded the UNTAET Administration offer some crucial components that could be drawn on for a UN-led policing mission in Afghanistan. The first was that

[85] 'Timor-Leste Police Development Program', *Nautilus Institute for Security and Sustainability* (Web Page, 2025) <https://nautilus.org/publications/books/australian-forces-abroad/east-timor/timor-leste-police-development-program/>.
[86] SC Res 1272, UN Doc S/RES/1272 (25 October 1999).
[87] Ibid 2.
[88] *Report of the Secretary-General on the Situation in East Timor*, UN Doc S/1999/1024 (4 October 1999).

in order to ensure stability the underlying applicability of East Timor law would remain so long as those laws were consistent with the mandate of the interim administration and with international human rights, with an additional power to enact new laws and regulations or repeal or suspend existing ones. This indicates a granular concern with the law to be enforced, the mechanisms of adjustment of that law, and control of law enforcers – all of which are components identified above as essential to a policing focused rule of law mandate.

The second is that the interim administration would be entrusted to rebuild governance and a fully functioning administration of justice, which was ultimately to be focused on the East Timorese themselves resuming responsibility for their own governance. This was necessary initially because of the failure of court systems, with judges, police, prosecutors and members of the legal profession having left the territory.[89] This issue of national ownership and capacity building is also a key component identified above.

The report also contained a number of important sections on the approach to the rule of law in East Timor under Part C, titled 'components of the mission'.[90] This section vested responsibility in the Deputy Special Representative for Governance and Public Administration to oversee the work of five divisions:

1. Judicial affairs;
2. Civilian police;
3. Economic, financial and development affairs;
4. Public services; and
5. Electoral operations.

The analysis here will focus only on the first two divisions, given the focus of this thesis on policing intervention.

3.1.1 Judicial affairs

The report broke down those elements to be administered under judicial affairs as being:

1. The administration of courts, prosecution services and prisons;
2. The development of legal policies;

[89] Ibid 6.
[90] Ibid 9.

3. The review and drafting of legislation for the goals and purposes of UNTAET; and
4. The assessment of the quality of justice in East Timor including training requirements.[91]

The report recommended the immediate appointment of an independent and impartial Judicial Affairs Division including judges, public defenders and prosecutors until such time as a selection process could take place East Timor wide. Lawyers would be recruited internationally with a view to also utilising those professionals within East Timor as identified. These newly appointed judicial officers were to receive continuous training.[92] The report also suggested the establishment of a correctional facility in accordance with international human rights standards and the amendments and additions where necessary to East Timorese criminal law and other laws governing peace and public order.

3.1.2 Civilian police

The report proposed to provide interim law enforcement services along with the rapid development of a credible East Timor Police Service. The only specificity contained within this report on the use of international police elements was for crowd control and operational support and a rapid response capacity within the civilian police unit.[93]

These recommendations and conclusions from the report provide important insights into the state of affairs in East Timor at the time of intervention. The UN had expected an orderly transfer of authority from the Indonesian Government (which had undertaken to maintain law and order in the interim period), but order had collapsed as the Indonesian Government simply withdrew and left the country in disarray. This left a massive vacuum for the UN and the international community to fill.

These issues as identified clearly lend more weight to the rule of law approach as identified by Durch in his analysis of a rule of law model. The Durch model provides that the international community is responsible for public security early so as to ensure that local security forces are rebuilt, corruption is curtailed, revenue is collected and those that participate in the peace operations are accountable for their actions. This accountability piece is also helpfully identified in the rule of law approach by Farrall where the onus is placed first on the UNSC to ensure that its decision-making processes are consistent and transparent.

In general, it can be said that these two concerns as to initial rule of law programming are most suitable for a post conflict Afghanistan as will be explained further in the thesis given the nature of

[91] Ibid 10.
[92] Ibid.
[93] Ibid 12.

what an international peace keeping force will likely face in Afghanistan and the need to establish security early. What must also be examined, however, is the extent to which the East Timor experience reinforces, or challenges, the four elements and their key indicia identified above as the critical framework for assessing and designing a future policing focused rule of law mandate in Afghanistan.

3.1.3 UNTAET – An assessment of the proposed thesis indicia against the final outcomes

More than a quarter of a century after the UNSC endorsed UNTAET's mandate, including the rule of law elements noted above, there remain challenges to the rule of law in Timor Leste. As Marriott noted in 2011, the Timorese had yet to agree on a domestic civil or criminal code.[94] Moreover, there were minimal court systems outside the main cities and a nationwide survey conducted in 2008 found that only 9% of interviewees had any direct interaction with the court system.[95] Marriott argues that many Timorese feel distanced from the legal system as many foundational legal documents were adopted and or adapted from elsewhere in the 1999 UN intervention.[96]

Marriott then argues that the importance of the rule of law is in its ability to provide a framework where the likely outcome of disputes can be predicted. He argues that the current system is undermined simply by the fact that the Timorese don't value it as it is flawed and disregarded. Marriott argues that the lawyers themselves in East Timor hold the key to connecting the disparate worlds of urban and rural communities though formal and informal justice which could therefore complete the rule of law framework.[97] This is important is terms of a solution to the problem of a centralised system in Afghanistan and in fact lawyers may be the answer in terms of connecting the provinces with the capital.

The UNSG reported, in 2013, on the continued challenges facing members states who call for a strengthened accountability from the UN with the UN to consider a system wide approach for the support of the rule of law in post conflict situations.[98] A decade later, the UNSG released a paper on its vision for the rule of law where it stated it would prioritise rule of law support to assist in the engagement of peace and security. It would do this through a 9-step plan through a focus on

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[94] Marriott (n 28).
[95] Ibid 105.
[96] Ibid.
[97] Ibid 106.
[98] United Nations Security Council, *Measuring the Effectiveness of the Support Provided by the United Nations System for the Promotion of the Rule of Law in Conflict and Post-conflict Situations: Report of the Secretary-General*, UN Doc S/2013/341 (11 June 2013) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_341.pdf>.

multilateral cooperation and a focus on people to deliver justice through technology, accountability, funding and a revitalisation of the Rule of Law Coordination and Resource Group.[99]

3.1.4 UNMIT

The progress on the rule of law in East Timor was hampered by a military and police revolt in 2008 which resulted in the 'ouster of the then Prime-Minister Mari Alkatiri from (the) Fretilin Party, the shooting of Jose Ramos-Horta, the attempted assassination of Xanana Gusmão, and the displacement of hundreds of thousands of the population'.[100] It also led to another UN intervention in the United Nations Integrated Mission in Timor Leste (UNMIT) which was officially mandated by the UNSC through resolution 1802 (2008),[101] following a report from the Secretary-General S/2008/26.[102] The report, titled 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste (for the period from 21 August 2007 to 7 January 2008)', stated (most relevantly to this thesis), that there was (back then) a need for UNMIT police to maintain stability until such time as the national policing agency developed adequate capacity.[103]

The report also identified the challenges facing UNMIT police mentors, such as the resistance of some East-Timorese police to accept the mentoring of UNMIT and the vocal support of Timorese leaders to give East Timorese increased operational tasks and to speed up the certification process. There were also concerns expressed by Timorese leaders of the inadequate skills of some UNMIT police.[104] This was exacerbated by the relatively low number of UNMIT police deployed to remote districts. The report also noted that many of the UNMIT police were deployed for their operational experience rather than training and mentoring experience and this would need to be addressed.[105]

The report also focused on the new government's renewed attention to strengthen the judicial system by sending permanent judicial staff to the districts, which was a deployment supported by the UNDP.[106] There were also some key commitments from the new government to draft a legal

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[99] United Nations, *New Vision of the Secretary-General for the Rule of Law* (2023) 4–10 <https://www.ohchr.org/sites/default/files/2023-08/230511-new-vision-for-rule-of-law.pdf>.
[100] Lindsey Greising and Nelinho Vital, *Legal Research in Timor-Leste* (Web Page, October 2024) <https://www.nyulawglobal.org/globalex/timor_leste.html>.
[101] SC Res 1802, UN Doc S/RES/1802 (25 February 2008).
[102] *Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste*, UN Doc S/2008/26 (17 January 2008).
[103] Ibid 7.
[104] Ibid.
[105] Ibid.
[106] Ibid 10.

framework and prepare new legislation on domestic violence and witness protection,[107] and a commitment from the new government to strengthen the prison systems. The report concluded with an indication of intent to send an expert mission to UNMIT in order to conduct a thorough assessment of the national police force as well as any adjustments that may be required to the UNMIT police skill sets. The report stated that

> the capacities of the national judicial and corrections institutions, however, are still insufficient to meet the country's needs, with the substantial case backlog as just one example. Continued support from UNMIT, together with that of UNDP and other partners, is necessary to consolidate and build on the gains made thus far to ensure sustainable development of the sector.

The UNSC resolution establishing UNMIT,[108] simply summarised and restated part of the report from the Secretary General. Unfortunately, the report did not appear to elaborate or break down the specific steps required to address the shortfalls of the police, (both the UNMIT and the National Police of East Timor (PNTL)) and seems to defer the commitment of the challenges of the judiciary to the UNDP and the policing issues to a special expert mission.

These issues identified in the report align with the four rule of law factors developed by this thesis that promote sustainable rule of law in war torn lands:

1. Transparency
2. Consistency
3. Accountability and
4. Engagement.

These four important elements developed by this thesis for a rule of law approach could well have led to a different outcome in Timor-Leste and are excellent building blocks for a future post conflict Afghanistan. These specific deficits to the Timor-Leste mission were further expanded upon by the UN through the analysis conducted by Andrew Hughes.

3.1.5 The expert mission to UNMIT

The report from Andrew Hughes titled 'Report of the Expert Mission to Timor-Leste on Policing, 17 to 27 March 2008',[109] stated, among other things, that the rebuilding of the PNTL was a long-term

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[107] Ibid 12.
[108] SC Res 1704, UN Doc S/RES/1704 (25 August 2006).
[109] *Letter Dated 16 May 2008 from the Secretary-General to the President of the Security Council*, UN Doc S/2008/329 (16 May 2008).

process. Section 147 of the Constitution of Timor-Leste provides that the PNTL are ultimately responsible for the security of the citizens and to defend the democratic legality of the country.[110] Mr Hughes visited three police stations that had been handed back to the PNTL and opined that they were inadequately prepared and had poor logistical support.[111] Mr Hughes also made the observation that UNMIT police were not deployed to sub district regions and hence the obligation of policing those districts remained with the PNTL. He also stated that there was a 'critical lack of specialists for the investigation of major crimes, including homicides, gender-based violence crimes, arson, trafficking and corruption'.[112] Importantly, Hughes attacked the limited duration of the missions' mandate and stated that much longer was needed in order to achieve sustainability.

Hughes also made some important observations on the rule of law in that there were '(in)adequate physical, human and institutional capacities, including a stark deficit of competent and independent judges, prosecutors, prison officers and public defenders' along with an absence of key penal code law, domestic violence and witness protection legislation and juvenile justice law.[113] The report was a comprehensive assessment of what was required to address the rule of law shortfalls and the need to engage with donor countries to ensure ongoing financial and institutional reform and the building of vital institutions.

The report aligns with a rule of law approach as posited by Durch and Maley where, in summary, they collectively add that to achieve a sustainable peace operation there must be strict accountability for peace operation participants, a rebuilding of security forces and a proper coordination of all areas of the criminal justice system.

3.1.6 Assessment of current rule of law progress in Timor Leste

Greising and Vital argue that due to its only recent autonomy and turbulent past, Timor Leste's legal and political systems are not yet fully functioning.[114] They further argue that due to the underdeveloped nature of the formal systems reaching the broader population that the 'tradition of informal law administered by local leaders and family heads' remain active and influential.

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[110] *Constitution of the Democratic Republic of Timor-Leste* (2002).
[111] *Letter Dated 16 May 2008 from the Secretary-General to the President of the Security Council*, UN Doc S/2008/329 (16 May 2008) 7.
[112] Ibid 9.
[113] Ibid 11.
[114] Greising and Vital (n 100).

The UNDP, the arm of the UN that was tasked with the judicial development of Timor Leste, has argued that Timor Leste has progressed well in term of rule of law with a network of courts, including four district courts, a court of appeal but the legal system itself requires further modernisation.[115]

In its main report in May 2024, the UNDP stated that performance of the core institutions of justice in Timor Leste had not met expectations.[116] This report argues that much of the Timorese population outside of Dili do not fully understand or trust the formal legal system and instead put their trust in customary law and the mediation offered by local leaders and authorities.[117] Further the report states that there needs to be

> an increase in the capacity and the geographical coverage of the formal institutions of justice to increase the public's confidence in the justice system and reduce the perception of impunity, there is also a need to develop an integrated and effective approach to legal aid in all municipalities, especially for the disadvantaged and vulnerable population, involving public defenders, private lawyers, other judicial support, and civil society organisations.[118]

The report stated that legal aid needs to be offered across the country but there are few resources and a dwindling trust of the people in the legal system. The report identified a disconnect between the formal system of laws and customary law. It stated that customary law has its weaknesses and is considered in many societies unfit to the needs of the modern nation state. But it also offered a number of advantages, in particular where the state judiciary is still weak and unable to serve the entire population.[119]

The report concluded that the revision of the new Criminal Procedure Code is needed based on a reflection on which criminal procedural model would best serve the interests of efficiency, transparency in criminal action, and constitutional safeguards for rights, freedoms, and guarantees.[120] Interviews revealed a lack of consultation on the approved draft law, or at least that feedback had largely been ignored.

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[115] Bruno Lencastre, 'Building Just Societies: Timor-Leste's Justice Reform', *United Nations Development Programme* (Web Page, 21 November 2024) <https://www.undp.org/timor-leste/blog/building-just-societies-timor-lestes-justice-reform>.
[116] UNDP, *Towards Better Justice Analysis and Recommendations for Improving the Justice Sector in Timor-Leste* (Report, May 2024) preface.
[117] Ibid 31.
[118] Ibid.
[119] Ibid 39.
[120] Ibid 64.

3.1.7 Conclusion as to Timor Leste case study

The Timor Leste experience is a great example of a how rule of law approach can be adapted and be flexible despite ongoing in country hostilities. Certainly, such a situation may arise in the Afghanistan context during a peace operation given the threats that are currently situated throughout along with what could be referred to as a divided population.

However, the Timor Leste experience also provides indicia as to what factors were not adequately managed. The UN special envoy mission to Timor-Leste, led by the late Andrew Hughes – a highly respected senior AFP and UN executive – provided a health check to the UN on the state of the rule of law in Timor-Leste, recommendations relating to which were eerily similar to Durch's rule of law approach. It is for that reason, that any blueprint for the rule of law in Afghanistan will need to incorporate some of the ideas as proposed by Hughes, especially on the professional capability of deploying police officers, the reach of mentoring to the outer regions and the use of the legal profession to support such a mission in the training of the Afghan judiciary. These recommendations sit nicely alongside the four elements of the rule of law as proposed by this thesis.

In terms of the validity or otherwise of the identified four key elements and their components indicated by this case study, in general it can be said that the Timor Leste experience confirms their broad validity but also discloses that some need some additional refinement. Each requires some further comment in relation to the Timor Leste experience.

3.1.8 Transparency

First, it could be said that whilst *transparency,* as a well-explained 'extra-legal' model in the form of the UN Transitional Administrator and his exceptional powers was clearly present, the need for constant explanation to the community of the reasons and intentions in their use – at least in relation to policing and the criminal justice system – was incomplete. This led to a lingering distrust of the policing system in the community. As the Hughes report indicated, this low rate of acceptance of the new policing model, particularly in the regions, effectively hamstrung implementation outside of the larger urban areas. The problems with the professionalisation of those entrusted with enforcing the rule of law in Timor Leste were also reported by the expert mission to UNMIT, which criticised the lack of attention to training in the outer districts of Timor-Leste and the critical lack of speciality training and qualification of those invested in mentoring and training of those in the Timor-Leste criminal justice sector.[121]

[121] Ibid 51.

Moreover, the fact that Timor Leste, with donor support, specifically sought to implement a community policing program after 2014, and that this has apparently contributed to an improvement in the reputation of and trust in the police,[122] confirms this analysis. A further analysis of the first element of *transparency* is the need to deal with corruption and organised crime within the policing and justice sector as an early priority. The literature on the Timor Leste experience does not tell us very much, although there are some lessons to be drawn about this component in terms of *accountability*, as discussed below. Thus, a future post conflict Afghanistan peace operation would need to ensure that those entrusted with training those in the Afghanistan's Criminal Justice Sector are suitably qualified to do so and that such training is not just limited to major centres such as Kabul and Kandahar, as posited by Maley.

3.1.9 Consistency

In relation to *consistency*, while there was evidence of pre-planning and a police-aware mandate, there remained early problems with consistency in implementation. This is readily discernible in the UNMIT reports and the Hughes report subsequent to the 2008 crisis. One factor indicated is that the range of police trainers was perhaps too variable and this created inconsistency across methods and priorities as different police trainers brought with them their own – often quite widely varied – national and personal biases and experiences. This consideration also includes how the local population views the police trainers. For example, in Timor Leste during UNTAET,

> the division between English- and Portuguese speakers had significant operational implications. This was true for police contingents (the Portuguese National Republican Guard (GNR) sat apart from Australian and New Zealand police) as well as for civilians … This was not only based on language but also reflected political interpretations of the role of Australia and Portugal during the crisis and indeed during the independence period more generally.[123]

The lesson from this experience for the elements and components identified in this chapter as fundamental to a policing mandate is therefore that the recruitment of trainers must also take into account the issue of local perceptions about the nationality and past conduct of the countries that are the proposed sources of these trainers.

Similarly, in respect of *consistency* in the form of pre-deployment integration, resource allocation, and role clarity, the Timor Leste situation indicates that this was a partially successful endeavour in that the deployment happened quickly. However, as the UNMIT and Hughes reports detail, while an early

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[122] Todd Wassel, *Institutionalising Community Policing in Timor-Leste: Police Development in Asia's Youngest Country* (Asia Foundation, 2014) 22–4.
[123] Eva Svoboda and Eleanor Davey, *The Search for Common Ground: Police, Protection and Coordination in Timor-Leste* (Humanitarian Policy Group, 2013) 19–22.

central authority (the Deputy Transitional Administrator) held a coordinating role, the integration of police personnel and roles was still sporadic in terms of reach into the regions. This resulted in, amongst other things, the need to re-imagine the policing endeavour after the 2006 and 2008 crises into a component of the 'cluster system' to better address coordination in support of national recovery. However, the limiting of police input to the protection cluster – one of 11 clusters – in some ways did not allow police project coordination to get beyond the narrow focus and fragmentation that had in part contributed to these crises.[124] Indeed, it is arguable that failure to respond to these imperatives was a key factor in the subsequent 2012 crisis between the police and defence force.[125] The lesson here is that the essentiality of prior planning and resource allocation for policing must be integrated not only within the plan, but more generally into the broader plan.

3.1.10 Accountability

In terms of *accountability*, the Timor Leste experience indicates that there was a reasonably clear distinction made between trainers, on one hand, and international support police for specialised riot control and major crimes investigations, on the other.[126] This reflects an ostensibly logical split of roles and a degree of sensible planning but even so, was not a panacea – as the Hughes report in particular points out. That is, there were still problems with the trainers and their integration and centralised coordination, and their lack of presence in the community.

However, the literature does not disclose much about the vetting and recruitment processes employed to bring in local police recruits. This is important because the fact that there is not much reportage on this issue indicates that it was not prioritised and this is one explanation for why the relationship between the evolving Timor Leste Police and Defence Force was so fraught, as was evident in the 2006 crisis.[127] The employment of former militia and rebel fighters in these roles also contributed to this,[128] thus indicating that recruitment strategies were not prioritised. Similarly, favouring previous Indonesian police officers in the recruitment process also contributed to fragmentation. As one report observed,

> Ultimately, since its inception by UNPOL in 2001, the PNTL's reputation has been tarnished due to the fact that more than a third of police recruits formerly served in the Indonesian police (POLRI) during that country's occupation of Timor-Leste. Overall, about 400 former

[124] Ibid 23–6.
[125] Deniz Kocak, *Timor-Leste: The Continuing Challenge of Police Building and Security Governance* (Centre for Security Governance, 2014).
[126] *Letter Dated 16 May 2008 from the Secretary-General to the President of the Security Council*, UN Doc S/2008/329 (16 May 2008) 10.
[127] Svoboda and Davey (n 123) 19–22.
[128] Ibid 16–17.

> POLRI-members were recruited into the new police of independent Timor-Leste, and due to their experience within POLRI, they had a shortened training period of only four weeks. In contrast, non-POLRI recruits who lacked prior knowledge of policing were obliged to pass through three months basic training and additional mentored training by UNPOL of three to six months.[129]

In respect of accountability as early action against the malign influence of corruption and organised crime, insofar as it affects institutions more broadly, again there is little in the literature. However, what can be distilled from the above is that the decision to employ former militia and rebels into the police and defence force did create a different type of challenge around former loyalties, historical animosities, and external agendas amongst recruited locals. This is particularly important in the context of Afghanistan, where issues around recruiting from militias (with their many legacies and divided loyalties) also presented a significant challenge. In this regard, the Timor Leste experience indicates that the accountability component of early action to deal with sources of external agendas and obstacles – corruption and organised crime – must be broadened to deal with pre-cursor demobilisation of militias before local recruitment into a police force, so as to avoid this situation.

3.1.11 Engagement

Finally, in respect of the fourth element of *engagement*, the Timor Leste experience indicates that policing project implementation, whilst requiring central coordination and management, must not evolve into an urban or capital-focused plan. A key challenge to the successful implementation of the UNTAET and UNMIT policing projects, as Hughes reported, was its localisation to the larger urban centres and inability to influence the regions through non-presence. The lesson for my indicators from this is that intensive centralised implementation management, whilst necessary, must be leavened with a clear plan for comprehensive presence and engagement so that it does not become 'centre focused', as well as centre managed.

The *engagement* element, in the Timor Leste experience, saw an inadequate incorporation of the customary processes and mechanisms within the policing project. As the UNMIT and Hughes reports noted above, and much academic commentary since, explained, the failure to engage with customary processes and leaders, and to explain how the policing project would integrate with them rather than supplant them, was a key flaw in implementation. This was further exacerbated by the geographic scope failures noted above, which left many areas where the customary processes were still very strong, with no real engagement or explanation, and thus no refinement and improvement in line with the policing plan.

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[129] Kocak (n 125).

Given these assessments, the refined elements and components for assessment and design, with the refinements prompted by this test case study in italics, are now as follows:

1. Transparency, with a focus in policing project implementation on (a) an in-built, well signposted, ringfenced, and continuously explained extra-legal measures model subject to external review, which is well explained to the community, and (b) early action against corruption and organised crime, so as to facilitate transparency within the policing project and the rule of law endeavour specifically.
2. Consistency, with a focus in policing project implementation on (a) a meticulous and detailed, step-by-step mandate *which is clearly pushed into and equally implemented in regional areas*, and (b) accompanying prior planning and resource integration *in respect of the broad mandate as a whole* before deployment and implementation, *including through early assessment of likely perceptions of those trainers due to national background or other features*.
3. Accountability, with a focus in policing project implantation on (a) recruitment of trainers and local police, *with a particular attention to prior loyalties and agendas of local recruits*, and (b) early priority on action against corruption and organised crime, *and rebel/militia group agendas and demobilisation*, so as to model a broad rule of law endeavour across the population and the country's institutions generally.
4. Engagement, with a focus in policing project implementation on (a) intensive central management of implementation (and also of the extra-legal measures option), *that does not fall into the trap of being centre-focused and regionally irrelevant*, and (b) incorporation of customary processes and mechanisms within the project scheme.

It is now appropriate to conduct a second test case assessment of a policing intervention so as to see if further refinement to this scheme might also be available based on a different context.

3.2 The Iraq experience

The Iraq experience, in terms of policing project implementation, is less informative than the Timor Leste experience. This is in part due to the low priority placed on policing as compared to counter-insurgency, and the long-term lack of any centrally coordinated and implemented policing plan. Post-invasion policing was at best an afterthought in Iraq. The consequence of this general situation is therefore that Iraq provides primarily a case study in how failure to attend to the elements and components distilled in this chapter for assessment and design of policing interventions contributed to the chaos and instability that ensued. That is, it offers primarily a negative proof of the elements in that their absence is one factor underpinning the Iraq imbroglio. This makes it difficult to mine the

Iraq case study for granular insights or refinements. However, there are a few specific lessons – apart from the general one that the elements should be attended to – available from the Iraq context, and it is to these that the analysis now turns.

3.2.1 The Coalition Provisional Authority (CPA)

The rule of law mandate was created differently in Iraq to Timor Leste with its origins in a letter to the UN President of the Security Council from representatives of the coalition partners and the US, given that the 'coalition of the willing' had created Coalition Provisional Authority (CPA).[130] This led to a UNSC Resolution endorsing this new coalition authority to administer the affairs of Iraq and its people.[131]

A 2003 report by the United States Institute of Peace stated that, 'based on the experience of previous peace operations, the US-led Coalition's most important objective [in Iraq] should be establishing the rule of law'.[132] The report refers to the US's obligations under article 64 of the Fourth Geneva Convention, which fails to refer to customary or local law. Interestingly, the report states that the US was ill-prepared to provide internal security, enforce public order and introduce the rule of law as it did not have civilian police forces or national police forces that it could provide to Iraq.[133] It is the only country that uses commercial contractors to fill contingents for UN-led police missions.[134]

The report also provided an illuminating piece of advice to US and coalition forces entering Iraq without invitation in 2003: that they should create a stability force composed of police, prosecutors, judges and corrections officers, and that these forces should arrive in Iraq as soon as possible following the conclusion of the conflict stage of the invasion.[135]

The US set about re-establishing the justice system in Iraq, post-invasion, in an attempt to rebuild the rule of law processes required prior to economic restoration, but what system was the rule of law based on, and did it work? Banks argues that the rule of law efforts in Iraq were uncoordinated, wasted money and lacked defined working relationships with the occupied state.[136] Most of these

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[130] *Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/538 (8 May 2003).
[131] SC Res 1483, UN Doc S/RES/1483 (22 May 2003) 2.
[132] Robert M Perito, *Establishing the Rule of Law in Iraq* (US Institute of Peace, 2003) 1.
[133] Ibid.
[134] Ibid 9.
[135] Ibid 12.
[136] Cyndi Banks, 'Reconstructing Justice in Iraq: Promoting the Rule of Law in a Post-Conflict State' (2010) 2(2) *Hague Journal on the Rule of Law* 155.

issues stemmed from the Coalition Provisional Authority (CPA), which was set up as an interim government of Iraq by General Tommy Franks in 2003 and led by US Diplomat, Paul Bremer. The CPA was legalised according to the law of armed occupation, and (as noted above) this followed a letter to the UNSC which set out the obligations and objectives of the US and the UK in post-conflict Iraq which included, ironically, the Office of Reconstruction and Humanitarian Assistance.[137] A number of bold commitments were made in this letter but the most relevant for this thesis was:

> To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that afford fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender.[138]

A major flaw with this arrangement was that the CPA only took direction from Washington, which is not conducive to a rule of law policy where the community is supposed to be engaged in reform of the current system.[139] The CPA also stated that the laws in Iraq would continue to apply so long as they did not conflict with laws or regulations made by the CPA, as was seen under CPA order 39 on privatisation which conflicted with Iraqi law and the law of occupation.[140] This made the idea of a rule of law specific to Iraq and the needs of the people unreachable as overall control was vested in the US, noting that UNSC Resolution 1483 was not proscriptive on this point. This also speaks to a poor use of the 'extra-legal measures' model – one that was partisan, distrusted, and thus perceived as dictatorial rather than pragmatic. The interim Iraqi government was established on 28 June 2004 and took over from the CPA, but it effectively operated as a US puppet regime.[141]

As noted above, the Extra-Legal measures rule of law approach if implemented as intended, as posited by Whittle, might have helped to ensure that the overreach by the CPA was more scrutinised and kept in check by the UNSC to maintain the higher order values of Iraqis in the rule of law application. The Iraqi situation was a soft handed approach by the UNSC which should have stepped in and conducted closer scrutiny of the CPA administration. The UNSC should have provided the CPA with more boundaries and a greater awareness of the domestic situation in Iraq under the Whittle model. Any intervention by the UNSC, though, was undermined by the US, UK (and Spain) who

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[137] *Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/538 (8 May 2003).
[138] Ibid 2.
[139] James Dobbins et al, *Occupying Iraq: A History of the Coalition Provisional Authority* (RAND Corporation, 2009) 11–30.
[140] Ibid.
[141] Thalif Deen, 'Iraq: Regime Change a "Fraud", Say Some Mideast Experts', *Global Information Network* (Web Page, 29 June 2004) <https://www.proquest.com/wire-feeds/iraq-regime-change-fraud-say-some-mideast-experts/docview/457552301/se-2>.

decided not to pursue a vote on an Iraq resolution and hence reserving the right to take their own steps to secure Iraq's disarmament.[142] As discussed earlier in the methodology chapter of this thesis, the US and the UK simply sidestepped the UNSC in the invasion of Iraq in 2003 and most likely would have vetoed a UNSC resolution at odds with the objectives of the coalition invasion. The approach to the rule of law in the Iraq case study, in particular by the US and the UK, demonstrated a military action without the support of the UNSC, as discussed by authors such as Paige.[143] Hence it must be highlighted early in this thesis that any criticism of the UNSC in relation to the Iraq situation in 2003 is tempered by the fact that it was likely that the US and the UK would have vetoed any UNSC resolution on Iraq anyway as they are part of the permanent five (P5) members of the UN who have a veto power.[144] A single no vote by any of the P5 would amount to stopping a resolution from passing.[145] The remainder of the P5 viewed the use of force in Iraq as a violation of the purposes and principles of the UN Charter and a violation of other international law.[146]

The four-element approach of this thesis could then have been implemented following the stabilisation of Iraq would have staved off many of the issues caused by the privatisation and civilian led approach by the CPA, by ensuring proper engagement with local laws and customary practice.

3.2.2 Summary of CPA

The CPA was a failure due in the most part to the fact that it was unable to establish a proper rule of law foundation in Iraq and attempted to govern Iraq from Washington. This failure meant that there was little effort to engage with the local laws or customary practices that were extant at the time of invasion. While the US attempted to establish a justice system in Iraq, it paid little attention to the established laws and practices in Iraq, particularly if they conflicted with the laws or regulations made by the CPA. Had the US approached the rule of law in Iraq using a combination of models suggested by Whittle, Farrall and Durch,[147] these fatal errors may not have occurred. The Whittle rule of law theory is perhaps more crucial in the Iraq experience, as it would have seen the UNSC adopt an extra-legal measures approach to ensure that the UNSC did not allow the CPA to overstep in its efforts to restore law and order in Iraq. It is also apparent that the UNSC failed in its duty to ensure, under the

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[142] 'UK, US and Spain Won't Seek Vote on Draft Resolution, May Take "Own Steps" to Disarm Iraq', *UN News* (Web Page, 17 March 2003) <https://news.un.org/en/story/2003/03/62132>.
[143] Tamsin Phillipa Paige, *Petulant and Contrary: Approaches by the Permanent Five Members of the UN Security Council to the Concept of 'Threat to the Peace' Under Article 39 of the UN Charter* (Brill, 2019) 177.
[144] 'Security Council Membership', *United Nations Dag Hammarskjöld Library* (Web Page, 3 February 2026) <https://research.un.org/en/unmembers/scmembers>.
[145] 'Voting System', *United Nations Security Council* (Web Page) <https://main.un.org/securitycouncil/en/content/voting-system>.
[146] Paige (n 143) 179.
[147] Note: these rule of law approaches postdated the Iraq conflict of 2003.

Extra-Legal measures model, to step in and act swiftly to ensure that any actions of the CPA on the rule of law were undertaken with due thought and proper consideration. The CPA had simply become a Schmittian executive which was vested with authority to circumvent the law in order to enforce order. An initial Whittle approach to the rule of law and a subsequent Durch application would have produced better results of sustained peace and Iraqi ownership of the rule of law process. Establishing an administration of Iraq on Foreign soil was the perhaps the main obstruction to these rule of law approaches. Again, this thesis adopts some caution in any criticism levelled at the UNSC in the Iraq situation, noting, as above, that the US and the UK had available to them the veto power and would likely have used it. It should be noted that the UNSC is not a unitary actor as its decisions are shaped by the national interests of its member states, and in particular, the P5.

3.2.3 United Nations Mission to Iraq (UNAMI)

The UN Mission to Iraq (UNAMI) was also established in 2003, with its mandate expanding to include the development of the 2005 Iraqi Constitution, to assist in elections and to coordinate humanitarian efforts.[148] These efforts were hampered in the early years by the poor security in Iraq and the need for the UNAMI to establish its offices outside of Iraq, in places like Jordan.[149] Indeed coordination between UNAMI and CPA was fraught in the early months of occupation. UNAMI was certainly focused on the human rights of the population and there was an assumption that the occupying forces would take care of the rule of law and governance issues. But what was the status of the rule of law in Iraq at the time of occupation?

3.2.4 The status of Iraq law at the time of occupation

Iraq's systems of law were comprehensive and well recorded prior to the invasion of 2003.[150] Iraq is thought to be the first country to have had a form of legal documentation, the Code of Hammurabi, which demonstrated a developed legal thinking. It was brought to Iraq by the Ottoman Empire.[151] The status of the rule of law in Iraq in 2003 was certainly somewhat better than that in Afghanistan, which, as demonstrated, had a much more troubled history of invasion and disconnection. However, Jones states that the 60,000 police in Iraq entrusted to enforce the law in the Saddam Hussain era were poorly trained and ineffective.[152]

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[148] SC Res 2732, UN Doc S/RES/2732 (31 May 2024) para 6a.
[149] *Report of the Secretary-General Pursuant to Paragraph 24 of Resolution 1483 (2003) and Paragraph 12 of Resolution 1511 (2003)*, UN Doc S/2004/625 (5 August 2004).
[150] Nabeel Althabhawi and Zinatul Zainol, 'The Patent Legal System in Iraq: The Path to Efficiency of its Statutes' (2014) 36 *World Patent Information* 32.
[151] Ibid 32.
[152] James Jones, *The Iraqi Police Service: The Report of the Independent Commission on the Security Forces of Iraq* (Atlantic Council, 2007) 93–108.

On a counter view, Ashraf contends that under the Hussain regime, the enforcement of laws was of a high standard which kept 'crime and public corruption at low levels compared to regional standards', as the police and intelligence services were instruments of control of Army.[153]

Jones concedes that the 500 US police advisors from the Department of State failed to make any inroads in the US led police training program.[154] This led to another monumental failure when the then US President George Bush placed the same task in the hands of the US Military who focused on counterinsurgency rather than traditional policing duties.[155]

The initial implementation of the rule of law in Iraq was left to the invading military forces, whose efforts to train Iraqis in the justice system were ill equipped and uncoordinated. This is perhaps because the main effort of the CPA at the time of invasion was on economics, as perhaps seen by the flawed decision by Bremer to dismantle the Iraq Army, which had the flow on effect of weakening Iraq's workforce and entrenching a sense of distrust in this interim administration.[156] Some commentators state that the military alleged it was attempting to understand the Iraqi system of law, but this was later found to be baseless.[157]

3.2.5 The United Nations Development Programme (UNDP) and the United Nations Office for Project Services (UNOPS)

The role of implementing wholesale changes to the rule of law in Iraq was left to two UN bodies in the United Nations Development Programme (UNDP) and the United Nations Office for Project Services (UNOPS). The European Commission funded these two bodies to provide training and legal assistance to two model courts and to support NGOs to monitor prisons and provide legal aid to detainees.[158] The report *Iraq – Support to the Rule of Law and Justice Project: Final Project Evaluation* demonstrated that support for the rule of law only gathered a small amount of momentum

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[153] MA Ashraf, 'The Lessons of Policing in Iraq – A Personal Perspective' (2007) 1(1) *Policing: A Journal of Policy and Practice* 103.
[154] James Jones (n 152) 93–108.
[155] Ibid.
[156] Jay Herndon, 'Failures of the Coalition Provisional Authority in Iraq', *Real Clear Defense* (Web Page, 2 November 2017) <https://www.realcleardefense.com/articles/2017/11/02/failures_of_the_coalition_provisional_authority_in_iraq_112574.html>.
[157] Ibid.
[158] Jim Freedman and Abbas Balasem, *Iraq – Support to the Rule of Law and Justice Project: Final Project Evaluation* (Report, Delegation of the European Union to Iraq, August 2012).

from 2008, due to inter-ethnic tensions which had contributed to extremely poor security in Iraq.[159] It appears on the face of it that the westernised approach to the rule of law failed to take into account the complex layers of customary and local laws associated with different ethnic groups. The Maley approach to the rule of law prioritises customary practice and local laws as key areas in a post conflict peace operation as distinct from a centralised approach as seen with the CPA in Iraq. The Maley approach, coupled with the Extra-Legal measures approach of Whittle (Greater UNSC oversight) and the systemic approach of Durch, could have assisted the coalition forces in Iraq to better understand the rule of law and how best to assist Iraqis to regain proper control of their country.

The efforts of the UNDP led to the training of a significant number of judges and the development of case management systems to assist with the judicial process.[160] Sadly, on its own admission, the UNDP failed to coordinate its efforts with the UNOPS. The report was refreshingly frank about the difficulties encountered when dealing with the Iraqi government and the lack of common ground when discussing legal reform and the rule of law. The report states that, while there has been significant training of judges, lawyers and court staff, there has been a very modest improvement in public confidence in the judiciary.[161] This lack of public confidence is, in my view, due to the lack of community engagement in reform to the rule of law.

3.2.6 Assessment of current rule of law progress in Iraq

A 2022 UNDP report on judicial integrity in Iraq observes significant progress in establishing a code of conduct for judges and prosecutors across Iraq with strict adherence to human rights standards.[162] Other rule of law UNDP advancements include upgrades to the criminal investigations' capacity due to the generous contribution of Germany through better standards of practice, interviewing skills and the provision of interviewing rooms.[163]

UNAMI remains in Iraq due to the extension of the presence of the mission by the UNSC.[164] The UN have also continued with the deployment of the UNDP in Iraq and the United Nations Investigative

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[159] Ibid.
[160] UNDP, 'Strengthening Judicial Integrity in Iraq: New Judicial Code of Conduct Launched Today' (Media Release, 22 November 2022) <https://www.undp.org/arab-states/press-releases/strengthening-judicial-integrity-iraq-new-judicial-code-conduct-launched-today>.
[161] Freedman and Balasem (n 158).
[162] UNDP, 'Strengthening Judicial Integrity in Iraq' (n 160).
[163] UNDP, 'Iraq's Ministry of Interior Upgrades its Criminal Investigation Capacity through UNDP and the Government of Germany's Support' (Media Release, 11 February 2024) <https://www.undp.org/arab-states/press-releases/iraqs-ministry-interior-upgrades-its-criminal-investigation-capacity-through-undp-and-government-germanys-support>.
[164] SC Res 2732, UN Doc S/RES/2732 (31 May 2024).

Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD),[165] to continue the stability efforts in Iraq and to promote economic and social progress following the defeat of ISIL forces. This timeline seems consistent with the suggestion that the US and coalition mission in Iraq will draw down by September 2025 with the final troops to leave Iraq by 2026.[166]

3.2.7 What does this mean for the rule of law in Iraq?

The UNDP in 2020 proclaimed that the 'access to justice project' had been a success but provided some very important insights into what is left to do.[167] The report states that the Judiciary, the Ministry of Justice and security sector institutions have been affected by years of neglect, conflict, poor infrastructure and violence.[168] It seems that UNDP is doing what it can to support the judicial institutions to strengthen their capacity in order to improve the rule of law, but progress is slow due to ongoing conflicts in Iraq.

According to Human Rights Watch, Iraq has regressed, evidenced by its stance on rights of citizens through an amendment to the Personal Status Law that would empower Iraqi religious authorities, rather than state law, to govern marriage and inheritance matters at the expense of fundamental rights and allow child marriages.[169] The same commentators expressed concerns on Iraq's increase in executions, and the punishment of same sex relationships.

3.2.8 Conclusion as to Iraq case study

The US had an extraordinary opportunity when it set up the CPA to incorporate a rule of law model that complemented the region and the type of legal framework that it was presented with when it invaded Iraq. The Durch approach to Iraq, for example, would have ensured the early provision of public security was a priority to the interim administration, which would have realised very early that running the administration from Washington DC would not be viable. A properly planned policing project would have ensured that appropriately trained and professional personnel were sent to Iraq to assist with the mentoring and training of the Iraq security forces and the judiciary. Professional

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[165] 'The United Nations in Iraq', *United Nations Iraq* (Web Page, 2025) <https://iraq.un.org/en/about/about-the-un>.
[166] Timour Azhari and Ahmed Rasheed, 'Exclusive: US-Iraq Deal Would See Hundreds of Troops Withdraw in First Year, Sources Say', *Reuters* (Web Page, 7 September 2024) <https://www.reuters.com/world/us-iraq-deal-would-see-hundreds-troops-withdraw-first-year-sources-say-2024-09-06/>.
[167] UNDP, *Increasing Access to Justice in Iraq* (Report, 26 March 2020) <https://www.undp.org/arab-states/publications/increasing-access-justice-iraq>.
[168] Ibid foreword.
[169] 'Iraq: Repressive Laws Roll Back Rights: Freedoms Under Threat; Executions on the Rise', *Human Rights Watch* (Web Page, 16 January 2025) <https://www.hrw.org/news/2025/01/16/iraq-repressive-laws-roll-back-rights>.

personnel could then have evaluated the health of the Iraqi legal system and focused on the eradication of corruption which was seen to be a barrier to the enforcement of law in Iraq as discussed above.

In terms of refinements or proofs (or counter-indicators) in respect of this thesis' methodology of four key elements with associated components for assessing and designing policing interventions, the Iraq context provides a few additional points.

3.2.9 Transparency

First, in respect of *transparency*, the refinement made as a consequence of the Timor Leste study in terms of proper use and communication/explanation of the 'extra-legal measures' model is again reinforced. This is because the partisan nature of the CPA's use of the extra-legal measures power, and its vesting in the Provisional Administrator, who answered to the US more than any other constituency, is a case study of how not to employ this mechanism. This issue of partisan perceptions is also relevant to the second component of consistency– early action against organised crime and corruption, and also militia agendas – in that it is, again, a negative that proves the factor. The failure to deal with demobilisation, the failure to deal with militias and the endemic corruption spurred by the influx of money, undermined rather than prioritise this component of transparency.

3.2.10 Consistency

Regarding *consistency*, again the Iraq context tends to prove the rule via a negative – there was no consistency in police project implementation, and this was clearly a factor in why the policing project, comprehensively failed.

3.2.11 Accountability

In terms of *accountability*, the Iraq context reinforces the need to ensure that prior loyalties of local agents should be consciously accounted for and mitigated against. However, Iraq perhaps offers a warning on going too far in the other direction, in that the dissolution of the armed forces, the police, and the Baath party, and the effective barring of former members of each from CPA sponsored roles in the 'new Iraq', actually deprived the country of an important resource. The Iraq context also reminds us that international agents can be partisan and that this needs to be consciously understood and mitigated against. The clear perception that the CPA was a US plant, and that it was serving US interest, made that organisation's job doubly hard from the very outset. The fact that the US also used often unaccountable contractors, as opposed to police, to implement and support policing, also sent a clear message to the Iraqi people about what the chief power in the land thought about policing, hence weakening the rule of law.

3.2.12 Engagement

Finally, in terms of *engagement*, Iraq is once again a negative proof in that there was little to no engagement with local and customary processes and mechanisms, and implementation quickly became centre-focused, externally dictated, and regionally scarce.

In general, consequently, the Iraq case study as a test of the four elements and associated components identified as the assessment and design criteria for this thesis, is of limited use. However, it does serve to prove the elements in general in that ignoring them was a contributing factor for the failure that followed. The Iraq case study also serves to reinforce the specific modifications made as a result of the Timor Leste case study, in terms of the need to consider militia and rebel group demobilisation and agendas, as well as corruption and organised crime. It also reinforces that the necessary existence of a centralised 'extra-legal measures' option needs to be non-partisan and well explained. Finally, the experience of the disbandment of the military, police, and Baath Party, and the barring of members from new CPA institutions does provide an important leavening to the Timor Leste based refinement around close vetting for militia and rebel group agendas and legacies. That is, whilst this issue must be closely monitored in recruiting locals for any new police force, and it is important to ensure that fragmentation does not result or that favouritism is perceived for one group of recruits as compared to others, neither it is necessarily useful to prohibit, ab initio, any recruitment from these legacy groups.

3.3 Conclusion

The approach to the rule of law in the Timor Leste and Iraq conflicts involved a multitude of UN Agencies and collation partners. Both conflicts had a myriad of interruptions post initial intervention and an unclear script on what would be the best approach to the rule of law. Both conflicts were led in circumstances where the UN and its partners were ill-prepared to provide professional personnel able to assist, mentor and advise on the rule of law and were closed to customary or local law.

Future attempts to introduce the rule of law post-conflict should be 'widely agreed within a given society'.[170] Farrall's assessment that the rule of law is a slippery concept with many definitions which, despite its elusive nature, can gain greater traction to a broader society, is sensible and forward thinking.[171] It does not mean that rule of law cannot be flexible and inclusive – in fact, it must be. As Mednicoff states:

[170] Farrall, 'Impossible Expectations?' (n 46) 138.
[171] Ibid.

> Arab society's own unique discourse on Islam and politics, mixture of legal systems and pattern of popular understanding of law and its relation to authority need to be mapped with an eye to exactly how country-specific reform might be possible.[172]

The training of criminal justice sector professionals is all moot in many ways without first looking at what a rule of law framework should entail, especially one that fits the needs of a post-conflict failed state.[173] This, in my view, cannot be achieved without international assistance and a rule of law approach that is practical and realistic.

The Timor-Leste and Iraq experiences in terms of the rule of law and those approaches, identify a number of important lessons for Afghanistan. An unfettered and unsupervised approach to the rule of law, as seen in Iraq, must not occur in a future post conflict Afghanistan. It is for that reason that the post conflict approach to Iraq cannot be a comparative approach for this thesis. While Timor-Leste had internal election issues, it was managed by the UNSC in a much more controlled and measured manner, particularly with the approach to send in an expert team to assess UNMIT led by Andrew Hughes.[174] The report from Hughes, aligned with those requirements of a future post conflict Afghanistan in that training and corroboration must extend to the outer most districts in order to achieve a complete access to the criminal justice system and a move away from a centralised system.

In this chapter, I have reviewed the general rule of law literature to approaches to post conflict situations and assessed the rule of law approaches to both Iraq and Timor Leste. I have settled on an evolved methodology drawn from the theories by Durch, Whittle and Maley in how to approach to the rule of law in Afghanistan, with a particular focus on the Timor Leste post conflict situation as a test case.

In this regard, it is important to note that while Iraq would seemingly share some significant similarities and complexities of religion and culture to Afghanistan, Timor Leste was predominantly a UN-led policing mission and would therefore better suit the type of new policing led mission to Afghanistan. The approach to Timor Leste was also better mandated and supported by the UN, which took a more hands-on approach than in Iraq, where the US essentially administered the rule of law from Washington under the CPA.

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[172] David Mednicoff, 'Middle East Dilemmas' in Thomas Carothers (ed), *Promoting the Rule of Law: In Search of Knowledge* (Brookings Institution Press, 2006) 251, 267.
[173] 'Afghanistan's Justice Training Transition Program (JTTP)', *International Development Law Organization* (Web Page, 2020) <https://www.idlo.int/what-we-do/initiatives/afghanistans-justice-training-transition-program-jttp>.
[174] *Letter Dated 16 May 2008 from the Secretary-General to the President of the Security Council,* UN Doc S/2008/329 (16 May 2008).

The preferred rule of law mandate for a UN policing mission to Afghanistan would therefore be one that holds the UNSC accountable and must be transparent and consistent as identified by Farrall.[175] The mandate would also need to ensure that the UNSC conforms with Extra-Legal measures to allow the UNSC to step in and out as required in order to ensure that proper values are protected once the Taliban have been ousted and that the interim government upholds the higher order values of Afghanistan in what will likely be an emergency situation.[176]

It may be that the UNSC has an ongoing and more hands-on application to a new and emerging Afghanistan, but it is important to note that this involvement and evolving mandates must be tempered by accountability and consistency to the extent that one day Afghanistan will be able to stand on its own. To that end the UNSC must ensure that any new administration in Afghanistan does not, as Maley states, abuse power and therefore require a more heavy-handed approach by the UNSC noting that such an approach must be informed by the complex existing judicial structure of Afghanistan.

In order for the UNSC to provide a realistic, consistent and accountable rule of law mandate for Afghanistan, it must follow the four elements which will be at the core of this thesis:

1. Transparency
2. Consistency
3. Accountability and
4. Engagement.

The use of this four-element approach to the rule of law will avoid a situation encountered in the Iraq experience where the CPA enacted orders that ignored international laws of occupation and countervailed the effects of local Iraqi laws and failed to engage with local customary practices. The critical factors, as identified in the literature, would be to engage with local laws and customary practices, provide public security and border control and help rebuild and reform local security forces with as much corroboration with the existing Afghan criminal justice sector as possible.

The four-element approach also conforms with those factors identified in the literature from the Brahimi report, the UN expert report to UNMIT and the Durch and Maley approach to the rule of law. The seminal Brahimi and UNMIT reports look for a doctrinal shift in the approach to rule of law by

[175] Farrall, Charlesworth and Ryan (n 27) 36.
[176] Whittle (n 27).

creating a team of qualified experts to train and mentor those across the criminal justice sector to ensure consistency from top to bottom. The Durch and Maley approach to rule of law ensure that those deployed in peace operations are suitably qualified, accountable and the training they engage in is decentralised and reaches the outer districts.

The lesson that was learned from the Timor Leste experience, in particular, came almost a decade after the initial intervention in 1999 from the late Andrew Hughes, a decorated Australian Federal Police officer and ultimately an esteemed leader at the UN. It followed a special mission to Timor Leste in 2008 in which he unapologetically made findings on the weaknesses of the UN policing mission and the insufficient assessment of the time required to implement essential rule of law requirements, calling for extension to the UN deployment.

Those weaknesses will turn to lessons for this thesis and any new mandate to be introduced by the UNSC to Afghanistan on the rule of law when the time comes must be informed by an expert convoy, as seen in Timor, to make a proper on the ground assessment of those critical rule of law requirements to be mandated by the UNSC.

With the four-element methodology, and its identified and linked critical indicators in mind, the next step in the analysis is to apply it to the Afghanistan context. However, as noted in the introduction to this thesis, it is impossible to design, develop and implement any policing focused rule of law program for Afghanistan without first understanding the deeper historical context that will either facilitate or hinder such an endeavour. It is to this that Chapter 4 now turns.

Chapter 4
Conflict and the evolution of policing in Afghanistan through the lens of a turbulent recent history

4.1 Introduction

In order to evaluate the extent to which policing in Afghanistan has reinforced the rule of law and propose consequent reforms it is critical to analyse its history. This is not least because Afghanistan 'has faced centuries of turmoil and strife',[177] and has only recently been able to rebuild (notwithstanding the current situation) under the protection of the international community. It has faced constant invasion because it is located on a critical trade route between Asia and the Middle East, yet these incursions or land grabs have nearly always failed.[178] Such failures should have sounded a warning to other invading countries, yet attempts continued with the foiled British invasions in the 19th century, the Russian invasion in 1979 and the US and coalition invasion in 2001.[179] Was the US-led invasion of 2001 one of those failures? Have the attempts to rebuild and reconstruct Afghanistan since 2001 been too focused on western viewpoints and not considerate of the complex nature of pre-existing Afghan laws and customs? What strategy should the international community now take after the recent Taliban takeover in Afghanistan?

This chapter focuses on the modern history of Afghanistan commencing with the establishment of the Durrani Empire by Ahmad Shah Durrani, a Pashtun military commander in the army of the Persian ruler Nadir Shah,[180] and responses to the 'Great Game' where Afghanistan acted as a buffer between Great Britain and Russia, with the British fearing that Russia was looking to expand southward, while the British were seeking to expand their influence northward.[181] The history of war and invasion in Afghanistan is instructive in considering how future efforts might be sustained to maintain post-conflict law and order.[182] It will inform the thesis not only about the type of leadership required to govern Afghanistan, but more importantly the type of policing and laws required to complement that leadership.

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[177] Meredith Runion, *The History of Afghanistan* (Greenwood Press, 2007) 1.
[178] Ibid.
[179] Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press, 2012).
[180] Kenneth Katzman and Layton Thomas, 'Afghanistan: Post-Taliban Governance, Security, and U.S. Policy' (2017) 8(4) *Current Politics and Economics of the Middle East* 531.
[181] Ibid.
[182] Benjamin Zyla, 'The International Peace- and State-Building Intervention in Afghanistan: Distilling Lessons to Be Learned' (2025) 39(1) *Ethics & International Affairs* 3.

It is important to clarify that many other nation-states, with the exclusion of Turkey, did not have a functioning police force during much of the historical period that this thesis explores.[183] It is therefore not the intention of this chapter to criticise Afghanistan for not having a national police force; rather the intention is to positively explore how law and order was enforced and justice served in Afghanistan from a historical perspective.

This chapter concludes with the more recent events that have cast a shadow once again on Afghanistan in the Taliban and ISIS-K.

4.2 British invasion 1839–1842: First Anglo-Afghan War

There have been numerous invasions over many hundreds of years, but the starting point for this analysis is the first of three British invasions in 1839. The first British invasion, also known as the 'Great Game',[184] was essentially a competition for territory in Central Asia between Britain and Russia. The British imperialists had, prior to the invasion, kept Afghanistan weak and therefore dependent on the British Government.[185] This battle for territory would continue for the next 150 years.[186]

However, the decade before the invasion is more relevant to this thesis as it saw the emergence of Dhost Mohammad Khan, whose desire to lead Afghanistan was fuelled by the gruesome torture and murder of his younger brother Fatteh Khan. He sought revenge for his brother's death by defeating the man responsible, Mahmud Khan. He then took Kabul, Jalalabad and Ghazni, effectively giving him leadership and making him the amir in Kabul.[187]

Dhost Mohammad removed Shuja Shah, a British government puppet, from power in 1836 with a view to giving Afghanistan independence.[188] But any real attempts at creating Afghan sovereignty

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[183] 'History', *NSW Police Force* (Web Page) <https://www.police.nsw.gov.au/about_us/history>; 'Victoria Police Annual Report 2023–24: Our Organisation', *Victoria Police* (Web Page, 2024) <https://www.police.vic.gov.au/victoria-police-annual-report-2023-24/our-organisation>; 'The Turkish National Police', *Misak-i Zafer* (Web Page, 2020) <https://misakizafer.com/2020/04/10/the-turkish-national-police-tnp/>; 'The History of the FBI', *Federal Bureau of Investigation* (Web Page) <https://www.fbi.gov/history/history-of-the-fbi>.

[184] 'The Great Game', *Ohio State University* (Web Page, 2024) <https://guides.osu.edu/c.php?g=300070&p=7043825>.

[185] Murray (n 13) 75.

[186] Ali Jalali, *A Military History of Afghanistan: From the Great Game to the Global War on Terror* (University Press of Kansas, 2017).

[187] Paul Antonopoulos, 'The "Unconquerable" Afghanistan: A Place Where Empires Come to Die and the "Third Great Game"?' (2018) 14(1–2) *Romanian Review of Eurasian Studies* 229.

[188] Antoinette Burton (ed), *The First Anglo-Afghan Wars: A Reader* (Duke University Press, 2014).

were dashed when Dhost attempted to form an alliance with the British in order to take Peshawar, with an invitation extended to the British Captain Alexander Burnes in Kabul.[189] The British were willing to re-form an alliance, but only if Dhost agreed to sever all current agreements with other European countries.[190] The British further demanded that Dhost cease his attempts at recovering Peshawar and stated that they would protect him from Ranjit Singh instead. Ranjit Singh was the first Maharaja of the Sikh Empire and ruled the north-west Indian subcontinent in the early half of the 19th century.[191] Dhost was quick to reject this offer from the British and quickly sought to form an alliance with Russia. Soon after, Captain Burnes saw a Russian emissary, Lieutenant Vitkievitch, in Kabul, which led to the retreat of the British to India and a declaration of war by Lord Auckland on Afghanistan in 1838.[192] In 1838, Ranjit agreed to a treaty with Lord Auckland to restore Shuja Shah to the Afghan throne at Kabul. The British Army of the Indus entered Afghanistan from the south, while Ranjit Singh's troops went through the Khyber Pass and took part in the victory parade in Kabul. Shortly afterward, Ranjit Singh was taken ill, and he died at Lahore in June 1839.[193] So the British mission was clearly to enter Afghanistan to prevent other European countries and Russia from gaining a foothold and to expand the British empire.[194]

By 1839 the British had marched into Kandahar to find that the Afghan princes had abandoned the area. There was no organised police force at this stage and would not be for many years to come. This enabled Lord Auckland to restore the puppet leader Shuja Shah to the throne as amir of Afghanistan following the flight of Dhost Mohammad to the Hindu Kush Mountains. Dhost surrendered to the British in 1840 and by 1842 his tribal supporters rallied.[195] The absence of a police force at this stage of Afghanistan's history reinforces the disorganisation and disarray of security in Afghanistan and the historical predominance of reliance on military and militia type forces for policing tasks. It highlights that the country was ruled and seemingly governed by a militarised system that was designed to repel invading forces. In the absence of a police force, there remain questions as to how laws were enforced, and crimes punished. There is certainly no evidence of criminal laws and a police force at this stage of Afghanistan's history.

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[189] Jeffery Roberts, *The Origins of Conflict in Afghanistan* (Bloomsbury Publishing, 2003) 4.
[190] Ibid.
[191] Kushwant Singh, 'Ranjit Singh', *Encyclopaedia Britannica* (Web Page, 27 September 2023) <https://www.britannica.com/biography/Ranjit-Singh-Sikh-maharaja>.
[192] Ibid.
[193] Ibid.
[194] Tony McClenaghan, 'The Imperial Service Troops Scheme in the 19th and 20th Centuries' in Rob Johnson (ed), *The British Indian Army* (Cambridge Scholars Publishing, 2014) 93, 93.
[195] Percy Sykes, *History of Afghanistan* (Routledge, 2007) vol 2, 11–12.

Following the rally of tribal supporters on 2 November 1841, Captain Alexander Burnes was murdered and dismembered by angry mobs in Kabul, which led to the agreed withdrawal of British troops from Afghanistan.[196] On the treacherous return journey between Kabul and Gandamak, almost 16,000 British troops were attacked and slaughtered by Ghilzai tribesmen. Only one man survived and that was Dr William Brydon who arrived at the Jalalabad British outpost barely breathing. The slaughter of British troops while retreating from Afghanistan gave rise to Afghanistan's reputation as a brutal and unhospitable place and should have provided warning bells for future invasions.

That said, it is difficult to apportion blame to Dhost for trying to galvanise Afghanistan and for the attack on the fleeing British troops. At the time, Russia was trying to press south to India in order to extend its power to the West, while on the other hand, Britain, which occupied India, was determined not to allow Russia to spread its power beyond its borders. In the middle was Afghanistan, a land-locked country desperately trying to maintain a semblance of sovereignty. It is clear that in this period Afghanistan did not have the economy or unity to support its own sovereignty. This is demonstrated by the fact that Afghanistan constantly sought assistance and aid from other countries including Great Britain and Russia.[197] It also paints a very clear picture of the absence of a police force and the brutality of the regime empowered with governing Afghanistan and of what it must have been like to be a citizen of Afghanistan in this period, in the absence of a force to police the provinces.

The loss of life and the destruction of property in Afghanistan along with the destruction of the *bazzar* (marketplace) in Kabul led to a severe hatred of foreign occupation in Afghanistan that is said to be somewhat 'ingrained in the culture to this very day'.[198] This may be the very barrier that has prevented peace in Afghanistan in the 21st century. As discussed below, the destruction of infrastructure by foreign forces in Afghanistan only became worse through the 20th and 21st centuries.[199] My deployment to Kabul from 2010 to 2011 gave me a graphic picture of just how desperate the situation is in Afghanistan. Buildings had yet to be repaired from the attack by US and British forces in 2001, particularly in Kabul and Kandahar, yet businesses still attempted to operate in precarious buildings seemingly oblivious to the perils. It was as though the Afghans had long come to terms with the futility of efforts to rebuild, perhaps enamelled by years of foreign invasion and

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[196] Ibid 27–8.
[197] Ibid 79.
[198] Ibid 78.
[199] See, eg, Gregory Fremont-Barnes, *The Soviet-Afghan War 1979–89* (Osprey Publishing, 2012) 84, 90; Françoise Bouchet-Saulnier and Jonathan Whittall, 'An Environment Conducive to Mistakes? Lessons Learnt from the Attack on the Médecins Sans Frontières Hospital in Kunduz, Afghanistan' (2018) 100(907) *International Review of the Red Cross* 337; Leoni Connah, 'US Intervention in Afghanistan: Justifying the Unjustifiable?' (2021) 41(1) *South Asia Research* 70, 78–9.

conflict. This suspicion of foreign interference is thus an essential historical element that must be accommodated in any project involving policing in Afghanistan.

4.2.1 Key features relevant to policing to be drawn from this period

As is evident from the above, there is a sense of futility that has long fuelled a distinct general distrust of westerners and their efforts to provide assistance to reform the security of the country. Much of this distrust, as stated earlier, is generational and has been passed down over the last two hundred years, mostly as a direct result of being a victim to the ulterior motives of the British, Russians and later the American and allied forces.[200] In this regard, the identified transparency indicator concerning the likely perceptions of foreign police trainers clearly has a good deal of historical provenance. This further attests to its validity as a key factor to be considered for policing project assessment and design.

One reason Afghanistan has not been able to prosper is that it has barely had a chance to recover since the British invasion in 1839. There is also a common theme of the placement of puppet leaders into Afghanistan by foreigners, from the British-favoured Shuja Shah in 1830 to Hamad Karzai in 2004, installed by the US, clearly designed to advance UK and US political interests. This did little to realise the vision of Dhost Mohammad in the 19th century of seeking independence for Afghanistan. Further, the use of such puppet leaders complicated efforts to withdraw from Afghanistan and obstructed the type of unified independence of the population that is required to maintain law and order. This was very much the case when the US led coalition withdrew in 2014, leaving in place a leader in President Karzia who was considered to be merely a puppet of the West by the majority of the Afghan people.

History has also informed us that leaders in Afghanistan who have been installed by foreign occupants have inevitably struggled to unite the people. The previous British-favoured leaders include Shuja Shah Durrani (1803–1809), Mahmud Shah (1809–1818), Sher Ali (1863–1866 and 1868–1879), Yaqub Khan (1879) and Abdur Rahman Khan (1880–1901). In essence the 19th century was a period of great divide for which the blame can be placed fairly and squarely on the shoulders of the British. It was only those leaders who chose to defy the British who were able to successfully unite Afghanistan. The question remains as to how is this turbulent history relevant to policing? The simple answer is that literature contains no record of policing, at least until the 19th century when Afghanistan entered a period of relative stability. The history of invasion has meant that Afghanistan

[200] 'Paper Concerned about Increasing Mistrust between Afghans, Foreigners', *BBC Monitoring South Asia* (7 February 2013).

has had to lean on its military forces to repel invasion and therefore the investment in arming the military has been its priority over policing. The history also illustrates the type of leadership that lends to investing in policing and a puppet leadership regime has not assisted either policing or galvanising a population to trusting and accepting police under a puppet regime. A future policing intervention must never again instal a puppet leader if it wants to earn the trust of the population. Again, this conclusion points clearly to the historical validity of another of the key indicators identified in Chapter 2: transparency in terms of the need for a clearly explained and accepted extra-legal measures model, including a locally acceptable focal point for the power to exercise these measures.

Sher Ali recaptured Kabul in 1868 and again the British viewed Afghanistan as the buffer state between India and Russia, hence they supplied Ali's regime with weapons and financial support. There was still no organised policing force in Afghanistan by this stage and much of the responsibility for law and order was placed squarely at the feet of the military or militia forces. The following decade saw a steady decline in the relationship between Afghanistan and Britain, and Russia compounded the scale of the challenges when it attacked the city of Khiva in Khanate located in modern Uzbekistan.[201]

With the Russians closing in on Afghanistan, Sher Ali once again called on the British to provide support, but this was not forthcoming as Britain, without the knowledge of Sher Ali, had signed an agreement with Russia the previous year in which the Russians agreed to respect the boundaries of Afghanistan.[202]

4.2.2 Conclusion

While it could be argued that the British used Afghanistan as a 'pawn' in their attempt to thwart Russian influence, at the same time Afghanistan also sought to play its part in the 'Great Game' by forming alliances with the highest bidder in order to fulfil its own ambitions. Any post-Taliban Afghanistan government must shy away from political games and first ensure that it secures its borders from insurgents and allows its people to prosper from meaningful trade. This will require a fully functioning and well-resourced national police force and judiciary that is loyal, dedicated and uncorrupted. However, this was never even contemplated at that time as the experience of this period for Afghan's, emphasised for them that their own personal security was their own obligation, and they could not rely upon the leadership of Afghanistan to protect them. These factors are relevant to the issue of policing because they challenge, or at least complicate, achieving at least another two of the

[201] Sykes (n 195) 87.
[202] Ibid. The agreement, constituted of letters between the relevant parties, is reproduced in Martin Ewans, *Securing the Indian Frontier in Central Asia*: *Confrontation and Negotiation 1865–95* (Routledge, 2010) app 2.

key indicators for the rule of law in the provision of public security and eradication of corruption. This aligns with the second and third step of the rule of law blueprint of this thesis in accountability and transparency, as there will likely be widespread mistrust when a UN international mission is deployed to Afghanistan, and a need to deal quickly and visibly with the policing de-railing forces of corruption, organised crime, and legacy militia agendas. This suspicion, however, will likely be counter-balanced, at least initially, by elation when the Taliban is removed from its brutal treatment of the population. This period will therefore likely be a ripe opportunity for the UNSC to set a mandate that will need to be consistent with the 4-step approach to the rule of law blueprint of this thesis in order to properly assist an interim leadership to set in a place a sustainable rule of law model.

4.3 British invasion 1878–1879: Second Anglo-Afghan War

Under its treaty with Russia, Britain could not provide any support to Afghanistan or Sher Ali. The commencement of the second Anglo-Afghan War was a result of the Russians sending an uninvited representative to Kabul. Sher Ali finally succumbed to the Russians, who offered to provide troop support, new roads and telegraph lines.[203] Conversely the British, upon hearing of the Russian visitor, sent a British envoy to Kabul but were stopped at the eastern entrance to the Khyber Pass and told not to proceed any further or they would be met with resistance by Afghan troops. This rebuke led the British Cabinet to declare war on Afghanistan, with British troops marching into Afghanistan in August 1878. The British divided their army into three distinct forces for a three-pronged attack that would last two years.[204]

Sher Ali sought to obtain support from the Russians, but he found them 'profoundly unsympathetic' and was advised to make peace with the British.[205] He was further advised that no Russian troops could campaign in the winter in Afghanistan. Sher Ali's request to personally meet with the Czar was politely declined and he subsequently died in Mazarr-i-Sharif in 1879 a broken man.[206] Sher Ali's son, Yaqub Khan, became the new leader of Afghanistan and essentially handed the country over to the British by negotiation and through the *Treaty of Gandamak* in May 1879 in return for an agreement that the British would not conquer the rest of Afghanistan. Khan was not a strong leader and gave no sign of being a capable monarch.

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[203] Sykes (n 195) 80.
[204] Kaushik Roy, 'Logistics and British Imperialism: Supplying the British Imperial Army during the Second Afghan War, 1878–1880' in Ashutosh Kumar and Kaushik Roy (eds), *Warfare and Society in British India, 1757–1947* (Routledge, 2023) 182.
[205] Martin Ewans, *Afghanistan: A New History* (Routledge, 2nd ed, 2002) 62.
[206] Ibid.

Perhaps the history of poor leadership could be linked to the difficulty of galvanising such a culturally divided Afghanistan, home to four large ethnic groups who speak over 40 different languages. Were these ethnic groups given adequate representation in discussions of social, economic and security sector reform and the rule of law? Some historians marvel at the ability of such a diverse population to band together in times of conflict and invasion.[207] Nevertheless, this component of the history of policing and security in Afghanistan clearly validates the identified indicators of engagement and consistency, with a provincial focus, so as to avoid the trap of a centre-focused implementation of policing programs. It also points to the need for incorporation of the diverse customary processes and mechanisms associated with policing and justice.

In 1880, Abd al-Rahman Khan became the King of Afghanistan and much of the current judicial system emerged under his rule. Hence, Abd al-Rahman Khan was effectively the father of the modern Afghanistan legal system.[208] He was responsible for centralising the court and legal system and three of his innovations would remain fundamentally important to the Afghan legal system:

- the creation of a court system;
- the provision of a judge's manual;[209]and
- the installation of the boxes of justice, which allowed individuals to directly petition the king.[210]

The periods of rule of Abd al-Rahman Khan (1880–1901) and then Habibullah Khan (1901–1919) were historically important as they saw the emergence of a centralised and specialised police force that was tasked with enforcing taxation and revenue collection.[211] These early police were more akin to armed militia, and they were known as khassadars.[212] These police at this stage were not well organised and very little else has been reported on how they policed or where they were stationed. The khassadars were horse mounted or on foot and were assigned to each provincial governor, but they had no training and were, by effect, armed militia: brutal and known to torture the population to extract revenue.[213]

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[207] Ibid 8.
[208] Afghanistan Legal Education Project, *An Introduction to the Law of Afghanistan* (Stanford Law School, 3rd ed, 2011) 6.
[209] Ibid 6, 20. For more information, see 'Asās Al-Quẓāt', *Library of Congress* (Web Page) <https://www.loc.gov/item/2001310183/>.
[210] Afghanistan Legal Education Project (n 208) 6.
[211] Giustozzi and Isaqzadeh (n 28) 13–14.
[212] Ibid.
[213] Ibid 2.

Unfortunately, it seems that this misaligned model for policing in Afghanistan was set early, creating a foundation for distrust and contempt towards police. The accountability and transparency linkages to the need to deal with corruption and organised crime, and alternative (non-policing) agendas amongst police recruits, thus appears to have significant historical provenance in Afghanistan.

4.3.1 Key features relevant to access to justice

In terms of the law, the population could utilise the boxes of justice which were essentially just that, a large box that was padlocked and contained individual petitions to the king.[214] These petitions allowed individuals to seek to settle a dispute. It was also a method that enabled women or the elderly to defend their legal rights when other methods were beyond their capability or means, hence approximating a modern-day human rights petition. This is an important consideration when assessing why and how parallel customary policing, legal, and social practices might be used to achieve 'modern' outcomes in respect of policing accountability as a factor identified in this thesis as an essential factor a rule of law blueprint.

The courts at this point were divided into two branches: the religious courts and the state courts. The religious courts or Sharia courts ruled on family law, criminal law and personal law. Conversely the state courts were responsible for cases that involved government employees, commerce and taxation.[215] This foundation of Afghanistan's judiciary should assist a future deployment to Afghanistan, in conjunction with the Durch five factors, to conduct a health check to the Afghan system to ensure that the rule of law approach is complimentary rather than oppositional to the traditional legal systems of Afghanistan.

During his rule from 1880 to 1901, Abdur Rahman Khan had the final say on any case brought before any court and had a weekly audience where those seeking to appeal a decision could petition the king.[216] He also codified the Sharia and did so through the institutionalisation of the Hanafi School of Islamic jurisprudence as the law of Afghanistan.[217] Khan had developed his own police at this stage with the main priority to that of the collection of taxation. These early police had no police training and were, by effect, armed militia who would extract taxation from farming for Khan and an additional amount for themselves. Around the same period, Khan introduced the Kotwali, roughly

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[214] Afghanistan Legal Education Project (n 208) 6.
[215] Ibid.
[216] Ibid 7. See also Sultan Mohammad Khan, 'The Constitution and Laws of Afghanistan' (PhD Thesis, University of Cambridge, 1900) 92 <https://tile.loc.gov/storage-services/service/gdc/gdclccn/19/00/81/34/19008134/19008134.pdf>.
[217] Afghanistan Legal Education Project (n 208) 7. See also Hamid Khan, *Islamic Law, Customary Law, and Afghan Informal Justice* (Special Report 363, United States Institute of Peace, March 2015) 5.

translated at Ministry of Interior, who were essentially given wide powers, were corrupt and performed acts of torture against the population to extract benefit which largely went unchecked.[218]

4.3.2 Conclusion

It is unknown what influence, if any, extant Afghanistan customary law had on this formal introduction of a centralised legal system. The centralised legal system in Afghanistan was exclusive of traditional or customary methodologies. This perhaps remains the single greatest barrier today to the unity of all tribes and cultures across Afghanistan and provides a historical and evidential foundation of why Afghanistan is so divided. It is therefore prudent that any future reformation of the rule of law involves all interested parties including those that practise customary law as consistent with the 'engagement' step of the 4-step process of the proposed rule of law blueprint for Afghanistan in Chapter 2. It is also essential that close attention is paid to the recruitment of a police force as Afghanistan's history is replete with examples of other agendas overpowering any proper capacity to carry out community-focused policing.

4.4 British invasion 1919: Third Anglo-Afghan War

The third conflict itself was short lived, lasting just two months or so. Historians state that it was the widespread support of the Ottoman regime against the British in Afghanistan that led to the third Anglo-Afghan War.[219] This was initially kept at bay by Habibullah Khan, who was the ruler of Afghanistan at the time and ensured that Afghanistan maintained a non-involvement policy in World War 1.[220] However, following his assassination on 20 February 1919 by persons associated with the anti-British movement, his son, Amanullah Khan, assumed control of the throne. Amanullah was very much anti-British and in his coronation address he declared total independence from Britain.[221]

The stance of the young ruler led to skirmishes between an ineffective Afghan Army and exhausted British India troops, already spent from involvement in World War 1. The conflict lasted barely a month but importantly resulted in the independence of Afghanistan with the signing of a peace treaty with the British on 8 August 1919 at Rawalpindi, which is now located in Pakistan.[222] Prior to the signing of this treaty the Afghans entered into a treaty of friendship with Russia under the new

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[218] Giustozzi and Isaqzadeh (n 28) 13.
[219] See, eg, Deepak Tripathi, *Afghanistan and the Vietnam Syndrome: Comparing US and Soviet Wars* (Springer, 2023) 123.
[220] 'Anglo-Afghan Wars', *Encyclopaedia Britannica* (Web Page, 27 August 2021) <https://www.britannica.com/event/Anglo-Afghan-Wars/>.
[221] Ibid.
[222] Ludwig W Adamec, *Historical Dictionary of Afghanistan* (Rowman and Littlefield, 5th ed, 2021) 49.

Bolshevik regime.[223] It was a special relationship between the two regimes that would last until the Soviet invasion of 1979.

Of critical importance to Amanullah Khan's rule was the creation of the first Afghanistan Constitution, which was approved by a Loya Jirga (which is a grand assembly said to be 'the supreme manifestation of the power and will of the people of Afghanistan),[224] and this took place in Jalalabad in 1923.[225] The first Afghan Constitution was influenced by many sources, including the Turkish and French Constitutions. In fact, Afghanistan commissioned Badri Bey, a prominent Turkish legal scholar, to oversee the writing of the Constitution.[226] The Turkish influence was thus dominant in the new Afghanistan Constitution. Turkey was undergoing a reawakening at the time through the vision of Mustafa Kemal Ataturk's project to construct a secular nation.[227] Ataturk added a new clause to the Turkish Constitution which declared Islam the 'religion of the state' of the republic of Turkey.[228] Very clear parallels can be drawn between the Turkish and Afghan constitutions in terms of the centrality of the administration and the deference to Islam as the religion of the population. The 1921 Constitution of Turkey proclaimed for the very first time the principle of national sovereignty and the only true representation of the nation.[229] The apparent support for this use of a Turkish model, given social, religious, and other similarities, tends to validate the importance of local trust in the models and agents employed in advising Afghanistan on legal and policing measures – a component of consistency.

Similarly, two of the most important aspects of the new Afghanistan Constitution were the development of individual rights and state sovereignty. For the first time in its history the Afghan state recognised the equal rights of all its citizens irrespective of religion or gender.[230] The first Constitution shifted the balance of power from tribal and religious elders to the king, who was now solely invested to make all laws.[231] It also prohibited the use of courts outside of the formal state courts, which greatly reduced the power of the religious courts.[232]

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[223] Amin Saikal, *Modern Afghanistan: A History of Struggle and Survival* (IB Tauris, 2003) 68.
[224] Babar Shah, 'Loya Jirga and the Present Day Afghanistan' (200) 20(4) *Strategic Studies* 146.
[225] Afghanistan Legal Education Project (n 208) 13.
[226] Ibid 8.
[227] M Şükrü Hanioğlu, *Atatürk: An Intellectual Biography* (Princeton University Press, 2017).
[228] Ibid 146.
[229] Ömer Faruk Gençkaya and Ergun Özbudun, *Democratization and the Politics of Constitution-Making in Turkey* (Central European University Press, 2022).
[230] *Constitution of Afghanistan* (1923) art 8.
[231] Ibid. See also Donald Wilber, 'Constitution of Afghanistan' (1965) 19(2) *Middle East Journal* 215, 215.
[232] *Constitution of Afghanistan* (1923) art 53.

Amanullah Khan believed that the independence of the state, or state sovereignty, was critical in order for Afghanistan to be free from external forces such as the British who had exercised control over Afghanistan until the conclusion of the war of independence in 1919.[233]

4.4.1 Key features relevant to the centralised system of formal state courts

The king created four main types of court in an effort to create a centralised system of formal state courts:

- the court of conciliation
- the court of first instance
- the provincial court
- the court of cassation.[234]

This was a court hierarchy, where matters would be commenced in the court of conciliation to test whether they could be settled. If no agreement could be reached then the matter would proceed to the court of first instance, with the final two courts acting as appellate jurisdictions.[235]

This overconcentration of power in the central government would prove too much to control and led to a rebellion by religious and local leadership due to the limitations that the Constitution had placed on their ability to govern and to settle disputes. This prompted a change in the Constitution in 1925 at Article 2 where religion was officially reintegrated back into the Constitution, once again drawing on the influence of the Turkish Constitution.[236] Once again, the necessity of integrating any new policing or justice system with local customs and mechanisms, a feature of engagement, is clearly illustrated by this period of Afghanistan's history.

This period also saw the emergence of the Kotwali, which roughly translates to the Ministry of Interior. This was established in 1922–23, following the initial introduction of the system in 1920 under the guise of 'Domestic Management'.[237] Major crimes were investigated by police before being

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[233] Afghanistan Legal Education Project (n 208) 9; *Constitution of Afghanistan* (1923) art 1.
[234] Afghanistan Legal Education Project (n 208) 9.
[235] Ibid.
[236] *Constitution of Afghanistan* (1923). Article 2 was amended to read: 'The religion of Afghanistan is the sacred religion of Islam, and its official religious rite is the sublime Hanafite rite. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided they do not disturb the public peace. Hindus and Jews must pay the special tax and wear distinctive clothing.'
[237] Giustozzi and Isaqzadeh (n 28) 14.

transferred to the judiciary, but minor crimes were handled by the ministry, which was able to sentence those who were convicted without the use of the judiciary.[238]

King Amanullah continued to develop the justice system in 1919–1929 and ensured that police training was conducted at the Kotawali Cadet School in Kabul. Amanullah also started to develop various rules and regulations which included a general penal code and guidelines for the initial investigations of crimes.[239]

The creation of the inaugural Constitution was an ambitious and controversial task. While the Constitution in its initial state had various short comings, as just surveyed, it is inarguable that it was necessary for the independence and governance of Afghanistan and the development of a national police force. Unfortunately, it would trigger the demise of the Amanullah Khan regime, but it did alert future governments to the importance of canvassing the views of religious and local leaders in any future legal reforms, which remains an enduring lesson for Afghanistan today. Again, as identified just above, these outcomes are relevant to my analysis because the rule of law approach that I propose includes one of the key factors as identified by Maley in that the success of a future rule of law regime rests on the inclusion of customary law and the decentralisation of the current enforcement of law from Kabul, as per the 'engagement' step of the proposed rule of law process in this thesis.

4.4.2 Conclusion

This period of history once again demonstrates the scale of the governance challenge and, in particular, the difficulties of governing such a complex environment with a simplistic centralised system. A new rule of law model must have broad input from not only those who enforce statutory law, but also those charged with implementing and or responsible for Sharia and customary law.

After becoming king by Loya Jirga in September 1930, Muhammad Nadir Shah's first order of business was to create a new Constitution in 1931.[240] The new king was determined to return power to local leaders in order to avoid the same fate as Amanullah Khan.[241] The 1931 Constitution was based on the Iranian, Turkish and French Constitutions at the time and influenced by Hanafi religious leaders.[242] The 1931 Constitution also created Afghanistan's first legislative entity with two bodies: an Upper House and the National Assembly.[243]

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[238] Ibid.
[239] Ibid.
[240] Afghanistan Legal Education Project (n 208) 11.
[241] Ibid.
[242] Ibid.
[243] *Constitution of Afghanistan* (1931) art 27.

The year 1964 was also important for the people of Afghanistan as it saw the passing of a new Constitution that for the first time established a government based on the sovereignty of the people rather than religion.[244] This change to the Constitution meant that the country would no longer be governed strictly in accordance with Islam, a distinct shift away from the Turkish influence. This change probably made Afghanistan more susceptible to the influence of Marxism and the Russian communist movement, but it was an important change as it meant that the people had more of a voice and the country could become more progressive.[245]

However, the most significant change in the Constitution came in the form of the amendment that made statute law more binding than Sharia law.[246] This is important in the context of this thesis, particularly in the area of reform to criminal law, as the Supreme Court is vested with the responsibility to ensure that laws passed by Parliament are consistent with the Constitution. This amendment thus meant that Sharia law was now complementary to customary and national laws in Afghanistan.[247]

Finally, the period 1965–1973 saw great development in Afghan law. There was further codification of the law under the leadership of Dr Mohammad Hashim Maiwandal, including the writing of the civil code, the criminal code and the criminal procedure code.[248] The 1977 Constitution never came into force as there was a coup against the Daoud administration on 27 April 1978 and the People's Democratic Republic was formed led by Nur Muhammad Taraki and soon replaced by the Soviet-style politburo.[249]

The development of the first Constitution and various iterations, along with the codification of law, led to great advancements in this period. This, in turn, saw the development of a hierarchical court and parliamentary system which propelled Afghanistan into a modern state, but at what cost? The lesson history has taught us during this period is that the centralisation of the rule of law undermined customary law and further isolated outlying provinces. It also meant that the newly centralised system

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[244] Afghanistan Legal Education Project (n 208) 18.
[245] Ibid 13. For further discussion on the influence of Marxism and the Russian communist movement in Afghanistan post-1964, see Razia Sultana and Azmatullah, 'Communist Rule in Afghanistan: Weakening Pashtun Power and Exacerbating Ethnic Conflict' (2015) 68(3/4) *Pakistan Horizon* 25, fn 2.
[246] Afghanistan Legal Education Project (n 208) 13.
[247] Nadjma Yassari and Mohammad Hamid Saboory, 'Sharia and National Law in Afghanistan' in Jan Michiel Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) 273.
[248] Afghanistan Legal Education Project (n 208) 16.
[249] Ibid 17.

was corruptible and malleable to external interference, as would be seen in the Soviet invasion that followed. This again emphasises the importance of the ‘engagement’ step in the rule of law proposal of this thesis.

That concludes that chapter on the British invasions of the 19th century and the subsequent development of a legal system. The next chapter examines the Soviet era, the influence of the Turkish system of law on Afghanistan and the emergence of the Taliban.

Chapter 5
The Soviet Era and the emergence of the Taliban

This chapter moves from the 19th century British invasion into the relative stability of the 20th century and the development of laws to combat crime and support policing and concludes with the emergence of the Taliban.

5.1 The Turkish model

To understand the current system of policing in Afghanistan we need to examine the main influences. This will help to develop ideas later in the thesis about how to ensure that justice is seen to be done and security in Afghanistan is maximised. As stated earlier, a primary cause of the third Anglo-Afghan War was the anti-British sentiment of the Afghanistan leadership and the support of the Ottoman empire. Afghanistan took this one step further by using the Turkish model of policing, which itself was largely based on the French system, and incorporating it into their own system.

The Turkish policing model was established in 1845 as a division of the Ottoman military and was preoccupied with the enforcement of public order.[250] Interestingly the first police recruits were sourced from the ranks of soldiers, and even today there is similar interplay between the Afghan National Army (ANA) and the Afghan National Police (ANP). This raises a critical point about the pools form which future police will be drawn for any future policing project in Afghanistan, in that there is a clear history of legacy loyalties in recruits – the military, tribal militia, other armed groups – tending to derail the viability of policing projects. This is a key feature of the accountability factor.

Both contemporary Afghanistan and Turkey have a Ministry of Interior. In fact, the Afghanistan Ministry of Interior website states on the 'Background and History' page that the first police structure was established in 1936 (1315 in Afghan years) with the formation of a police training centre in Mahtab Qala (near Pol-e-Sokhta).[251] The early policing model was thus based on the Turkish system of policing, with evidence that Turkish policing manuals and codes were translated in the late 1930s.[252]

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[250] Betül Ekşi, 'Police and Masculinities in Transition in Turkey: From Macho to Reformed to Militarized Policing' (2018) 22(3) *Men and Masculinities* 491.
[251] 'Background and History', *Afghanistan Ministry of Interior* (Web Page) <https://moi.gov.af/en/background-history/>.
[252] Giustozzi and Isaqzadeh (n 28) 14, citing Vartan Gregorian, *The Emergence of Modern Afghanistan* (Stanford University Press, 1969) 372.

There were two main pieces of legislation that were translated:

- the *Police Organization Act 1937*
- the *Police Powers and Duties Act 1934*.

The *Police Powers and Duties Act* was incorporated into the Afghanistan system and could be summarised as obligating the police to protect the safety of the population from criminals and to enforce the law. On the face of it, these Acts also confirm that the other main role of policing in Afghanistan was to ensure that any public protest against the government was stamped out, which is indicative of the nature of the historical type of leadership.

There is some correlation between these Acts and the manner in which policing was conducted in Afghanistan from the 1930s until the German Government provided support in 1937. It also suggests that citizens had limited rights when it came to police operations and or investigations, which is commensurate with the type of regime installed in Afghanistan from 1930 to 1960.

The policing model installed, seems reactionary, government driven and paramilitary in nature, given its close links to the ANA as a security protection force and a source of recruitment. It was a 'software to run its operations more effectively'.[253] But it was also a system that was designed to collect taxes, check and provide passports, and conduct traffic duties. More serious crimes were handed over to the prosecution.

A truly national police force only emerged in the 1960s following years of Afghanistan's elite police being sent abroad to Germany and Birmingham for further training.[254] In the early 1960s, five of the top police students from the Kabul police academy were sent to Munich in Germany to get their master's degrees in criminology and police work.[255] Much of this was premised on the close relationship between Germany and Afghanistan and the already tumultuous relationship with the United Kingdom. The Friendship Agreement forged between Germany and Afghanistan for friendly trade, first in 1916 and again on 3 March 1926, galvanised relations between the two countries and would ultimately lead to the German influence on the national policing model in Afghanistan.[256] As this thesis notes later, however, the German influence on policing in Afghanistan was misguided and

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[253] Danny Singh, *Investigating Corruption in the Afghan Police Force: Instability and Insecurity in Post-conflict Societies* (Policy Press, 2020) 161.
[254] Gregorian (n 252) 372.
[255] Federico Vecci and Fabio Sappino, 'An Historical Overview of Police Reforms and Gender Issues in Afghanistan' (2021) 4 *CoESPU Magazine* 42.
[256] *Treaty of Friendship*, Afghanistan–Germany, 62 LNTS 115 (signed and entered into force 3 March 1926).

not suitable for the needs of the people of Afghanistan, thus creating negative consequences for decades to come.[257] The issues of consistency and engagement are clearly identified by this experience.

The police training centre was established in 1936 in Kabul, having been previously upgraded in 1935 as the School of Gendarmerie. Police recruits were trained by German instructors of the Nazi regime in Mahtab Qala in Kabul. The course would generally last 9–12 months and graduates would gain the title of 'sobadar', which is a junior commissioned officer.[258] Policing in Afghanistan was known as 'the Security Department' until 1947, when the name was changed to 'Police and Gendarmes General Command'. The main role of police during this period was to provide security inside the cities, while the gendarmes were responsible for border security.[259]

5.1.1 Police Law 1973

Prior to the Soviet invasion of Afghanistan in 1979, the policing force consisted of police and gendarmerie.[260] The gendarmerie, a French term for paramilitary police, were introduced in 1939 and incorporated the border police, the prime responsibility of which was to prevent armed smugglers from crossing the borders. Taxation of goods remained a vital area of revenue for the Afghanistan government, so this role was critical for funding of police and other security forces.[261] By the 1960s, the gendarmerie was a mobile force mostly on horseback but with some vehicles and contained to Kabul. By 1971, a mobile reserve force was deployed to Kandahar to set up a battalion. However, this did not amount to a national policing force at this stage. It was still very much a centralised agency and hence had only modest control over the provinces of Afghanistan. Most crimes, including murder, were underreported and control of the population was so weak that any census carried out was unrepresentative of the crimes that were committed.[262]

The Gendarmerie and police exerted poor control over the tribal areas, thus relying upon tribal militia members as late as 1967.[263] This was not ideal for the police who at this stage were confined to Kabul and Kandahar and relied heavily on the support of the ANA. Although some reports state that a lone

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[257] Andreas Ulrich, 'Failure Threatens Afghan Police Training Mission', *Spiegel International* (online, 28 December 2012) <https://www.spiegel.de/international/world/failure-threatens-german-afghan-police-training-mission-a-874825.html>.
[258] 'Background and History' (n 251).
[259] Ibid.
[260] Giustozzi and Isaqzadeh (n 28) 17–18.
[261] Ibid 4–5.
[262] Ibid.
[263] Ibid 17–8, citing Shah Mahmood Hassin, *The Ministry of Interior in History* (State Printing House, 1984) 71–3.

police officer with a stick walking into a village could provide law and order, this was not the same as having a well-resourced ANP police station in the provinces to respond to crime.[264] The roles and objectives of the police and the gendarmerie were made clear in The *Law on Police and Gendarmes* (the Police Act), enacted in 1974 with 34 articles.[265]

Article 2 of the 1974 Police Act stated the aims of the law as follows:

a. taking effective legal measures to ensure security, order and wellbeing of the public
b. taking effective legal measures for crime prevention
c. taking effective legal measures in safeguarding people's rights and freedom and providing needed protection in the interest of the public
d. application of the courts' verdicts in accordance with the provisions of the law
e. taking effective legal measures for application of provisions of laws and state regulations.[266]

Article 2(c), above, provides insight into the philosophy of the Afghanistan government of the time and represents a useful basis for the provision of a witness protection unit and program in Afghanistan. It also supports the application of court verdicts that are made within the confines of the law.

Article 6 provides for the duties of police, and more specifically article 6(14) states that police need to safeguard prisoners and detainees and their transfer. Other specific duties of police are legislated such as, collection of taxes and safeguarding natural resources and relics.[267]

The gendarmerie have their own specific set of duties which include:

1. patrolling and guarding the boundaries of the country and ensuring security and order on the borders for consolidating national sovereignty
2. controlling the departure and arrival of people at borders, rivers and airports
3. police pursuit at the borders of the country
4. prevention of smuggling contraband goods and goods under government monopoly
5. taking necessary actions during movements against the principles of national sovereignty or when it is being violated

[264] Giustozzi and Isaqzadeh (n 28) 18.
[265] *Law on Police and Gendarmes 1974*.
[266] Ibid.
[267] Ibid.

6. performing the duties of security patrols at the borders in case the army enters war.

The gendarmerie are essentially at the coal face protecting the vast borders of Afghanistan, hence the paramilitary nature of the role. The Police Act articulates that they are to be supported by the ANA, but it is unknown how the Police Act worked in practice.

Nevertheless, these legislative instruments appear at first blush to still be capable of serving the needs of the Afghan people as they provide a blueprint to police a modern community and protect its citizens from harm. However, much would depend, as indicated by the engagement factors of regional focus with central management, upon these local perceptions of the relevance of the policing system to people in their tribal and more remote areas.

5.1.2 Conclusion

This precedent from history provides lessons for what policing model is best suited to Afghanistan. This type of model could be reintroduced into a new Afghanistan given that it is spread among many provinces in unhospitable terrain and landlocked by other countries.

This system of policing served Afghanistan well given its status as a landlocked country and the need to ensure taxes were paid at border crossings. The geographical nature of Afghanistan has not changed and therefore, to a degree, this thesis will argue that the structure of police should remain the same, albeit modernised, to the extent that the Afghan Government is able to be self-sufficient once it is able to stand on its own with limited donor support. The laws identified above also correlate with the rule of law factors as proposed by Durch, in particular public security, protecting the border and what is essentially opposing those that deal in contraband in accordance with the two elements of the proposed rule of law model in accountability and transparency of a policing intervention.

5.2 The Soviet invasion 1979

Dibb states that perhaps the true invasion of Afghanistan occurred in April 1978, when Soviet-trained Afghan officers seized control of the government and established the Democratic Republic of Afghanistan, a socialist state governed by a communist party.[268] The President at the time, Nur Taraki, had made sweeping changes across Afghanistan, particularly in relation to women's rights, land redistribution and the removal of the old social order.[269] This idealism went against the tide of the

[268] Paul Dibb, 'The Soviet Experience in Afghanistan: Lessons to be Learned?' (2010) 64(5) *Australian Journal of International Affairs* 495.
[269] Ibid 496.

longstanding cultural and social order and made the government very unpopular. Before long, a civil war broke out with the emergence of yet another resistance faction and with religious leaders issuing a jihad against the communist regime, which itself split into two factions, creating a civil war within a civil war. In September 1979, Taraki was murdered by Hafizullah Amin, who then seized control. However, Amin fared no better than Taraki and he rapidly lost control of his country and the support of the people. The Soviets then decided that military intervention was the only way to rescue its client state from complete chaos.[270]

It was a clever ploy by the Soviets, akin to playing one family member off against the other, which led to a deep distrust within the population that is still present to this day. The root of instability arose from within the People's Democratic Party of Afghanistan (PDPA), through the assassination of Daud Khan in 1978. Daud had overthrown his cousin in 1973 in one of many palace coups in Afghanistan, as he was frustrated by the slow pace of reform and believed that Afghanistan needed to reform quickly in order to keep up with its neighbours, especially Pakistan.[271] He denounced the monarchy and established the republic of Afghanistan in an attempt at modernisation and reform.[272] But his high taxes and his poor relations with the customary authorities undermined his rule and the newly formed republic was short lived.[273]

The great period of unrest from 1978 until the Soviet withdrawal in 1989 had an important impact on the issues considered in this thesis. This traumatic period, along with other historical events, must be taken into account when contemplating the types of reform that Afghanistan must adopt in order to move forward and to provide a more secure country for its citizens and for visitors. A new rule of law model must be endorsed by key representatives of Afghanistan that will give all an equal voice at the table, consistent with step 4 of the proposed rule of law model in 'engagement'.

Upon taking up the helm of leadership following the assassination of Daud, the administration of Noor Mohammed Taraki (a Ghilzai Pashtun) was almost immediately plagued by infighting from the duelling Parcham and Khalq factions. The Taraki administration was further plagued by a fierce revolt in the countryside against the polarising effect of communist policy.[274]

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[270] Russian General Staff, *The Soviet–Afghan War: How a Superpower Fought and Lost*, tr Lester W Grau and Michael A Gress (University Press of Kansas, 2002).
[271] Jennifer Brick Murtazashvili, *Informal Order and the State of Afghanistan* (Cambridge University Press, 2016) 51–3.
[272] See generally, Hasan Kakar, 'The Fall of the Afghan Monarchy in 1973' (1978) 9 *International Journal of Middle East Studies* 195.
[273] Ibid 195.
[274] Murtazashvili (n 271) 53.

While some academics state that the emerging countryside revolt and PDPA in-fighting were the predominant reasons for the Soviet invasion,[275] it was arguable that the Soviets had ulterior motives of exploitation and a progressive move to India that provided naval and military advantage. Many strategic positions throughout the areas of Afghanistan that posed a risk to a Soviet invasion were already populated with Soviet forces well before the invasion, through the *Treaty of Friendship* between the USSR and Afghanistan.[276] The Afghans were so familiar with seeing Soviet aircraft come and go that they gave little thought to the presence of forces in key provincial positions. The motive of the Soviets was to occupy key ports in India in order to mobilise its fleet and expand its empire. Afghanistan just happened to be located in the middle of the path towards that ambition.

The PDPA did not consult the people and introduced harsh interest rates and landholding inequality. Rural communities were ignored, elders were taken from provinces and never seen again during the brief reign of Hafzullah Amin in 1979 after he had overthrown Taraki in September of the same year.[277] The communist regime had isolated and ignored rural communities, which were the heartbeat of Afghanistan. Hence the maliks' (community village leaders – often Pashtun) positions as community mediators were made redundant, closing the last channel of communication with the broader communities. This is another critical point for this thesis in terms of the ongoing ignorance of customary law and the views of elders.[278] It is a lesson in history that ignoring customary law in any rule of law model in Afghanistan is untenable and creates division not unity. A future policing intervention in Afghanistan must engage with the broader Afghan community as per step 4 of the rule of law process.

The Soviet invasion of Afghanistan in 1979 triggered a nine-year soviet sponsored counterinsurgency against the mujahideen Islamic rebels, designed to divide and conquer and to seek allies through the disgruntled Uzbeks and Hazaras in their fight against the Pashtun and Tajik rebels.[279] The Soviets armed and funded these allies and gave them full autonomy to attack the rebels.[280]

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[275] See, eg, Jalali (n 186) ch 9; Ewans, *Afghanistan* (n 205) ch 14.
[276] *Treaty of Friendship, Good-Neighborliness and Co-operation,* Afghanistan–Union of Soviet Socialist Republics, signed 5 December 1978, 1145 UNTS 325 (entered into force 27 May 1979).
[277] Murtazashvili (n 271) 54.
[278] See, eg, ibid 81–5.
[279] Ibid 305.
[280] Ibid.

The Soviet invasion was officially launched on 27 December 1979. This was orchestrated through the overthrow of President Amin and the installation of the Moscow puppet Babrak Karmal.[281] Amin, a Pashtun, was head of the Khalq faction of the People's Democratic Party of Afghanistan (PDPA), which was a communist party. He massacred thousands of opponents of his regime. Karmal, by contrast, was an ethnic Tajik and an intellectual. He was considered malleable and essentially pro-Moscow.[282] He would later depart Afghanistan in 1986 for Moscow, where he died a decade later.

The Soviet troops had deployed days before the invasion, shutting down all civil and military communication, which essentially cut Afghanistan off from the rest of the world and the Afghan command from their own military. Around 5,000 rapid deployment troops began landing in heavy Antonov transport planes at Kabul airport two days before Christmas.[283] The Soviets had done their homework, as they had planned the invasion around Christmas knowing that western intelligence would only have a skeleton staff to monitor the invasion.[284] The attack was well executed, and the Soviets claimed that the invasion had been necessary to prevent neighbouring governments from invading Afghanistan.[285]Advance teams flew in weeks prior to the rapid deployment teams and landed at airstrips in Kandahar, Bagram, Jalalabad and Shindand, covering all points of the compass, creating a strategic cordon of the major populated areas of Afghanistan.[286]

The Ministry of Interior, responsible for policing and security, was ransacked at the same time, rendering the police force ineffective and effectively vesting the control of the majority of Afghanistan with the Soviets. At the same time as the assault on the Ministry of Interior, a KGB counterterrorism unit assaulted the Darulaman Palace, where Amin was sheltering with 300 of his personal guard. He was assassinated, with some reports stating he was shot while others state that he was blown up at his bar with a grenade.[287] This followed two failed assassination attempts by the KGB, when they had tried to poison him, only weeks prior.[288]

On 27 December 1979, the Soviets announced on Radio Kabul that Amin had been overthrown and had been replaced by Karmal, the Afghan-born Soviet-influenced Marxist. The invasion by Russia

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[281] Shireen Burki, 'Edward Girardet, Killing the Cranes: A Reporter's Journey Through Three Decades of War in Afghanistan' (2012) 24(4) *Peace Review* 526.
[282] Ibid 527.
[283] Fremont-Barnes (n 199) 39.
[284] Dibb (n 268) 496.
[285] Ibid.
[286] Ibid.
[287] Ibid 528.
[288] Vasilli Mitrokhin and Christopher Andrew, *The World Was Going Our Way: The KGB and the Battle for the Third World* (Basic Books, 2005) ch 21.

was unexpected and unnoticed by Afghanistan as the Russians had been assisting the Afghan Government for a number of years, hence the landing of Russian aircraft in the days and weeks before the invasion was considered not out of the ordinary.

It is interesting to note the mission objective of the Soviets. The plan was to stabilise Afghanistan, strengthen the Afghan Army and withdraw the bulk of Soviet troops within three years. Ultimately, history tells us that this did not happen and that the war would last nine years, one month and 18 days. It cost the Soviets 13,833 lives and 50,296 wounded or missing in action.[289] Some reports actually put the number of deaths at 26,000.[290] The full scale of what the Soviets would face was not apparent to them. The rebellion forces of Mujahideen of between 40,000 and 60,000 fighters, coupled with the inadequacies of the Afghan security forces, meant that the Soviets fought battles on many fronts. In some respects, Afghanistan today is starting to morph into the same type of battlespace following the Taliban takeover and the multiple fronts that a redeployment will face in the future, noting the presence of ISIS-K and Al Qaeda.

There is also some misrepresentation on the military objective of the Soviet invasion, with some arguing that the Soviet Union had:

> interests in exploration and production of gas in Northern Afghanistan, namely in the gas fields Jarkuduk, Shiberghan and Hoja-Gugerdag. In the late 1970s the Soviet Union was supplied with about 30 milliards cubical meters of natural gas – this volume amounted to 8–9% of its own annual production of natural gas – in exchange for loans and other forms of assistance.[291]

Similarly, it could be argued that China and the US have similar objectives relating to gas and oil in Afghanistan today.[292] The US has completed comprehensive surveys of Afghanistan and found that there are promising prospects of oil and gas, but it is sufficiently concerned about the security risk that placing a pipeline in Afghanistan would pose with the Taliban leading Afghanistan.

5.2.1 Key features of an unlikely influence on law enforcement in Afghanistan: The Soviets

In 1980, the Revolutionary Council introduced a new Constitution that once again posited religion in general as the most important aspect of the Constitution, in what could be seen as a start in the progressive development of law in Afghanistan.[293] It was, however, the only time in Afghanistan's

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[289] Ibid 497.
[290] Russian General Staff (n 270).
[291] Anton Oleinik, 'Lessons of Russian in Afghanistan' (2008) 45(3) *Society* 288, 288.
[292] See, eg, Erica Downs, 'China Buys into Afghanistan' (2012) 32(2) *SAIS Review of International Affairs* 65.
[293] Afghanistan Legal Education Project (n 208) 23.

constitutional history that Islam was not recognised as the official religion of the country. This act by the Council would be a major step out of sync with the majority of the Afghan people and would ultimately galvanise the people to revolt against the Soviets. Religious studies at schools were replaced with communist ideology and the period saw constant pressure on students at all levels to join the Communist Party.[294] Clearly, both the unworkable centralisation and rejection of cultural and religious norms as expressed through the Soviet approach to law, justice, and policing in Afghanistan was never going to take root.[295] Indeed, it could be said that this period provides the clearest example of how non-compliance with any of the four identified indicators and their components inevitably led to complete failure of the imposed system and its policing attributes. The underpinning ideology and methodology for policing was foreign; the agents of these developments were not trusted; implementation and administration was intensively centralised; non-customary or locally sensitive agendas were predominant; and rival loyalties were provoked if not in some cases encouraged, to the detriment of any coherence in the law, justice, and policing system.

In 1985, after becoming the leader of the Soviet Union, Mikhail Gorbachev increased the strength of the soviet military by 26,000 soldiers in an attempt to expedite the objective of the invasion. While aggressive military operations killed and injured many of the Mujahideen (3,690 killed) they did not produce the type of decisive progression sought by Gorbachev.[296] By late 1986, Gorbachev described the war in Afghanistan as a 'bleeding wound' and called for the return of Soviet troops.[297] Karmal was removed from leadership in May 1986 and the Soviets installed the former leader of Khadamat-e Aetla'at-e Dawlati (KhAD), Mohammad Najibullah, as he understood the Soviet ambition to withdraw from Afghanistan. Gorbachev directed Najibullah to unite the Afghans and gave him two years in which to do so.[298] Dr Najibullah introduced a new Constitution that rescinded the previous constitutional position on open religion and named Islam as the religion of Afghanistan.[299]

The Soviets began to Afghanise the war by handing over most of the responsibility for combat operations to the Democratic Republic of Afghanistan Army (DRA). By 1989, the Soviet forces had

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[294] Hassina Sherjan, 'Education in Afghanistan', *Aid Afghanistan for Education* (Web Page, 2021) <https://www.aidafghanistanforeducation.org/post/education-in-afghanistan>.
[295] Michael R Fenzel, *No Miracles: The Failure of Soviet Decision-Making in the Afghan War* (Stanford University Press, 2017) 121.
[296] David Fivecoat, 'Leaving the Graveyard: The Soviet Union's Withdrawal from Afghanistan' (2012) 42(2) *Parameters* 42.
[297] Ibid 43.
[298] Ibid 44.
[299] *Constitution of Afghanistan* (1987) art 2: 'The sacred religion of Islam is the religion of Afghanistan. In the Republic of Afghanistan, no law shall run counter to the principles of the sacred religion of Islam and other values enshrined in this constitution.' Translation available from <http://www.dircost.unito.it/cs/docs/AFGHANISTAN%201987.htm>.

helped to grow the DRA forces to over 329,000, which included elements of the KhAD, army and Ministry of Interior. The last Soviet soldier stepped off the Freedom Bridge into the Soviet Union on 15 February 1989. The regime they left behind was challenged almost immediately by the Mujahideen, who tried and failed to capture Jalalabad in April 1989.[300]

The communist influence of the Soviets and the subsequent invasion in 1979 continues to have the most profound effect on the people of Afghanistan. The enforcement of a communist model of rule from the capital of Kabul, along with the removal of key provincial leaders, led to the effective disenfranchisement of the population.[301] The Soviets had strategically placed military personnel in the key provinces with the objective of spreading and proselytising communism, to the exclusion of customary and Islamic rule. This removal of tradition and provincial influence led to a deep distrust and ultimately a civil revolt, with Afghans fighting Afghans, which was a far cry from the previous foreign invasions where Afghans drew strength from unity and resisted invasion after invasion.[302] This is important to my analysis, as a future Afghanistan must have a seat at the 'rule of law table' for customary and traditional law elders so that the voices of those in the outlying provinces can be heard.

Many Afghan civilians would perish under the communist rule between 1979 and 1992, with some reports stating that the number of Afghan deaths was somewhere between 1.2 and 1.7 million, with 6.2 million Afghans emigrating to refugee camps in Pakistan and Iran.[303] The removal and relocation of whole communities was prevalent in the period.[304] It was a stolen generation old enough to relay the narrative from one generation to the next. The brainwashing rhetoric of the communist regime divided what was already a complex population of ethnicity, religion and origin.[305] This is important for the analysis in this thesis as two of the key factors to the rule of law model I propose is accountability and transparency, which are steps required to win back the trust of the population and encourage them to participate and assist in the rule of law process.

The Soviet influence and subsequent invasion of Afghanistan created new obstacles for policing in Afghanistan, with the rise of resistance networks and insurgents. These new uprisings led to the

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[300] Fivecoat (n 296) 47.
[301] Zulfiqar Ahmed Bhutta, 'Children of War: The Real Casualties of the Afghan Conflict' (2002) 324(7333) *British Medical Journal* 349.
[302] Mark Galeotti, *Afghanistan 1979–88: Soviet Air Power Against the Mujahideen* (Osprey, 2023) 47.
[303] Imtiyaz Gul Khan, 'Afghanistan: Human Cost of Armed Conflict since the Soviet Invasion' (2012) 17(4) *Perceptions* 209.
[304] Mohammed Kakar, *Afghanistan: The Soviet Invasion and the Afghan Response, 1979–1982* (University of California Press, 1997) ch 13.
[305] Vassily A Klimentov, 'In Search of Islamic Legitimacy: The USSR, the Afghan Communists and the Muslim World' (2023) 23(2) *Cold War History* 283.

creation of secret police by Russia (KhAD), which consisted of over 26,700 agents.[306] The KhAD arrested and interrogated insurgents, negotiated ceasefires with local tribal and militia leaders, and conducted counterinsurgency operations. The KhAD were said to be the 'most successful institution of the regime. The ruthlessly efficient agents helped the government maintain control of the population and counter the insurgency.'[307] The police force at that time numbered over 90,000, which did not include KhAD, and were considered to be a very effective and able force who were able to fight the insurgents and guard industrial and government sites in every province.[308]

Of particular relevance to this thesis, the police force in 1985 had a seemingly stronger layer of support than that enjoyed by the ANP today through the use of KhAD.[309] There is little doubt that for the rule of law to work effectively, discussed later in this thesis, there must be effective capture of perpetrators and the protection of witnesses and victims in the criminal justice system. Whilst many would argue that KhAD was merely a puppet of the Soviet regime and a communist Afghan government, few can argue against its effectiveness in addressing the very same issues that the now dormant ANP faces today. It is perhaps unreasonable to expect the DRA, as it was known in 1985, which had a reputation of being lazy and unimpressive when left alone in combat situations, to maintain this level of effectiveness. The Soviets stated that the DRA forces had 'poor shooting skills and discipline, weak command and control, and failure to care for equipment'.[310]

5.2.2 Key lessons for a future Afghanistan from the Soviet invasion

Much attention recently has been placed on the Taliban, who were largely a product of the Mujahideen who fought against the communist regime. Notwithstanding the extremist nature of the Taliban, its origins were Afghans who were displaced and disaffected by the harsh rule of the PDPA.[311] The more modern version of the Afghan Taliban does not resemble the freedom fighters. Where the Afghan-based Taliban numbers have dwindled, the Pakistani Taliban have swelled throughout the Afghan provinces with the goal to promote disruption, local autonomy and the implementation of Sharia law at the expense of other law sources in Afghanistan.[312]

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[306] Fivecoat (n 296) 43.
[307] Ibid.
[308] Ibid.
[309] Giustozzi and Isaqzadeh (n 28) 29–30.
[310] Olga Oliker, *Building Afghanistan's Security Forces in Wartime: The Soviet Experience* (RAND Corporation, 2011) 61.
[311] David Edwards, *Before Taliban: Genealogies of the Afghan Jihad* (University of California Press, 2002) 76–7.
[312] Kristian Berg Harpviken, 'The Transnationalization of the Taliban' (2012) 15(3) *International Area Studies Review* 203.

The Taliban influence throughout Afghanistan is discussed in the next section below but it paled in comparison with the civil unrest and cultural division of communism. The displacement of entire cultural groups, particularly the Hazari, will long live in the memory of generations to come.[313] With that in mind, it is essential to create a reform that is multifaceted to promote the peace and prosperity of modern-day Afghanistan. The critical question is who can unite and lead the country? The leadership of Afghanistan need not be ruthless or violent or indeed a dictatorship. Rather, it must be leadership that creates and promotes peace, calm and progress through democracy. Afghanistan last enjoyed a measure of such peace and improvement under the leadership of Nadir Khan, who re-established the monarchy and the Durrani dynasty in 1929.[314]

Nadir Khan's leadership provided the style of governance that would harmonise an Afghanistan in the second decade of the 20st century. He is quoted as stating that 'Since the people designate me, so I accept. I will not be the king but the servant of the tribes and the country.'[315] Nadir Khan's style and approach would lead to one of the longest periods of peace that Afghanistan has seen in recent times. It is therefore hard to ignore his methodology of galvanising the rural communities while appealing to the masses. It is a model that, coupled with appropriate representation in the judiciary, would lead to a more content and less suspicious society. But not even Nadir Khan could have prevented the emergence of the Taliban.

5.3 The emergence of the Taliban

5.3.1 The period of 1994–2001

The Taliban, which emerged following a decade or more of Soviet occupation, was formed by an Afghan faction of the Mujahideen in the early 1990s.[316] The Taliban in 1994 mainly consisted of religious students who were fed up with the in-fighting of the Mujahideen, the endless suffering of the people, the kidnapping of women and the general insecurity of the country. The Taliban was founded by Mullah Mohammad Omar, who was born in the village of Singesar, near Kandahar, in1959. Omar had an impoverished upbringing but despite this was renowned for his devotion to Islam. He was dedicated to promoting the culture of Afghanistan and protecting its inhabitants. He remained the Supreme Leader of the Taliban for the duration of its first period of rule and assumed the Islamic title

[313] Kakar, *Afghanistan* (n 304) ch 13.
[314] Murtazashvili (n 271) 48.
[315] Ibid.
[316] Lindsay Maizland, 'The Taliban in Afghanistan', *Council on Foreign Relations* (Web Page, 3 August 2021) <https://www.cfr.org/backgrounder/taliban-afghanistan/>.

of Amirul Momineen, or 'commander of the faithful', a distinction which ranks nearly as high as prophet.[317]

The Taliban were covertly backed by the US Central Intelligence Agency (CIA), the Pakistani Inter-Services Intelligence (ISI) and Saudi Arabia.[318] They were predominantly Pashtun, which is the main ethnic group in Afghanistan's south and east. They were joined in the early period by Pashtun tribespeople who studied in Pakistani madrassas. Hence the name 'Taliban' is Pashto for students.[319]

The Taliban entered a crime-ridden Kandahar in November 1994 to restore order by way of a blend of strict Sharia law coloured by the Wahhabi doctrines of Saudi Arabia and a Pashtun pre-Islamic tribal code.[320] While somewhat effective in law and order, the regime ignored social services and other basic state functions. The Taliban were cruel to women and required that they wear head to toe *burqas*. They also banned television and music, and they jailed men whose beards were deemed too short.[321] This indicates that although the Taliban were cruel and excessive, they nevertheless had struck upon one key element of the policing success indicators – the engagement factor of coherence with local customs and mechanisms.

The original Taliban membership had its origins in the *madrassas* (religious schools) that occupied the border areas between Pakistan and Afghanistan.[322] They are predominantly Pashtun and, by September 1996, they had captured Kabul and overthrown the Rabbani government, members of which had escaped with Massoud to the Panjshir Valley once again.[323] By the end of1996, the Taliban had created a repressive and strict regime in Kabul and provided a safe haven for Al Qaeda to plot terrorist attacks against the West and its allies.[324] The Taliban were always complicit in their support for Al Qaeda, although whether the provision of such support was also the objective of the then Pakistani Prime Minister is unclear. However, the Taliban received their instructions (and finances), and Pakistan is one of the most likely sources.[325]

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[317] James Ryan, *Taliban* (Great Neck Publishing, 2009) 1.
[318] Indu Pandey, 'Peace in the Middle East: Afghanistan on the Road to Peace' (2019) 40(3) *Harvard International Review* 8.
[319] Ryan (n 317) 1.
[320] Murtazashvili (n 271) 60.
[321] Ryan (n 317) 1.
[322] Murtazashvili (n 271) 60.
[323] Ibid; Matthew R Lamothe, 'The "Lion of the Panjshir" Inspired Dogged Afghan Resistance to the Soviets – And the Taliban' (2004) 20(6) *Military History* 74, 78.
[324] 'Taliban', *Encyclopaedia Britannica* (Web Page, 26 April 2025) <https://www.britannica.com/topic/Taliban>.
[325] See further, Daniel Byman, *Deadly Connections: States that Sponsor Terrorism* (Cambridge University Press, 2007) 194–7.

The Taliban also had an enormous resource available to them through the students emerging from the madrassas. Hence the odds were stacked against Massoud and his supporters, who had no equivalent resource to repel the Taliban. This forced Rabbani and Massoud to forge alliances with other Taliban-targeted Afghan groups and form a combined group which would be known as the Northern Alliance.[326] The threat of the Taliban was confirmed by Englehart, who described the Northern Alliance as 'a motley coalition united by the threat posed by the Taliban'.[327] This moment in history represents an opportunity for a future Afghanistan, as detailed in the recommendations chapter of this thesis, to eradicate the recruitment nests of the Taliban in Pakistan by forging stronger diplomatic ties with Pakistan.

The Taliban captured Kabul in 1996 and assumed leadership of Afghanistan, overthrowing the rule of President Burhanuddin Rabbani, who was, before his execution by the Taliban, an ethnic Tajik whom the Taliban viewed as anti-Pashtun and corrupt. By 1998 the regime had become internationally isolated, and two UN Security Council resolutions passed in 1998, UNSC Resolutions 1193 and 1214, essentially condemned the Taliban's persecution of religious minorities and of women and called for immediate negotiations and peace talks.[328] It is important to detail life under a Taliban regime in this thesis in order to articulate the types of reforms that are required to combat the undermining of the criminal justice system by the Taliban and its affiliates. The Taliban established a Ministry for the Promotion of Virtue and Suppression of Vice (PVSV) to enforce their extremely conservative laws.[329] Under the PVSV, crimes such as homosexuality, murder and adultery were punishable by public execution. Those found guilty of stealing could expect to have their limbs amputated, which was consistent with the extreme interpretation of the Sharia law with Wahhabi influence. Those responsible for what westerners refer to as summary offences and religious infractions were often beaten or flogged by members of the Taliban military.[330] This mixing of policing roles with military personnel was one reason for the noted excesses of the Taliban in its law enforcement, and also tends to validate the lack of accountability that dogged this system in terms of the actual loyalties and agenda of the policing agents.

When it came to Afghan women, the Taliban's view was that they were inferior in every way to men and were therefore to be denied any equivalent civil rights to men. Afghan women were required to

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[326] Neil Englehart, 'A Tale of Two Afghanistans' (2010) 50(4) *Asian Survey* 736.
[327] Ibid 737.
[328] *The Situation in Afghanistan*, SC Res 1193, UN Doc S/RES/1193 (28 August 1998); *The Situation in Afghanistan*, SC Res 1214, UN Doc S/RES/1214 (8 December 1998).
[329] Ryan (n 317).
[330] Ibid.

wear *burqas*, long gowns that completely concealed their bodies, with only a small mesh opening allowing them to see and breathe. They were forbidden to engage in any work outside the home, they had limited access to healthcare, and young girls were not allowed to attend schools which would therefore limit any further education beyond that from the home.[331]

In 1999, the UNSC adopted a further Resolution 1267 demanding that the Taliban hand over Osama bin Laden following his indictment for the bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania on 7 August 1998 and for conspiring to kill American nationals outside the United States.[332] Prior to this resolution, Omar had granted Al Qaeda, and by extension its leader Osama bin Laden, safe haven in Afghanistan, provided that he did not antagonise the US. Bin Laden would ultimately renege on this demand with the above-mentioned bombings of US embassies in East Africa.[333] Despite these bombings, Omar refused to give up bin Laden to the US. On 7 October 2001, the US led a NATO invasion of Afghanistan under the banner of Article 51 of the United Nations Charter, citing self-defence as the predominant reason.[334] The initial reason for the invasion was to respond to the 9/11 terrorist attacks on the World Trade Center twin towers in New York.[335] The Bush regime claimed that such action was needed to prevent further similar attacks.[336]

Interestingly, the invasion or any military action for that matter was arguably not supported by the two lead-up UNSC resolutions. The two resolutions in question, 1368 and 1373, both dealt with 'threats to international peace and security caused by terrorist acts'.[337] Some argue that UNSC Resolutions 1368 and 1373, although not clear on whether they authorised a chapter VI or VII action, were enough to take action under articles 41 and 42 of the UN Charter.[338] This argument relies upon the wording used by the UNSC in those resolutions: 'expressed its readiness to take all necessary

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[331] Ibid.
[332] *The Situation in Afghanistan*, SC Res 1267, UN Doc S/RES/1267 (15 October 1999).
[333] Maizland (n 316).
[334] *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security* Council, UN Doc S/2001/946 (7 October 2001).
[335] Ibid.
[336] See, eg, National Security Council, *The National Security Strategy of the United States of America* (Report, White House, September 2002) 6 ('we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country … our best defense is a good offense').
[337] SC Res 1373, UN Doc S/RES/1373 (28 September 2001); SC Res 1368, UN Doc S/RES/1368 (12 September 2001).
[338] Afroz Ahmad, 'Understanding the Efficacy of United Nations Security Council (UNSC) Responses to Terrorism: A Case Study of 9/11 Episode' (2023) 4(1) *African Journal of Terrorism and Insurgency Research* 93; Eric PJ Myjer and Nigel D White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7(1) *Journal of Conflict and Security Law* 5.

steps to respond to the terrorist attacks of 11 September 2001; and to combat all forms of terrorism, in accordance with its responsibilities under the UN Charter'.[339]

The counter argument is that neither of these two resolutions allowed military action in Afghanistan as a result of the 9/11 attacks and/or the US embassy bombings in East Africa and that then President Bush's response was an act of 'retaliation or punishment' not self-defence.[340] Neither resolution contained any language that could be used to justify military action. Furthermore, the latter resolution, although reaffirming that terrorism is an issue that needs to be dealt with, was more concerned about the Afghan people establishing an interim administration leading to a government. There was certainly no approval for the use of military force in Afghanistan by the US or any other NATO member.[341] The justification of self-defence under article 51 was unfounded as 'the notion of preventative self-defence or retaliatory self-defence has no basis under international law'.[342]

Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[343]

The US's argument based on self-defence lacked credibility and was not supported by the UK in its letter to the UNSC, where the UK did not refer to the hijackings in the US on 9/11 as an 'armed attack' but rather an operation of terror.[344]

To take that argument one step further, it is necessary to look at what led to UNSC Resolutions 1368 and 1373. On 20 January 2000, the Secretary-General of the United Nations expressed concerns over

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[339] SC Res 1373, UN Doc S/RES/1373 (28 September 2001); SC Res 1368, UN Doc S/RES/1368 (12 September 2001).
[340] Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Routledge, 2009) ch 6.
[341] Note: the only other state representative that used the word in the speeches that preceded the adoption of Resolution 1368 was Israel, which was not a member of the UN Security Council.
[342] SC Res 1373, UN Doc S/RES/1373 (28 September 2001); SC Res 1368, UN Doc S/RES/1368 (12 September 2001).
[343] *Charter of the United Nations* art 51.
[344] *Letter Dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, UN Doc S/2001/947 (7 October 2001).

the failure of Afghanistan to adhere to the repeated UN Security Council demands for an immediate ceasefire. These concerns focused on the targeting of the civilian population in the course of fighting, humanitarian and human rights issues, poppy cultivation, and terrorism.[345] The ceasefire concerned a civil war in Afghanistan between the Taliban and those who opposed their rule. Both sides expressed their opposition to terrorism, with the Taliban stating that the territory of Afghanistan would not be used to carry out attacks against other nations.[346] In the same report from the Secretary-General there is reference to the 'Six plus Two' Group.[347] This group was formed in 1997 and dissolved in 2001 and was made up of an informal coalition of China, Iran, Pakistan, Tajikistan, Turkmenistan, Uzbekistan, the US and Russia, who worked to find a political solution to the problems in Afghanistan.[348] Interestingly, the Six plus Two Group criticised the Taliban government of 2000 for being too determined to pursue a military solution to the issues in Afghanistan, with the Six plus Two Group stating that this was 'unacceptable and unachievable' and expressing concerns about the humanitarian and human rights impact.[349]

This analysis of the US invasion is important to this thesis as a future deployment to Afghanistan must have a UNSC mandate that clearly indicates what is necessary to achieve a restoration of law and order and appropriately obligate those vested to enforce it. Before they were overthrown in 2001, according to some analysts, the Taliban regime controlled some 90 per cent of the country.[350]

5.3.2 The Taliban 2001 – present day

On 26 September 2001, the US commenced first phase operations covertly in Afghanistan, with a CIA team known as Jawbreaker working with anti-Taliban forces to overthrow the Taliban regime.[351] Those allied forces included the Northern Alliance.[352] The Northern Alliance was led by General Abdul Rashid Dostum and, with just 350 US troops made up of US Air Force, a small number of

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[345] *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, UN Doc A/55/633–S/2000/1106 (20 November 2020).
[346] Ibid.
[347] Ibid.
[348] '"Six Plus Two" Group Stresses Need for Broad-Based Afghan Government', *UN News* (Web Page, 12 November 2001) <https://news.un.org/en/story/2001/11/20322>.
[349] *The Situation in Afghanistan and its Implications* (n 345) 3.
[350] Maizland (n 316).
[351] See generally, Gary Berntsen, *Jawbreaker*: *The Attack on bin Laden and Al-Qaeda* (Crown Publishers, 2005).
[352] Griff Witte, 'Afghanistan War', *Encyclopedia Britannica* (Web Page, 16 August 2021) <https://www.britannica.com/event/Afghanistan-War/>.

Green Berets and CIA Special Activities Division, was able to defeat the Taliban within just two months.[353]

The Northern Alliance were Uzbeks and direct descendants of the Mongol Golden Horde. They were mounted on horseback and with the laser-directed missile technology of the US were able to flush the Taliban out of key positions.[354] It seems that much of the credit for the initial defeat of the Taliban was given to the small US force rather than the Northern Alliance. It is also apparent that very little effort was made by the US and coalition forces to understand the different ethnic groups or *qawn*, as Willliams observes: 'Understanding the diversity of ethnic groups in Afghanistan is key to understanding the battle order and objectives of the Northern Alliance and Taliban before and during Operation Enduring Freedom'.[355] This cultural understanding is important in the context of building a future policing intervention as there will need to be a thorough understanding by those that deploy of what is required to unite the population while enforcing a suitable mandate that reinstates security across Afghanistan.

The Taliban are mainly made up of Pashtuns, who account for 40% of the Afghanistan population. Pashtuns are essentially an Indo-European ethnic group located in the south and the east of Afghanistan. The Pashtuns created the state of Afghanistan in 1880 by conquering surrounding ethnic groups.[356] Those groups who were subdued included the Tajiks (25% of Afghanistan) who are Sunni Persians living predominantly in Afghanistan's northeast, Hazaras (10%) who are Persian-speaking Shia Mongols who live in the central mountains of the country, and the Uzbeks (10%) who are Turko-Mongols descended from the Golden Horde living in the northern plains.

The main source of the power within the Taliban from 2001 to 2007 was the Quetta Shura Taliban (QST) who saw themselves as the rightful rulers of Afghanistan and had spread their operations throughout much of Afghanistan.[357] However, the main objective of the QST during this period was to secure the provinces of Helmand and Kandahar, noting the significance of Helmand in terms of poppy production. Helmand province also provided the Taliban with significant cash flow from the narcotics trade from poppy production, along with an amenable Pashtun population. There is no indication that

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[353] Brian Glyn Williams, 'General Dostum and the Mazar i Sharif Campaign: New Light on the Role of Northern Alliance Warlords in Operation Enduring Freedom' (2010) 21(4) *Small Wars & Insurgencies* 610.
[354] Ibid.
[355] Ibid 612.
[356] Ibid.
[357] Jeffrey Dressler and Carl Forsberg, *The Quetta Shura Taliban in Southern Afghanistan: Organization, Operations, and Shadow Governance* (Report, Institute for the Study of War, 21 December 2009) <http://www.understandingwar.org/report/quetta-shura-taliban-southern-afghanistan>.

Helmand has moved on from the production of narcotics,[358] so it would remain an excellent target for large-scale controlled operations by a future Afghan police force.

While Helmand province certainly provided the sustenance for the Taliban, Kandahar was its spiritual home and the centre of operations for then spiritual leader Mullah Omar.[359] The real operational leader of the Taliban, Mullah Baradar, is now the Chief of the Taliban Diplomatic Office in Qatar, following his release by Pakistan on 25 October 2018.[360] Baradar fought side by side with the late Omar against the Soviets and helped establish Taliban madrassas in Kandahar.[361]

5.3.3 Key features relevant to threats to a future policing intervention

The Taliban is said to be made up of both indigenous fighters and foreign fighters. The foreign fighter aspect is of concern and, while the obvious contributor is the Pakistan madrassas, there is now a broader concern that Islamic State insurgents may have infiltrated those ranks following defeat in Syria and Iraq.[362] Foreign fighters are preferred as suicide bombers so as not to upset the families of local Afghans and erode public support for the Taliban.[363] Hence there is a certain strategic mindset to Taliban operations in Afghanistan. One of the main strategies of the Taliban in opposition was to turn the population against the government through intimidation and, in the process, the gaining of strategic territory.[364] Most of the strategic territory is centred around Kandahar City in Kandahar, Lashkar Gah and Gereshk in Helmand. The Taliban's focus was on eliminating agencies of the Afghan Government such as the National Directorate of Security (NDS), which was also known as the Afghan intelligence service. The Taliban considered the NDS very capable as it had previously stood in the way of the Taliban ambition to fully control the provinces.[365] Many attacks were waged against important tribal and anti-Taliban commanders in order to weaken control of key provinces such as Kandahar City. This is relevant to a future policing intervention in terms of what they may encounter not only in the capital but in the provinces across Afghanistan. A thorough threat

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[358] United Nations Office on Drugs and Crime, 'Opium Cultivation in Afghanistan: Latest Findings and Emerging Threats' (Research Brief, November 2022) 14.
[359] Dressler and Forsberg (n 357) 2.
[360] 'Afghan Taliban Founder Mullah Baradar "Released" by Pakistan', *Al Jazeera* (online, 28 October 2018) <https://www.aljazeera.com/news/2018/10/25/afghan-taliban-founder-mullah-baradar-released-by-pakistan>; 'Profile: Mullah Baradar, New Deputy Leader in Afghan Gov't', *Al Jazeera* (online, 7 September 2021) <https://www.aljazeera.com/news/2021/9/7/profile-mullah-baradar-afghanistans-new-leader>.
[361] Ron Moreau, 'Meet the Taliban's New Chief', *Newsweek* (online, 24 July 2009) <https://www.newsweek.com/meet-talibans-new-chief-81727>.
[362] Trevor Filseth, 'ISIS-K is Infiltrating the Taliban in Afghanistan', *National Interest* (Web Page, 13 October 2021) <https://nationalinterest.org/blog/buzz/isis-k-infiltrating-taliban%C2%A0-afghanistan-195035>.
[363] Dressler and Forsberg (n 357).
[364] Ibid 5.
[365] Ibid.

assessment must be conducted by a future policing intervention prior to entering Afghanistan as it will determine the type of forces necessary to counter the insurgencies. Perhaps, perversely, this also serves to indicate that when alternative loyalties are sidelined – as the Taliban arguably sought to do in its ruthless attacks upon government agents and police – then a degree of provincial and social control can be achieved, albeit the Taliban example offers us an intensely negative and problematic case study of this factor.

Following the coalition withdrawal in 2014, the Taliban mounted and sustained its toughest military campaign to date, albeit in a changing landscape along with different tactics.[366] As stated previously, the former Afghan government was incompetent in preventing organised criminal activity and corruption and this provided the ideal platform for the Taliban to regain power. The strict regime of the Taliban was illustrated in an instrument called *Edict of General President of the Religious Police Kabul, December 1996*,[367] which dictated that no drivers were allowed to pick up women wearing the Iranian *burqa*. In case of a violation the driver would be imprisoned. If women in such dress were observed in the street, their house would be found and their husband punished. If women wear stimulating and attractive clothing and do not have a male relative with them, drivers should not pick them up. The edict further prevented music and its broadcast in shops, hotels and vehicles. It banned cassettes in shops and vehicles and stated that, if any music cassette was found in a shop or a vehicle, the shopkeeper and or driver would be imprisoned, and the shop locked.[368]

The edict prevented beard shaving and cutting and required arrest and imprisonment of those in breach until their beard regrew. It also prevented the keeping of pigeons and playing with birds and provided that, following a period of observation, if such activity continued the birds would be killed. The edict somewhat famously prevented kite flying and prohibited shops from selling them. To prevent idolatry, the Taliban also prohibited portraits in vehicles, shops, hotels, museums, and any other place pictures and portraits could be kept. The Taliban stated that the religious police should tear up all pictures in the above-mentioned places.[369]

The Taliban prohibited gambling in collaboration with the security police and required that any gamblers should be imprisoned. To eradicate drug addiction, the Taliban stated that addicts should be

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[366] Vanda Felbab-Brown, 'How Predatory Crime and Corruption in Afghanistan Underpin the Taliban Insurgency', *Brookings Institute* (Web Page, 18 April 2017) <https://www.brookings.edu/blog/order-from-chaos/2017/04/18/how-predatory-crime-and-corruption-in-afghanistan-underpin-the-taliban-insurgency/>.
[367] *Edict of the Taliban Regime of Spring 1997* (Afghanistan, 1 April 1997) <https://www.refworld.org/docid/3ae6b4d68.html/>.
[368] Ibid.
[369] Ibid.

imprisoned, and an investigation established to locate the supplier and the shop, which, once located, should be imprisoned and punished and the shop shut down. The edict also prohibited British and American hairstyles and stated that people with long hair shall be arrested and taken to the Religious Police department to shave their hair at the expense of the criminal.[370]

The Taliban prevented the washing of clothes by girls and women along the water streams in the city and stated that those responsible would be respectfully taken to their houses in accordance with Islamic law and their husbands severely punished. The edict also prevented music and dancing in wedding parties and those responsible for violations would be arrested and punished. Other prohibitions included the prevention of sorcery and the prohibition on young people entering shops during prayer time in mosques. Such strict measures would ultimately lead to revolt against the Taliban by the general population, although history would soon tell us that the purging of the Taliban would not be easy or indeed possible to date.

The Taliban have largely achieved what they set out to do and that is to overthrow the Government of the Islamic Republic of Afghanistan (GIRoA) and gain community support from sympathisers or those too weak or unable to resist. The Taliban have established dispute resolution which has resulted in the establishment of Sharia law courts in Kandahar, Helmand and Kabul, which is alarming noting that there had been 27 executions since 2008, but is also demonstrative of the lack of control that the GIRoA had over Afghanistan.[371] The Taliban also collect taxes or *zacat* from villagers under their control, which is the predominant funding source for their military efforts. This tax is, not surprisingly, tied to the production of illicit crops of opium, as well to legitimate crops of wheat and fruit.

Such is the Taliban's grip on Afghanistan that long-term sustainable methods need to be deployed to diminish the influence of the Taliban before the population becomes too reliant on their leadership. Much needs to be done to bridge the gap between isolated villages and provinces by the next Afghan government. A post-Taliban government must know that it cannot rule Afghanistan from Kabul and therefore must spread its wings, galvanise the population and expand its presence in the provinces and eventually the remote areas.

Newspaper articles depict attack after attack by the Taliban prior to becoming the Islamic Emirate of Afghanistan (IEoA) in 2021. The peace pact with the US was shown to be nothing but words and now broken promises. The Taliban do not want peace. Rather, they want to dominate and divide

[370] Ibid.
[371] Ibid 8.

Afghanistan and have now also fulfilled their ambition of leading the country. Not surprisingly, Russia is once again involving itself in Afghanistan politics in order to fulfil its own ambition of exploitation of Afghanistan.[372] Articles as recently as June 2020, contained allegations the Russians were paying the Taliban to kill US troops.[373] This was known as the bounty scheme, where Russia used Rahmatullah Azizi as an intermediary between Russia and the Taliban. This was orchestrated by the Russian military intelligence agency known as GRU and was a cunning way to push the US out of Afghanistan.[374]

5.3.4 Key lessons learned from the first critical decade of the US invasion

It is reasonable to say, following a reflection on the first decade of the Afghan conflict from 2001 to 2011, that the US enabled the Taliban to obtain footholds in areas of organised crime as the US focused on counter-narcotics and the eradication of poppy fields in order to bankrupt the Taliban.[375] This policy had the opposite effect on the Taliban, who are now seen by the population and the farmers as protectors, noting the huge reliance of Afghanistan on opium production.[376] However, that control came at a cost because, despite opening the country up to trucks and trade, ministries, schools and other public services were neglected. This is Afghanistan of 2025, in an unfortunate case of history repeating and should provide a blueprint of sorts as to how Afghanistan will fare under the current regime. The Taliban had moved to a radical interpretation of Sharia law, which had an immediate negative impact on the population, particularly women and girls. Foreign aid to the country was restricted during this period due mostly to the Taliban's strict policy against foreign non-government organisations (NGOs) and a general distrust of foreign aid organisations.

Some policing implications to be drawn from the current situation, in advance of a future policing project

The purging of the Taliban from Afghanistan will require the aid of a new beefed-up deployment from coalition forces with a clear strategy on the capture and imprisonment of the Taliban with a view to placing them before the International Criminal Court (ICC). Afghanistan became a party to the ICC

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[372] See, eg, Claude Rakisits, 'Pakistan and Afghanistan: Russia is Back', *Australian Institute of International Affairs* (Web Page, 28 May 2018) <https://www.internationalaffairs.org.au/australianoutlook/pakistan-and-afghanistan-russias-back-in-the-neighbourhood/>.
[373] Charlie Savage et al, 'Suspicions of Russian Bounties were Bolstered by Data on Financial Transfers', *New York Times* (online, 30 June 2020) <https://www.nytimes.com/2020/06/30/us/politics/russian-bounties-afghanistan-intelligence.html>.
[374] Ibid.
[375] Ibid.
[376] United Nations Office on Drugs and Crime (n 358) 3, 19.

as it ratified the Rome Statute on 10 February 2003.[377] The ICC was founded by way of Article 1 of the Rome Statute in 1998.[378] The purpose of the ICC is to prosecute four main crime types:

1. Genocide
2. Crimes against humanity
3. Grave breaches of the Geneva Conventions and
4. Crimes of aggression.[379]

The ICC has an active investigation into Crimes against humanity and war crimes from 2003, following the Prosecutor's Request for authorisation of an investigation of 20 November 2017.[380] The facts in the decision to deny the investigation, indicated that the following parties be held to account for the acts that they allege to have been either crimes against humanity or war crimes:

1. *The Taliban* – suicide attacks and bombings that killed civilians, police, judges, Afghan forces and International forces
2. *Afghan Forces (ANSF)* – crimes against people detained including torture and other inhumane treatment
3. *US Forces and the CIA* – for interrogation of detainees who were tortured, raped and sexually assaulted in facilities following transfer by US forces to US facilities within Afghanistan.
4. *Other acts by members of the international armed forces* – for torture of detainees, civilian casualties and casualties from air strikes and drone attacks. The prosecution notes that it is has not yet have a reasonable basis to believe that the alleged crimes committed fall within the jurisdiction of the ICC.[381]

The prosecution request to investigate was eventually authorised by the ICC on 30 October 2022, with the judges opining that Afghanistan was not actively carrying out genuine investigations which should come as no surprise given that the Taliban by then was in power.[382] On 23 January 2025, the ICC Prosecutor filed two applications for the arrest warrants against the Supreme Leader of the Taliban, Haibatullah Akhundzada, and the Chief Justice of the 'Islamic Emirate of Afghanistan', Abdul Hakim Haqqani for crimes against humanity for persecution on gender grounds under article 7(1)(h) of the

[377] 'Afghanistan: Situation in the Islamic Republic of Afghanistan', *International Criminal Court* (Web Page, February 2017) <https://www.icc-cpi.int/afghanistan>.
[378] Ibid.
[379] Ibid.
[380] Ibid.
[381] Pre-trial Chamber II Decision (12 April 2019) 6–10. See Ibid.
[382] 'Afghanistan: Situation in the Islamic Republic of Afghanistan' (n 377).

Rome Statute. This would be of little consequence to the Taliban who announced on 20 February 2025 that they did not recognise any legal obligation under the Rome Statute.[383] Nevertheless, the applications remain pending before the Pre-trial Chamber II, and it is very much a distinct possibility that when the Taliban are removed from power that the arrests will be orchestrated and the investigation into the four parties mentioned above commenced. For a police intervention to be successful and gain the trust of the population, the ICC arrests of the two Taliban leaders and the investigation of post 2003 war crimes and crimes against humanity must be undertaken in a cooperative, open and transparent manner.

5.4 Al Qaeda in Afghanistan

Despite a decline in numbers in recent years, Al Qaeda has remained entrenched in both Afghanistan and Pakistan.[384] The initial withdrawal of coalition forces in 2014 provided a safe haven for Al Qaeda for the first time since 2001. They achieved this through cooperation with the Taliban and their numbers are growing.[385] Al Qaeda's return to power threatens the civilian population in Afghanistan. The issue for Afghanistan and its neighbours is that Al Qaeda has strong ties to the Taliban that go back decades, and it also has a very good understanding of the landscape. Any non-Taliban government is likely to become the target of Al Qaeda forces in the future and, as a result of Al Qaeda's familiarity with the landscape, a new coalition mission will likely be engaged in a prolonged campaign to eradicate those forces.

The history of Al Qaeda stems back to the war against the Soviet Union, when thousands of foreign fighters from many countries were drawn into the jihad, most of whom originated from the Middle East.[386] Following this came the radical teachings of the Palestinian teacher Abdullah Azzam, who headed the Arab Services Bureau which was responsible for coordinating foreign fighters and the funding to equip them to eventually become part of the Afghanistan mujahideen. One of Azzam's students was none other than Osama bin Laden himself who would later form the Al Qaeda group in 1988 based on his learnings.[387]

In recent times Al Qaeda has been able to unite other militant groups in Pakistan by framing the jihad as global not just local. This had the effect of strengthening Al Qaeda in the region and provided them

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[383] 'Taliban Reject ICC Authority, Announce Afghanistan's Withdrawal', *KabulNow* (Web Page, 2025) <https://kabulnow.com/2025/02/taliban-reject-icc-authority-announce-afghanistans-withdrawal/>.
[384] Lauren McNally and Marvin G Weinbaum, *A Resilient Al-Qaeda in Afghanistan and Pakistan* (Report, Middle East Institute Policy Focus, August 2016).
[385] Ibid.
[386] Ibid.
[387] Ibid.

with greater manoeuvrability. This was despite the assertions from the Pakistan military that they have been successful in clearing the Tehrik-e-Taliban Pakistan (TTP) or the Pakistani Taliban insurgency, Al Qaeda and other foreign militant groups from Pakistan. However, many of these militant groups, including Al Qaeda, simply fled across the porous border into Afghanistan.[388]

5.4.1 Key features of the Al Qaeda threat to Afghanistan

As Kilcullen states, Al Qaeda has a modus operandi of simply injecting and aligning itself with other like-minded groups in conflicts globally in order to exploit what it can.[389] The important question in the context of this thesis is what is the threat to national security in Afghanistan from Al Qaeda, taking into account this method of operation, and how will a future Afghan police force and the criminal justice system deal with this threat? These questions are not easily answered as there are considerations of Al Qaeda's motives and the level of their capacity and motivation. Most reports suggest that Al Qaeda's motives are more global in nature than local, but certainly westerners remain their target.[390] The group also orchestrates and plans attacks and has direct involvement in improvised explosive device (IED) and suicide bomber networks.[391] This cooperation with the Taliban along with that of the Haqqani network led to attacks against western military targets in Bagram and Kabul, until the final withdrawal of coalition forces on 30 August 2021.[392] The implication for a policing intervention are the global nature of Al Qaeda attacks noting that westerners remain their target. Irrespective of a Taliban defeat, an intervention force will still have to deal with Al Qaeda factions within the borders of Afghanistan and the presence of which will dictate the force elements of any such intervention.

This cooperation was confirmed in a report in June 2020 by Al Jazeera news agency, which noted that the ties between the Taliban and Al Qaeda remain close.[393] This is despite the peace pact that the Taliban made with the US on 29 February 2020, which included the condition that the Taliban would

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[388] Ibid.

[389] David Kilcullen, *Blood Year: The Unraveling of Western Counterterrorism* (Oxford University Press, 2016) 8.

[390] Daniel L Byman, 'Comparing Al Qaeda and ISIS: Different Goals, Different Targets', *Brookings* (Web Page, 29 April 2015) <https://www.brookings.edu/articles/comparing-al-qaeda-and-isis-different-goals-different-targets/>.

[391] Henry Rome, 'Revisiting the "Problem from Hell": Suicide Terror in Afghanistan' (2013) 36 *Studies in Conflict & Terrorism* 819, 822–3.

[392] See, eg, Fahim Abed and Mujib Mashal, 'Taliban Attack U.S. Base in Afghanistan as Negotiators Talk Peace', *The New York Times* (online, 11 December 2019) <https://www.nytimes.com/2019/12/11/world/asia/Afghanistan-bagram-airfield-attack.html>.

[393] Abdullah Abdullah, 'Roadside Bomb in Taliban-Controlled Area Kills Afghan Civilians', *Al Jazeera* (online, 2 June 2020) <https://www.aljazeera.com/news/2020/06/roadside-bomb-taliban-controlled-area-kills-afghan-civilians-200602083746155.html>.

prevent Al Qaeda from using Afghan soil to threaten the US and its allies.[394] Another report in June 2020 stated that Al Qaeda was at that time getting stronger and actively plotting with the Taliban. The same report stated that Al Qaeda had re-established training camps and that it was highly unlikely that the Taliban government would exert pressure on Al Qaeda to leave Afghan soil.[395] Reports suggest that Al Qaeda have between 400 and 600 operatives across 12 provinces in Afghanistan.[396] The provision of an ongoing safe haven for Al Qaeda was secured in exchange for *bayat* or fealty to the Taliban leader Mullah Omar in the 1990s and has made the same pledge today via Osama bin Laden's successor Ayman al-Zawahiri to Taliban chief Haibatullah Akhundzada.[397] Once again, the implications for a policing intervention in Afghanistan are those insurgency barriers to the implementation of a rule of law mandate and what resources are required to eradicate them as per step 2 and 3 of the rule of law proposal of accountability and transparency.

5.4.2 Key lessons learned on the Al Qaeda presence in Afghanistan

Returning briefly to the Taliban, part of its leadership group splintered off from the main group of Taliban following the US peace pact. This group, Hizb-i Vilayet Islami, or 'Islamic Governorate Party', is currently based on the Pakistan border with Afghanistan and is posturing with Al Qaeda forces ready to fight against the West, should they return to Afghanistan to remove the Taliban from government.[398] It is therefore difficult to separate the actions of Al Qaeda from the Taliban in Afghanistan, given the groups' shared networks. Therefore, any strategy aimed at curtailing and defeating the criminality of the groups must be applied equally as though the groups are intertwined. The implications for alternative legacy loyalties in police recruits, and the need to source recruits form a trusted local pool, are clear in these lessons regarding Al Qaeda in Afghanistan.

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[394] *Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan* (29 February 2020) <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

[395] Katherine Zimmerman, 'Al-Qaeda's Return', *American Enterprise Institute* (Web Page, 4 June 2020) <https://www.aei.org/foreign-and-defense-policy/al-qaedas-return/>.

[396] *Letter Dated 19 May 2020 from the Chair of the Security Council Committee Established Pursuant to Resolution 1988 (2011) Addressed to the President of the Security Council*, UN Doc S/2020/415 (27 May 2020) 12.

[397] Kimberly Dozier, 'Defying Trump's Landmark Peace Deal, Taliban Continues to Back Al-Qaeda in Afghanistan, UN Report Says', *Time* (online, 1 June 2020) <https://time.com/5844865/afghanistan-peace-deal-taliban-al-qaeda/>.

[398] *Letter Dated 6 February 2025 from the President of the Security Council Acting in the Absence of a Chair of the Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and Associated Individuals, Groups, Undertakings and Entities Addressed to the President of the Security Council*, UN Doc S/2025/71 (6 February 2025) 17.

Nevertheless, it is dangerous to believe that a peace pact orchestrated by the US would divide Al Qaeda and the Taliban. Harder and tougher measures needed to be applied, as history informs us. A new policing intervention will need to do more with Afghan elders and communities in order to build up a resistance along with strict mutual assistance partnerships with Pakistan and other neighbouring states that harbour insurgent groups that threaten peace and security in Afghanistan. These important partnerships must be in place prior to a police intervention to ensure that the intervention has the very best opportunity to prevail and succeed with the assistance of those regional partnerships. But what of other threats to peace in Afghanistan and a possible obstruction to a police intervention?

5.5 Islamic State in Khorasan Province, ISIS-K (formerly ISIL) and the Pakistani Taliban (TTP) in Afghanistan

The evidence that the TTP and ISIS-K are operating in Afghanistan is incontrovertible noting that Afghanistan is a weakened state This again highlights that a long-term international commitment to Afghanistan is critical in order to allow it to achieve sustainable peace. I have established in this chapter of this thesis the failures of international interventions in Afghanistan, with the exception of the most recent attempt, which I address in Chapter 6 where I assess the intervention of the ISAF. This thesis will endeavour to recommend an international intervention that will be capable of assisting Afghanistan to sustain law and order with a view to Afghanistan maintaining its own long-term law and order.

The ISKP (now ISIS-K), is named after an area that includes parts of what is now known as Iran, Pakistan and Afghanistan, and has been active in the latter since 2014.[399] The ISKP (ISIS-K) were named a Foreign Terrorist Organization by the US State Department on 14 January 2016. Its leader was the late Abu Bakr al-Baghdadi, who committed suicide on 23 October 2019, as a US commando team raided his compound outside the village of Barisha, in the north-western Syrian province of Idlib, many hundreds of kilometres from Afghanistan. He had fled to a tunnel under the compound and blew himself up along with his children.[400]

Although operating from Syria at the time of his death, Abu Bakr al-Baghdadi had lived in Kabul during the first Taliban administration and had ties with Al Qaeda. The former Afghanistan Government stated that the Taliban could not be exonerated from such attacks as they ultimately provided the platform for terrorist attacks by other insurgent groups. Still, the Taliban openly

[399] Ibid 16.
[400] 'Who Was Abu Bakr al-Baghdadi?', *BBC* (online, 28 October 2019) <https://www.bbc.com/news/world-middle-east-50200392>.

condemned this most recent attack.[401] The launch of ISIL, as described by Kilcullen, was viewed across the world through the lens of social media and popular television, with all the horror and crimes against humanity displayed with complete cruelty, as ISIL tore through Iraq.[402]

ISIL suffered serious causalities in Iraq and Syria in 2019 and was forced to flee, but the UN state that they then likely established a headquarters in Afghanistan.[403] It is also likely that they joined forces with Al Qaeda, given the two groups have a similar ideology and a global focus.[404]

5.5.1 Key features of Islamic State-Khorasan Province (ISIS-K)

The new variant of ISIL, Islamic State-Khorasan Province (ISIS-K), has claimed responsibility for numerous attacks in Afghanistan, including the attack on 25 March 2020 on a Sikh temple in Kabul, killing at least 25 innocent people.[405] The ISIS-K also orchestrated dozens of attacks on Shia mosques in the period from 2016 to 2018, killing and wounding thousands of innocent civilians.[406]

The active strength of ISIS-K in Afghanistan was said to range from 2,500 to 4,000.[407] The Taliban actively opposes ISIS-K, despite its close relationship to Al Qaeda, which seems to work in favour of any returning international force. It is also said that the ISIS-K group had driven Taliban fighters from some districts in the eastern provinces, although this point is now moot given the Taliban is in government. Simultaneously, the Pakistani military are hunting ISIS-K fighters out of Pakistan which will only drive up the numbers of ISIS-K fighters in Afghanistan.[408] The ISIS-K group comprises many nationalities including French and Algerian fighters, who crossed into Afghanistan from Syria and Iraq in 2017 and established bases in the north near the Afghanistan–Tajikistan border.[409]

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[401] Zeeshan Aleem, 'The Deadliest Attack of the Year in Kabul Bodes Poorly for the US-Taliban Deal', *Vox* (Web Page, 18 August 2019) <https://www.vox.com/world/2019/8/18/20811041/kabul-deadliest-attack-year-afghanistan-us-taliban-peace-deal>.
[402] Kilcullen, *Blood Year* (n 389).
[403] *Letter Dated 6 February 2025* (n 398) 16
[404] Liu Chunlin and Rohan Gunaratna, 'The Terrorist Threat Assessment 2020' (2020) 52 *UNISCI Journal* 125.
[405] Emal Haidary, 'At Least 25 Dead in Attack on Sikh-Hindu Temple in Kabul', *AFP International Text Wire in English* (Web Page, 25 March 2020) <https://www.proquest.com/wire-feeds/at-least-25-dead-attack-on-sikh-hindu-temple/docview/2382686439/se-2>.
[406] 'Afghanistan: Prosecute Head of ISIS-Linked Group', *Human Rights Watch* (Web Page, 6 April 2020) <https://www.hrw.org/news/2020/04/06/afghanistan-prosecute-head-isis-linked-group>.
[407] *Eighth Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, UN Doc S/2019/103 (1 February 2019) 7.
[408] Chunlin and Gunaratna (n 404) 126.
[409] 'France/Afghanistan: French Fighters Appear with ISIL in Afghanistan', *Asia News Monitor* (online, 11 December 2017) <https://www.ndtv.com/world-news/french-fighters-appear-with-isis-in-afghanistan-1785903>.

In May 2020, ISIS-K took responsibility for a deadly suicide attack at a funeral in Nangahar province, killing 24 people. The ISIS-K group made this statement on the Telegram app: 'The jihadist Abdallah al-Ansari hit Afghan security forces and militia allied to Nangarhar, exploding his [suicide] belt … [and] killing and wounding 100 non-believers'[410]

Reports in 2024 suggested that the US administration sought to align itself with the Taliban to eliminate the threat of the now known ISIS-K (ISIL) as it has lost some visibility since withdrawing from Afghanistan in 2021.[411] This followed an attack by ISIS-K on a concert hall on the outskirts of Moscow on 23 March 2024 that killed 133 people.[412] This attack made the US administration stand up and take notice that ISIS-K was a real threat to peace and security, given this brazen attack on Russian soil.[413]

Nangahar is a province close to the Afghanistan–Pakistan border which is also a stronghold for TTP and ISIS-K forces. It has withstood many seasons of war and the presence of these insurgents. What makes the ISIS-K presence all the more ominous is a statement from the Taliban that it will no longer focus attacks on or around civilians. If the Taliban leaders are true to their word, then the majority of current attacks that kill civilians in modern Afghanistan are by ISIS-K and Haqqani networks.[414]

5.5.2 The Pakistani Taliban (TTP)

The infiltration of an opportunistic insurgency is a multi-level issue where cooperation must also be made with the Pakistan Government. The Pakistani Taliban (Tehrik-e-Taliban Pakistan or TTP) are active within the Afghanistan border region and, despite in-house fighting following a leadership spill in 2014, joined the Afghan Taliban in opposition to the former Afghan Government, ANP, ANA and coalition forces.[415]

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[410] 'Afghanistan: Deadly Suicide Attack Targets Funeral in Nangarhar', *Al Jazeera* (online, 12 May 2020) <https://www.aljazeera.com/news/2020/05/afghanistan-deadly-suicide-attack-targets-funeral-nangarhar-200512081739828.html>.
[411] Dan De Luce et al, 'The Enemy of My Enemy: Biden Admin Weighs Working with the Taliban to Combat ISIS-K', *NBS News* (online, 3 July 2024) <https://www.nbcnews.com/investigations/biden-admin-weighs-cooperation-taliban-counter-isis-k-rcna159789>.
[412] Kevin Doyle, 'Moscow Concert Hall Attack: Why is ISIL Targeting Russia?', *Al Jazeera* (online, 23 March 2024) <https://www.aljazeera.com/news/2024/3/23/moscow-concert-hall-attack-why-is-isil-targeting>.
[413] De Luce et al (n 411).
[414] See generally, Amira Jadoon et al, 'The Enduring Duel: Islamic State Khorasan's Survival Under Afghanistan's New Rulers' (2023) 16(8) *CTC Sentinel* 8.
[415] Katzman and Thomas (n 180).

The TTP are alleged to be staging attacks on Pakistan from the Afghanistan–Pakistan border, which is leading to tensions between Pakistan and the Taliban. The Pakistani government is starting to lose patience with the Afghan Taliban's lack of response in curbing the TTP. In fact, some reports state that the Afghan Taliban gave the TTP political asylum in Afghanistan in return for their assistance against the former Afghan government and coalition forces.[416]

5.5.3 Key lessons for a police intervention and the essential need for an on the ground threat assessment

Why is this assessment of the ISIS-K, Al Qaeda and TTP relevant to this thesis? This thesis aims to provide a blueprint for a future international peace operation mission to Afghanistan. Such a mission will need to know what organisations and groups stand to oppose peace and security in Afghanistan in order to better equip a new national Afghan police force to counter organised resistance and repressive regimes. The issues of engagement in terms of cultural and local cognisance, and transparency and accountability in terms of legacy loyalties and early action against crime, corruption, and militias, are clearly verified by this experience.

However, the dimensions and context of this experience also require some explanation as to the difference between Shia and Sunni Muslims as this will give some context to some of the violence against minorities in Afghanistan.

5.5.4 Shia versus Sunni Muslims

Todd Lawson, a Professor of Islamic Thought, states:

> The difference between Sunni and Shia Islam has to do with the way in which religious authority of the Prophet Muhammad was continued[417] … the identity of the two was worked out during the first 250 years of Islam, as a result of which each group developed its own version of Islamic history.[418]

Muhammad died in 632 and majority of the Muslim community did not recognise his cousin and son-in-law Ali as his rightful successor. Abu Bakr, who was a close friend and father-in-law of the Prophet, was instead chosen. Although Ali was eventually elected caliph, the dissidents (known as Shiite Ali) believed that passing him over as Muhammad's direct successor was a grave mistake for

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[416] Mir (n 9).

[417] See Todd Lawson, 'The Origins of the Shi'a: Identity, Ritual, and Sacred Space in Eighth-Century Kufa' (2013) 30(2) *American Journal of Islamic Social Sciences* 125.

[418] 'What is the Difference between Sunni and Shia Muslims?', *The Economist* (online, 28 May 2013) <https://www.economist.com/the-economist-explains/2013/05/28/what-is-the-difference-between-sunni-and-shia-muslims>.

Islam.[419] Shiite Ali is translated as 'members of a branch of the Islamic religion which regards Mohammed's cousin Ali and his successors, rather than Mohammed himself, as the final authority on religious matters'.[420]

Following Ali's death there were bloody battles when the Shia rejected the authority of the dynasties of caliphs established in Baghdad and Damascus. The Shia insisted that only the children of Ali and Muhammad's daughter Fatima were the legitimate heirs of Islam. But the Prophet's grandson Husayn, along with 72 family members and supporters, were killed by caliphate soldiers in the battle of Karbala, a symbol of Shia martyrdom for centuries.[421]

In fact, the differences between Sunnis and Shias travels well beyond the succession to the different views of their religion. For Sunnis, Islam derives from a large body of literature that preserves the life and teachings of Muhammad and is the basis of law and doctrine. For Shias, according to author Vali Nasr, it is more personal, where 'People need the help of exceptionally holy and divinely favoured people in order to live in accord with the inner truths of religion.'[422]

Throughout most of Islamic history, Sunnis have dominated Shias in power as well as numbers. The Shia population is now less than 200 million out of the 1.3 billion Muslims worldwide. But in strategic areas of the Middle East they are on the ascent, altering patterns drawn by the colonial powers.[423] The Shias remain the prime target of groups such as ISIS-K who see the Hazaras, who are predominantly Shia Muslims, as offensive as 'they do not accept Caliph Umar and Bibi Aisha' who are important figures to Sunni Muslims.[424]

The situation in Iraq is the polar opposite, with Shias alleged to have tortured and killed hundreds of Sunnis in response to the Zarqawi Group's bombing of one of the holiest sites in Shia Islam.[425] Interestingly, the AQI saw the Shia domination as the greatest threat and that therefore a caliphate

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[419] Ibid.
[420] *Collins Dictionary* (online at 8 September 2021) 'Shiite' (n, def 1).
[421] Vali Nasr, *The Shia Revival: How Conflicts within Islam Will Shape the Future* (Norton and Company, 2007) ch 1.
[422] Ibid.
[423] 'Sunnis and Shia in the Middle East', *BBC News* (online, 13 December 2013) <https://www.bbc.com/news/world-middle-east-25434060>.
[424] 'Afghanistan: Surge in Islamic State Attacks on Shia, ISIS Affiliate's Targeted Killings Amount to Crimes Against Humanity', *Human Rights Watch* (Web Page, 25 October 2021) <https://www.hrw.org/news/2021/10/25/afghanistan-surge-islamic-state-attacks-shia>.
[425] Norman Hermant, 'Insurgents Claim Responsibility for Baghdad Raid; Iraq Bomb Attack; Zarqawi Group Claims Bombing', *ABC News* (online, 3 December 2004) <https://www.proquest.com/other-sources/insurgents-claim-responsibility-baghdad-raid-iraq/docview/190358750/se-2>.

was a realistic world objective and a sectarian war with the Shia 'the quickest way to it'.[426] The path of Islamic State is not strictly relevant to this thesis other than to point out that coalition forces had pushed them out of Iraq and Syria and essentially into Pakistan and Afghanistan. This will not be an insignificant obstacle to a new policing intervention that enters Afghanistan in the future as it illustrates the types of obstacles that a new national police force and criminal justice system will face when the current Taliban regime is ousted and further demonstrates the need for step 2 of accountability in the rule of law proposal of this thesis.

5.5.5 The situation in Pakistan: Extremist Islamic groups

It is important to assess the state of terrorism and terrorist groups in Pakistan, given the overwhelming data that demonstrates that the majority of external attacks on Afghanistan are planned and commenced from Pakistan. Some authors such as Nizami, Hassan, Yasir, Rana and Aslam, state that 'since 9/11, Pakistan has been at the epicentre of both terrorism and the war against it'.[427] The same authors also state that Pakistan has experienced death and wanton destruction and that terrorism is a means of retaliation, although taking on the West in Afghanistan is a curiously marathon method.[428] This analysis is akin to calling a perpetrator of domestic violence the victim. There is also some merit to the argument that past violence and oppression may have created fertile breeding ground for the emergence of extremism and terrorism. Although this theory has some merit, it lacks the assessment of other key historical strategies of the Pakistan government.

The history of Pakistan emerges from the battle for independence in 1947. In its battles, attacks and conflicts against India, Pakistan has deployed covert methods of attack through the use of irregular troops. This has also been perpetuated by its support for various terrorist and insurgent attacks against India.[429] Partition in 1947 followed the Mountbatten Plan of providing contiguous majority areas of Muslims and non-Muslims in order to create what is now Pakistan and its partition from India, a predominantly non-Muslim state. Most issues were resolved, but the states of Jammu and Kashmir became contested. Kashmir is a Muslim-majority state that occupies over 85,000 square kilometres on the Pakistan–India border.[430]

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[426] Kilcullen, *Blood Year* (n 389) 35.
[427] Asad Tamizuddin Nizami et al, 'Terrorism in Pakistan: The Psychosocial Context and Why It Matters' (2018) 15(1) *BJPsych International* 20.
[428] Ibid 20.
[429] Chris Ogden, 'Tracing the Pakistan–Terrorism Nexus in Indian Security Perspectives: From 1947 to 26/11' (2013) 69(1) *India Quarterly* 35.
[430] Registrar General & Census Commissioner, 'Population by Religion Community – 2011', *Census of India* (Census Data, 2011) <https://web.archive.org/web/20170302204405/http://www.censusindia.gov.in/2011census/C-01/DDW00C-01%20MDDS.XLS>.

In an article published in *BBC News* in 2018, the Pakistan Interior Minister released the names of 72 terrorist groups. The list included Pakistani Taliban, Daesh or the so-called Islamic State, Lashkar-e-Taiba, Lashkar-e Jhangavi and Jamaat-ud-dawa.[431] In response to the Pakistan Interior Minister, a spokesperson for the Afghanistan Interior Minister stated: 'Pakistan supports terrorists. If Pakistan changes its policy, on the same day, the scope of war in Afghanistan will drop by 50 per cent.'[432]

This may be so, but Pakistan has a long history of conflict and death. Much like Afghanistan, Pakistan carries deep scars from colonial oppressions and conflicts with India and what they would deem as political interference from the US. The cultural and religious demographics of Pakistan are somewhat complex. There is a distinct division based on ethnicity which is in the main between Baluchis, Sindhis and Muhajirs, on one hand, and Punjabs and Pashtuns on the other.[433] Then there is also the religious divide between the Shias, who make up 15–20% of the population, and Sunnis who make up the majority in Pakistan. Then there is a third religious group, the Wahhabi, who seek to agitate the Shias and the Sunnis.[434]

The link between Pakistan and what is now known as the Taliban has its roots in the Islamist Party of Jamaat-i-Islami, which was founded by Maulana Mawdudi in the 1940s and acted as the link between the Pakistani Army and the pro-Pakistan Afghan mujahideen of Gulbuddin Hekmatyar's Hizb-i-Islami.[435] Of most significance to this thesis was the fact that after the departure of the Soviets from Afghanistan a jihad was waged against Massoud by the then Taliban and Al Qaeda. At this point I must pause my assessment of the situation in Pakistan in order to assess another motivation for Pakistani involvement in modern Afghanistan.[436]

5.5.6 Ahmad Shah Massoud

If ever Afghanistan needed a hero such as Ahmad Shah Massoud, it was between the time of the Soviet withdrawal and the US-led invasion in 2001. The Taliban had Afghanistan firmly in its grip in

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[431] 'Afghanistan Says Pakistan Hosts Terrorist Groups', *BBC Monitoring South Asia* (8 January 2018).
[432] Gulabudin Ghubar, 'Pakistan Shares Names of 72 Terror Groups with its Citizens', *TOLOnews* (online, 9 January 2018) <https://tolonews.com/afghanistan/pakistan-shares-names-72-terror-groups%C2%A0-its-citizens>.
[433] Mariam Abou Zahab, *Pakistan: A Kaleidoscope of Islam* (Oxford University Press, 2020) 1.
[434] Ibid 17.
[435] Seyyed VR Nasr, *Mawdudi and the Making of Islamic Revivalism* (Oxford University Press, 2023).
[436] Brian Glyn Williams, 'Afghanistan after the Soviets: From Jihad to Tribalism' (2014) 25(5–6) *Small Wars & Insurgencies* 924.

the 1990s and ruled in a tyrannical and brutal manner, further exposing the population to trauma, particularly through the strict enforcement of Sharia law.

Ahmad Shah Massoud's history could be considered polarising. On the one hand he was considered a hero for his constant repulsion of Soviet forces in the Panjshir Valley, but on the other a traitor for signing a truce with the Soviets in March 1983, although he broke this truce by conducting an ambush on the Salang Highway against the Soviets.[437] The plethora of assassinations and deadly overthrows in Afghanistan is testament to a population that has rarely been content with its leaders and perhaps says more about the mindset of the people than those trying to galvanise them. Following the breaking of the truce, Massoud returned to favour with the people by repelling the Soviets during their ninth raid of the Panjshir valley, earning himself the nickname 'the Lion of Panjshir'. The Panjshir Valley was an important entry point for the Soviets and their supply lines.[438]

Parallel to these developments in 1992, the Pakistan Government began to exert increasing influence, along with the Pakistani ISI, favouring a guerrilla group in Afghanistan against the communist regime, led by a man named Hekmatyar.[439] Pakistan feared that Massoud had become too independent. For his part, Massoud had become weary of the undue influence of Pakistan within the borders of Afghanistan and the Arabs that had 'volunteered' following funding from Osama bin Laden.[440]

The withdrawal of the Soviet Fortieth Army in 1989 by Gorbachev was a clear signal of the impossible mission to conquer Afghanistan, due in part to the resistance of Massoud.[441] Massoud and his men entered Kabul and overthrew the communist government in 1992, but this was to be short lived as Massoud could not work with the majority Pashtun, which led to the continuation of civil war. Once again, ethnic and cultural differences in Afghanistan stood in the way of cohesive and effective government. It seems that no amount of intervention could bridge the cultural and religious differences.

At the same time that Massoud was pursuing a campaign to drive the Taliban from the borders of Afghanistan he also sought assistance from the European Union to mollify the threat that the Taliban

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[437] Lamothe (n 323) 77.
[438] Ibid 76.
[439] William Branigin, 'The "Lion of Panjshir": Veteran Fighter Massoud Grips Kabul', *The Washington Post* (online, 28 April 1992) <https://www.washingtonpost.com/archive/politics/1992/04/29/the-lion-of-panjshir/ccf368a3-423d-4016-8148-8d8052af77ac/>.
[440] Lamothe (n 323) 78.
[441] Ibid 74.

posed. His words to the US prior to its invasion in 2001 remain compelling. Massoud pleaded with then US President George W Bush:

> My message to President Bush is the following: if he isn't interested in peace in Afghanistan, if he doesn't help the Afghan people to arrive at their objective of peace, the Americans and the rest of the world will have to face the problems.[442]

By early 2001, Massoud and the Northern Alliance had been driven to the northeast corner of Afghanistan by Taliban forces. He consented on 9 September 2001 to a television interview with what would be a bogus camera crew, claiming to have ties with Arab News International. During the interview the camera, filled with explosives, detonated, killing Massoud and the camera operator in his headquarters. The world would wake up on 11 September 2001, just two days later, to news that three highjacked airlines had crashed into the World Trade Center and the Pentagon. Massoud's earlier plea for help to the US president would never ring so loud and so true, yet it seemingly took his death and that of thousands of Americans for his pleas to be heard. This infamous cry for help from Massoud to the US should have spelt a warning to the US and coalition partners on what would become a prolonged campaign in Afghanistan and that a proper rule of law mandate may have made a withdrawal from Afghanistan in the years to come, plausible.

In December 2001, European police linked the death of Massoud to Al Qaeda.[443] It is likely that Osama bin Laden and Mullah Omar had anticipated that Massoud would form an alliance with the US following 11 September 2001, so they had him killed. Had Massoud been able to forge an earlier alliance with the US it is possible that bin Laden may not have provoked the US with such deliberate acts of terrorism.[444]

On 7 October 2001, the US led a major offensive and airstrike into Kabul, through Operation Enduring Freedom.[445] In November 2001, the Northern Alliance defeated the Taliban and re-entered Kabul, where it resumed control as an interim government. The assassination of Massoud was lamented by those now in power, none more so than Dr Abdullah Abdullah, who was quoted as stating that Massoud's 'hope, energy, charisma, and leadership would now have a great impact'.[446]

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[442] Ibid 78.
[443] Dan Bilefsky and John Carreyrou, 'Belgium, France Detains 14 Suspects In Massoud's Death – Bin Laden Was Behind Killing of Afghan Rebel, Police Say', *Wall Street Journal* (online, 27 November 2001) <https://www.wsj.com/articles/SB1006799203770244880>.
[444] Ibid.
[445] Benjamin S Lambeth, *Air Power Against Terror: America's Conduct of Operation Enduring Freedom* (RAND Corporation, 2006) 203.
[446] Lamothe (n 323) 78.

It is undeniable that Pakistan was behind the rise of the Taliban. Indeed, the evidence is incontrovertible that this influence continues today.[447] The link to this thesis is that a new international intervention in Afghanistan must be supported by a diplomatic agreement with Pakistan, setting out the types of actions and restraints it must take and impose to support the success of the intervention and the re-establishment of security.

5.6 Summary of lessons from the conflicts in Afghanistan relevant to the design and implementation of a policing program

The conflicts in Afghanistan were politically motivated and akin to a game of chess. While one could argue that Afghanistan was a landlocked pawn in all of this, its leaders played a pivotal role in what was a strategic game. On the one hand, they wanted independence from all other nation-states, but on the other they begged for aid when times were tough and would concede influence and make concessions to foreign forces in exchange for that assistance. Some would argue that this was simply a survival strategy for a complex nation separated by provinces, culture and religion yet united by pride in defence of their country. Afghanistan was simply doing what it could to survive.[448]

This history indicates that for Afghanistan political stability is essential, but that this stability is often fleeting as there have been constant assassinations and churn at all levels of the Afghan government for many decades, and indeed centuries. There is sadly no 'fix all' solution to this problem; rather there is a need to galvanise the people first, learn from them, learn from the elders, and then create policy and a strong rule of law model to support those views. Therefore, a future policing intervention must have in place a rule of law mandate that reflects the four key indicators identified in Chapter 2 – an approach that not only encompasses the five pillars of the Durch approach to the rule of law but the Maley philosophy of tribal and customary inclusion, and the Hughes theory of providing professional mentoring and access to justice to the furthest provinces of Afghanistan and inwards and the Whittle approach to extra-legal measures.

The exploration of Afghanistan's history is therefore peppered with critical lessons for its future and for the rebuilding of the state following many generations of conflict, war and invasion. This history also tends to validate the four factors, and their associated components identified in the thesis methodology as being key to assessing and designing a future policing project for Afghanistan. In this

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[447] 'Pakistan/Afghanistan: Pakistan Denies Involvement with Afghan Taliban', *Asia News Monitor* (15 June 2010); Abid Hussain, 'Pakistan's Defence and Spy Chiefs Discuss Security with Taliban', *Al Jazeera* (online, 22 February 2023) <https://www.aljazeera.com/news/2023/2/22/pakistan-defence-minister-isi-head-discuss-security-with-taliban>.

[448] Grant M Farr and John G Merriam, *Afghan Resistance: The Politics of Survival* (Routledge, 2018) 14.

regard, it is arguable that the main lesson for a future Afghanistan is that it is important to build upon customary law in the decision making of the central government. Many commentators have found that, despite decades of war and conflict, rural communities have maintained their strict adherence to their customs and rules. It is therefore critical that all future central governments in Kabul acknowledge that all critical political actors in Afghanistan outside the capital must be included in decision making. Rural and community leaders should thus be given the status and respect they deserve. That cooperation could also be harnessed to deploy more remote police stations, thus lessening the need for mercenary-type forces to protect small towns and communities. It would also provide the ANP at these remote stations an opportunity to gather data and intelligence on insurgent and criminal movement and therefore an indication of where to bolster numbers.

Most Afghans do not want money or material items; rather they want peace and security.[449] There are vast possibilities for wealth in mining and tourism which remain very much unexplored in Afghanistan.[450] The potential is extraordinary and realistic, provided that there are cohesion and cooperation. The central government is entitled to collect taxes and revenue, but it is not entitled to horde wealth through corruption and nepotism, while the rest of Afghanistan remains impoverished. Wealth must be distributed amongst the population and trade encouraged. There have been many discussions about vast rail networks to connect otherwise inhospitable locations.[451] This is essential along with good roads, renewable energy such as solar and wind farms, and better management of water. To enable this, a new policing intervention must be equipped with the intelligence and resources to help Afghanistan purge itself of those organisations that stand against a free and prosperous Afghanistan, as per two of the four elements of accountability and transparency in the rule of law model proposal of this thesis.[452]

5.7 Conclusion

This chapter explored the last two centuries of Afghanistan's history with a focus of conflict, security, administrative arrangement, and policing. This history has both indicated and historically validated each of the four factors and their associated components identified as the methodology underpinning the assessment and design aspects of this study. Having explored the history of war and policing in

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[449] Tamim Hamid, 'What Do Ordinary Afghans Want for the Future?', *TOLOnews* (online, 8 February 2020) <https://tolonews.com/afghanistan/what-do-ordinary-afghans-want-future/>.
[450] 'Minerals in Afghanistan Worth $1 Trillion, U.S. Says', *CNN* (online 15 June 2010) <https://edition.cnn.com/2010/WORLD/asiapcf/06/14/afghanistan.minerals/index.html>.
[451] Samal Jamal, 'Pakistan, Afghanistan, Uzbekistan Sign Strategic Plan for Railway Project', *Gulf News* (online, 4 February 2021) <https://gulfnews.com/world/asia/pakistan/pakistan-afghanistan-uzbekistan-sign-strategic-plan-for-railway-project-1.76961644/>.
[452] 'Supporting the Need for Nation-Building in Afghanistan' (2007) 390 *The Lancet* 914.

Afghanistan and some of the insurgency roots that have remained firmly planted within its provinces, the next chapter will therefore analyse the ISAF policing endeavours with a view to assessing if it paid heed to these historical lessons and the factors they indicate, or attempted to create a new rule of law based on western values – an endeavour directly in contrast to many of the indicators both proposed in this thesis, and apparently proved by the history of policing in Afghanistan.

Chapter 6 examines the ISAF policing endeavour, which is central to the research question posed in this thesis; that is:

1. What impact did the ISAF policing program have on the rule of law in Afghanistan?
2. What lessons can be drawn from the ISAF policing experience to guide future efforts by international actors to promote the rule of law through policing?

Chapter 6
The ISAF policing endeavour

6.1 Introduction

Given the origins of the ANP subsequent to the 2001 invasion, it is important to consider the question of whether or how it can avoid the impression of partiality. How may the ANP be rebranded or reformulated to increase and reinforce its role as protector of all Afghans? In this chapter, these questions are considered in the light of the policing program model distilled in Chapter 2, which has now been tested and validated against both the Iraq and Timor Leste case studies, in light of the historical survey in the previous chapter of the course of conflict, security, and policing in Afghanistan over the last 200 years.

The ANP was first established in 2001 following the invasion of Afghanistan and the toppling of the then Taliban government.[453] Prior to the Taliban resuming control of Afghanistan in 2021, the ANP was seen as the most visible segment of the executive branch, with citizens more likely to come across the ANP than any other departmental or government official.[454] The ANP was part of the Ministry of Interior and directed by the President to enforce the criminal laws of Afghanistan. The 62,000 strong ANP force consisted of the uniformed police, Criminal Investigation Police, Border Police, Civil Order Police, Counterterrorism Police and Counternarcotics Police. Uniformed police made up the majority of all numbers (approximately 40,000 members) followed by Border Police (17,000 members) and Civil Order Police (5,000 members).[455] It is estimated that there was one police officer in Afghanistan for every 576 people.[456]

It is worthwhile at this initial stage in describing the policing arrangements in Afghanistan during the ISAF mission to use a comparison point so that the scope and scale of the ANP can be placed in context. In this regard, Yemen – a country with a similar population and land size to Afghanistan[457] – offers a useful comparison. As of 2010, Yemen had around 170,000 police or one police officer per 235 people.[458] Afghanistan and Yemen share similar histories in terms of civil war and foreign

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[453] Marcus Skinner, 'Counterinsurgency and State Building: An Assessment of the Role of the Afghan National Police' (2008) 4(3) *Democracy and Security* 290.
[454] Ibid.
[455] Sopko (n 22).
[456] Ibid.
[457] 'Countries in the World by Population', *Worldometer* (Web Page, 2025) <https://www.worldometers.info/world-population/population-by-country/>.
[458] Shaima Bin Othman and Mareike Transfeld, 'The State of Police in Western Yemen', *Yemen Policy Center* (Web Page, January 2020) <https://www.yemenpolicy.org/the-state-of-the-police-in-western-yemen/>.

invasions as well as societal and political differences.[459] Similarly, and relevant to the current Taliban era, the Yemen police capacity depends on which group claims authority, but both countries rely on a centralised structure. Afghanistan and Yemen also share similarities with religion and tribal areas that coordinate with police to maintain security. Both countries have a distinct lack of logistical support for police stations and equipment and a deeply entrenched corruption challenge, yet Yemen has double the number of police in comparison to Afghanistan. Therefore – as identified in the consistency, accountability, and engagement factors informing the assessment and design criteria proposed by this thesis - a future policing intervention must focus on recruitment to more effectively police the entire population not just the main provinces and the Capital. A future policing intervention would need to assess the actual numbers of extant police prior to deployment and once again on the ground to ensure there are enough police to meet these essential requirements.

6.1.1 What we know of the ANP

The ANP was arranged into five regional commands with a chief police officer assigned to each of the 34 provinces.[460] The 2004 Constitution provided that the attendance at or first response to crime is the duty of the police, while investigation and prosecution are left to the Attorney General's Office (Saranwal).[461] Thus, the main duty of the ANP was to detect crime. The ANP also operated a forensic laboratory in Kabul, which was responsible for fingerprints, drug testing and crime scene analysis.[462] Yemen has a similar legal system to Afghanistan in that it is governed by Sharia law, formal judiciary, and customary law.[463] Yemen is an Islamic and independent sovereign state, and like Afghanistan, also provides that police will be responsible to preserve the law and implement the laws of the judiciary in much the same manner as Afghanistan.[464]

Entry-level training for the ANP was conducted at the Central Training Centre in Kabul or at one of seven regional training centres located in Kandahar, Herat, Gardez, Mazar-i-Sharif, Konduz, Jalalabad and Bamyan.[465] Recruits attended an eight-week training program covering the following areas: general police duties, weapons proficiency, first aid, human rights training, community policing, basic border police training, and the law and culture of Afghanistan.[466] Many recruits underwent specialised

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[459] Ibid.
[460] Ibid.
[461] *Constitution of the Islamic Republic of Afghanistan* (2004) art 134.
[462] Giustozzi and Isaqzadeh (n 28) 9.
[463] Mark S Wagner, *Jews and Islamic Law in Early-20th-Century Yemen* (Indiana University Press, 2015) 2.
[464] *Constitution of Yemen 1991* (Rev 2015). See art 1 and art 39.
[465] Task Force Phoenix J-3 Police, *Afghanistan Uniformed Police Smartbook: Manual for Incoming PMT/PTT* (2009) <https://info.publicintelligence.net/AfghanPoliceManual.pdf>.
[466] Ibid 5.

training courses in bomb disposal, fingerprinting, traffic management, unarmed combat, crime scene investigation, advanced firearms instruction or civil order/riot control skills. ANP officers and non-commissioned officers were trained at the National Police Academy in Kabul.[467] The academy's three-year training program for officers graduated its first class of 251 *sarans* (second lieutenants) in August 2005.[468] The academy's nine-month non-commissioned officer program trained more than 2,500 police sergeants, including more than 50 women. Training at the National Police Academy consisted of police operations, tactics, traffic policing, management and criminology.[469]

When assessed against the 4-step (element) proposal for the rule of law approach identified for this thesis in Chapter 2, it appears that the ANP structure, depending on whether it is intact in a future police intervention, is appropriate to police all of the provinces to effect public security. This is, however, a 'big if' in that the current state of policing and the ANP is difficult to determine. This means that the start point for a future policing project in Afghanistan may well be quite different given that the ANP and its systems and capabilities may well have been dismantled. Consequently, it is essential to fully critique, in the light of the thesis methodology, the ISAF policing endeavour as an ab initio project may well be the requirement for a future program. This next section of the thesis will therefore examine the ISAF policing endeavour in order to identify how and why it was ultimately unsuccessful. This chapter will thus examine the training failures of ISAF and coalition partners along with the serious flaws identified not only in the rule of law mandate as set by the UNSC, but also the delay in progressing the mandate. This analysis will then set the scene for the methodology guided Chapter 7 assessment of the legal architecture in Afghanistan as it applies to policing, with a view to providing methodology informed recommendations in the appendix to this thesis, which are intended to assist in project assessment and design in order to ensure a more successful future policing intervention in Afghanistan.

6.2 ISAF policing context

ISAF was established in 2001 by UNSC Resolution 1386 'to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment'.[470] It is not obvious what the ISAF specifically did in relation to policing in Afghanistan. The conditions in

[467] Ibid.
[468] Giustozzi and Isaqzadeh (n 28).
[469] Ibid.
[470] SC Res 1386, UN Doc S/RES/1386 (20 December 2001); *Letter Dated 19 December 2001 from the Permanent Representative of Afghanistan to the United Nations Addressed to the President of the Security Council*, UN Doc S/2001/1223 (19 December 2001) para 3.

Afghanistan following the insertion of the ISAF by way of Resolution 1386 were poor across many sectors, but none more than security and the rule of law, which by the time the ISAF was set up was essentially non-existent.[471]

For the assessment and design purposes of this thesis, the key question is how and to what extent did the ISAF, the coalition and the newly formed interim authority of Afghanistan promote and implement the rule of law through a policing program. However, prior to exploring this critical question it is first important to understand the three types of law in Afghanistan:

1. Sharia law.
2. State law; and
3. Customary law.

All three sources of law are discussed later in the thesis in more detail, but when the ISAF entered Afghanistan, it faced a complex tapestry of the rule of law. On one hand there was Sharia law, which was the longest-standing law in Afghanistan.[472] Sharia law is a pivotal concern to state building in Afghanistan due to its resonance with Islam as a way of life.[473] State law was embodied in instruments such as the Constitution of Afghanistan and other codified laws. A number of formal institutions such as the ANP were established to enforce those laws, however due to the security situation the application of state law rarely stretched beyond the borders of towns and officials.[474] Customary law, which operated primarily through the tribal codes of the Pushtunwali (the traditional code of conduct), was given effect through the institution of *jirga* (a tribal council).[475] It operated mainly outside the provincial areas of Afghanistan and typified a governance rather than a government approach to the rule of law.[476] Once again, the importance of consistency between the centre and the regions, and engagement in the form of program relevance for the regions and the incorporation of customary processes and mechanisms, is evident in the Afghanistan policing experience.

What then was the role of the ISAF and other coalition partners in terms of the implementation of the rule of law? According to Maley, the ISAF did not exercise due diligence in advancing the rule of law. It seems more effort was put into the westernised formulation of the 2004 Constitution to ensure

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[471] Barfield (n 179) 19.
[472] Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2012).
[473] Barfield (n 179) 213–39.
[474] Maley, 'The Rule of Law and the Weight of Politics' (n 27) 67.
[475] Ibid 69.
[476] Ibid.

that the international community had a strong influence on elections until at least 2009, rather than into establishing a legitimate and sustainable rule of law culture.[477]

The consequence of this was, at the time, a continuation of what was perceived to be a puppet regime in Afghanistan – a historical parallel which has cursed the country since the Great Games of the British as identified in Chapter 4. This could do little other than generate a continued distrust amongst the population, rubbing against the key factors of consistency in terms of appropriateness of mandate, and transparency in respect of the agendas at the centre.

Vendrell argues that it was a mistake to impose a westernised approach to the governance of Afghanistan on what has predominantly been a tribal society.[478] One US assessment of the success of the implementation of the rule of law in Afghanistan indicated that efforts never really got off the ground.[479]

6.2.1 Counterinsurgency (COIN)

The US Army and the US Marine Corps published a joint field document on 'counterinsurgency' in 2006 which would ultimately support its approach to the Taliban in Afghanistan.[480] The same document provided barely a glance at the rule of law under the tile of 'legal considerations'. The document describes some of the key aspects of the rule of law as:

> - A government that derives its powers from the governed and competently manages, coordinates, and sustains collective security, as well as political, social, and economic development. This includes local, regional, and national government.
> - Sustainable security institutions. These include a civilian-controlled military as well as police, court, and penal institutions. The latter should be perceived by the local populace as fair, just, and transparent.
> - Fundamental human rights. The United Nations Declaration on Human Rights and the International Convention for Civil and Political Rights provide a guide for applicable human rights. The latter provides for derogation from certain rights, however, during a state of emergency. Respect for the full panoply of human rights should be the goal of the host nation; derogation and violation of these rights by HN security forces, in particular, often provides an excuse for insurgent activities.[481]

COIN, at least by this definition, is therefore not an appropriate vehicle to enforce the rule of law as it is designed to enforce security measures and quell insurgent forces. This position is reinforced by the

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[477] Ibid 75.
[478] Francesc Vendrell, 'The International Community's Failures in Afghanistan' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 53, 53.
[479] Muzhgan Wahaj, 'There and Back Again: The Collapse of the Rule of Law in Afghanistan', *International Bar Association* (online, 28 April 2023) <https://www.ibanet.org/rule-of-law-Afghanistan>.
[480] US Army, *FM 3-24/MCWP 3-33.5, C1: Insurgencies and Countering Insurgencies* (Field Manual, 2014).
[481] Ibid 13–14.

ISAF/COIN operations, which were considered a glaring failure in Afghanistan. Despite years of training and resources from ISAF, morale in the ANSF was low. There were ghost attendance and insufficient equipment, and COIN was a two step forward two step back process in Afghanistan and did not really make significant inroads.[482] Perhaps this was due to having too many competing priorities in what was a completely disjointed and uncoordinated approach by ISAF. Eikenberry states that 'the COIN paradigm was applied with such unquestioning zeal [in Afghanistan] that critical thought was often suspended' and 'Before the next proposed COIN toss, therefore, Americans should insist on a rigorous and transparent debate about its ends and its means'.[483]

Despite these failures at the ISAF level, COIN could be useful to complement the police-led four-step approach to the rule of law as it could be utilised in the initial phases of operation to provide 'comprehensive civilian and military efforts made to defeat an insurgency and to address any core grievances'.[484] A COIN force could operate in the outer cordon to defeat a resistant insurgency to allow a new deployment to enforce the four-step approach to the rule of law. COIN is a concept far better suited and used by military forces in operations in the security environment, which in a new police-led mission will be essential to support the four-step rule of law approach.[485] With sufficient phased planning, a COIN operation could be a useful force element of a police-led return to Afghanistan to provide the security the population desperately needs, to enable a post-conflict rebuilding of the criminal justice system.[486]

6.2.2 ISAF rule of law failures

The COIN approach from the US perhaps only reinforced the scale of challenges of promoting the rule of law in Afghanistan. It was also deaf to several of the key factors identified here as necessary for a rule of law and policing project in Afghanistan. This was not least in respect of both components of transparency: a failure to focus (and explain) the extra-legal measures model on rule of law rather than counter-insurgency outcomes; and a preoccupation with insurgency which ignored early action against corruption and organised crime (which in some respects fuelled the insurgency).

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[482] Christopher Paul and Colin P Clarke, *Counterinsurgency Scorecard Update: Afghanistan in Early 2015 Relative to Insurgencies Since World War II* (RAND Corporation, 2016).
[483] Karl W Eikenberry, 'The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN' (2013) 92(5) *Foreign Affairs* 59, 60.
[484] NATO, *Counterinsurgency: A Generic Reference Curriculum* (Report, 2017) <https://www.nato.int/content/dam/nato/webready/documents/deep/deep-counter-insurg-curr-en.pdf>.
[485] Metin Gurcan, *Seeing the Other Side of the COIN: Problematization of 'Our' Counterinsurgency (COIN) Efforts in Afghanistan* (Report, Istanbul Policy Center, 2016).
[486] Ibid; Eikenberry (n 483).

There are a range of other glaring issues with this approach by the US, given they were the lead in the invasion and subsequent operations in Afghanistan. One is that the program adopted failed spectacularly on the issue of consistency in terms of a meticulous, detailed, planned, and resourced policing mandate to be actioned ab initio. This is perhaps most starkly illustrated by the fact that the US and its partners were deployed into Afghanistan from 2001, yet they had no policy on the rule of law until 2006. This would indicate that there was no serious approach to the rule of law until at least 2006, some five years after the invasion. What then were US and other coalition partners doing in terms of the rule of law before 2006. Moreover, even when the rule of law did gain some recognition in the counterinsurgency document, it took the form of a minimalist approach to the rule of law that was not 'particularly robust or thorough' and which failed to define what conception of the rule of law it referred to.[487]

The rule of law model set out in Chapter 2 would have ensured the early provision of public security to allow effective border control and the early prevention of crime rings to reestablish law and order. The Maley approach – which informs the Chapter 3 methodology developed for assessment and design – would have ensured that customary law was carefully considered during the early implementation of the rule of law, and the Whittle concept of extra-legal measures would have enabled the Farrell approach of transparency and accountability to be at the forefront in the management of the rule of law mandate from both the UNSC and the interim administration.

That said, the rule of law was debated within the UN at the United Nations World Summit in 2005, where it was identified by then world leaders as one of the four key areas demanding greater attention.[488] Following the summit, the UN General Assembly debated the rule of law annually and adopted annual resolutions.[489] While there was no readily identifiable rule of law policy in relation to the transitional arrangements from the NATO-led invasion to the UNSC resolution supporting the ISAF, the wording of those resolutions is important in terms of the rule of law program, which could and should have been implemented for Afghanistan. As the following analysis will illustrate, the ISAF failure on this count was not one of imagination or concepts for the UN had clearly developed detailed rule of law advice and guidance. Rather it was a failure to even take cognizance of this advice and guidance.

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[487] Bryce G Poole, 'Counterinsurgency and the Rule of Law in Afghanistan' (2022) 33(7) *Small Wars & Insurgencies* 1093, 1096.
[488] 'The Rule of Law in the UN's Intergovernmental Work', *United Nations and the Rule of Law* (Web Page) <https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/the-rule-of-law-in-un-work/>.
[489] Ibid.

The wording of Resolution 1386 indicates that the ISAF was to assist Afghanistan with policing through the word 'security', which should not be strictly interpreted as referring to military forces only. It may be, however, that the original responsibility for police forces was held by the interim Afghanistan administration. An agreement was struck in 2002 between the ISAF and the interim Afghanistan administration, which placed the responsibility for the police fairly and squarely at the feet of the administration, not the ISAF.[490] This agreement, *Afghanistan: Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, states at article III (1):

> The Interim Administration recognises that the provision of security and law and order is their responsibility. This will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised human rights and fundamental freedoms, and by taking other measures as appropriate.[491]

The level of specificity and distinction in relation to police as opposed to the military is confirmed in article III (2), which can be read as stating that ultimately the Afghan military forces could only operate with the approval of the ISAF commander.

Hence it can be argued that the requirements of a police force in Afghanistan from January 2002 were far from the minds of the occupying force, not simply by neglect but by agreement. That focus was shifted to the Office of Military Cooperation – Afghanistan which was created in 2002 and was part of the US Embassy of Kabul, not the US Department of Defense.[492] Hence, it would appear from the ISAF approach that there was a greater focus on security in the first six years of the invasion than the rule of law. The neglect of ANP by ISAF was captured in a report by the UNGA in 2006:

> The Afghan National Police has limited ability to project itself outside Kabul. Once deployed to the regions, police officers lack sufficient leadership, equipment and facilities to perform their role. They lack premises, vehicles and communication equipment and salary structures. This situation is compounded by the absence of a functioning judicial and penal system. Furthermore, there is no comprehensive strategy to provide officers with on-the-job training. In some cases, provincial reconstruction teams provide officers with mentoring, logistical assistance and equipment, but this approach is not uniform.[493]

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[490] *Afghanistan: Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan*, UN Doc S/2002/117 (2002).
[491] Ibid.
[492] Terrence K Kelly et al, *Security Force Assistance in Afghanistan: Identifying Lessons for Future Efforts* (RAND Corporation, 2011) ch 2.
[493] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security: Emergency International Assistance for Peace, Normalcy and Reconstruction of War-Stricken Afghanistan*, UN Doc S/2006/145 (7 March 2006) para 18.

The assessment and design factors identified as key by the analysis in this thesis would require that a rule of law mandate and security sector reform be used in tandem in a future policing intervention in Afghanistan rather than one before the other, as well as systematic planning and integration as per the 'consistency' factor.[494] This could have been achieved by having a military backed, but police-led intervention, where the military could provide the security while the police and all other judicial system professionals could enforce the rule of law mandate. This then brings the analysis to the point of a closer examination of the policing endeavour itself.

6.3 ISAF policing project

6.3.1 German ANP training failure

In April 2002, international donors met at the G8 conference in Geneva and agreed on a security sector reform plan for Afghanistan, which was divided into five pillars, with each nation taking a lead role in a particular pillar. In the case of policing, this responsibility landed with Germany.[495] Much of this effort was in Kabul and it was limited to 41 German police officers from 2002 to 2006. Germany was subject to considerable criticism by 2006, as it had only trained 16,000 ANP, most of them officers in Kabul, against the 40,000 that the US had trained in the same period. This was despite Germany having responsibility for policing under the agreement.[496] Germany was put under strong pressure in this period by NATO and the EU, because it kept its forces in the relative calm of the north as opposed to the more volatile and dangerous south.[497]

By 2012, Germany, after 10 years in Afghanistan, had trained a total of 56,000 police officers – a far cry from the scale that the Yemen comparison would indicate as necessary – despite carrying the lead in that role, with some commentators stating that they had poorly prepared the ANP to tackle the many challenges that would emerge after the coalition withdrawal.[498] The German police approach to a new curriculum, involving training the trainer for non-commissioned ANP officers in 2011, was criticised for not including training with light machine guns. Rather it was focused on the types of civilian policing that the Germans would implement back in Germany.[499] This importation of such a foreign and centrally managed system, with little attention to customary structures or regional implementation, was ignorant of the consistency-perception and consistency-regional focus factors,

[494] Bleiker and Krupanski (n 26).
[495] European Court of Auditors, *The EU Police Mission in Afghanistan: Mixed Results* (Report, European Union, 2015).
[496] Dempsey (n 29).
[497] Ibid.
[498] Ulrich (n 257).
[499] Ibid.

and the engagement requirement of avoiding the trap of policing that is centre-focused and regionally irrelevant. To be fair, however, Germany was not the only donor country in Afghanistan to have created a training curriculum that does not meet the demands of a country where a paramilitary police force, or at least an arm thereof, is a necessity. As the next section explains, other donor countries also supported programs that were drawn from unsimilar policing contexts.

6.3.2 US private contractors' ANP training failure

There has also been a focus on the training of the gendarmerie arm of the police in Afghanistan from 2001, who were responsible for policing the vast borders of Afghanistan. Much of this training was conducted by US private contractors such as DynCorp or Xe, some of which were implicated in problematic activities, including activities described as atrocities.[500] Xe, formerly known as Blackwater, infamously killed 17 Iraqis in Baghdad in 2007, hardly a recommendation on either company's resume for Afghanistan.[501] In 1999, DynCorp were responsible for trafficking young girls for sex while training police in Bosnia.[502] Yet despite these records of rule of law violations, these contractors were handed multi- million-dollar contracts to train the Afghan gendarmerie. While there were some modest results, most of the training failed to eventuate.[503]

It is arguable therefore that private contractors should not be engaged in the first place to undertake such a monumental task. They could quite rightfully be seen by the population as mercenaries seeking quick money. This is a clear breach of the consistency factor in terms of the need to take cognisance of likely local perceptions of the trainers. There were also criticisms of DynCorp, with the Italian police deployment (Carabinieri) stating that the US contractor failed even to teach trainees how to shoot in body armour, which goes to the consistency issue of a properly planned and integrated policing mandate.[504]

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[500] Peter W Singer, 'The Dark Truth about Blackwater', *Brookings* (Web Page, 2 October 2007) <https://www.brookings.edu/articles/the-dark-truth-about-blackwater/>.
[501] Pratap Chatterjee, 'Policing Afghanistan: How Afghan Police Training Became a Train Wreck', *Global Policy Forum* (Web Page, 21 March 2010) <https://www.globalpolicy.org/us-military-expansion-and-intervention/afghanistan/48857-policing-afghanistan-how-afghan-police-training-became-a-train-wreck.html/>.
[502] 'Sex Trafficking Scandal in Post-conflict Bosnia', *International Code of Conduct Association* (Web Page) <https://icoca.ch/case-studies/sex-trafficking-scandal-in-post-conflict-bosnia/>.
[503] 'US Firm Slammed Over Afghan Police Training', *Tribune Business News* (online, 16 August 2021) <https://virtual.anu.edu.au/login/?url=https://www.proquest.com/wire-feeds/us-firm-slammed-over-afghan-police-training/docview/883659074/se-2>.
[504] Cornelius Friesendorf, 'Gendarmeries in Multinational Operations' (2017) 21(1–2) *Journal of International Peacekeeping* 125.

This criticism of US contractors was consistent with my own experience during my deployment to Afghanistan in 2010–2011. The ANP recruit training program was largely implemented by the Australian Federal Police (AFP) in Tarin Kowt. My key responsibility was to take recruits through live weapon range practice, which was done in body armour. In fact, the training curriculum we conducted, which is on file with the author, was similar to that endorsed by the Carabinieri, where ANP recruits were taught to detect improvised explosive devices (IED), both worn and vehicle borne. Fire and movement were taught in the provincial training centre (PTC) by highly experienced hand-picked tactical operators from the AFP's elite Operational Response Group. Police powers and criminal offences were taught as classroom theory. The ANP graduates from the PTC in Tarin Kowt were therefore prepared to confront the difficulties that awaited them, although the mortality rate of graduate police was shockingly high, with approximately 75 killed a week in 2013.[505] Some commentators called for militarised police bodies to be part of international deployments, but this would have to be provided in conjunction with mentoring and training.[506] This position would be in line with how this thesis would see a future police intervention deploy to Afghanistan, noting the presence of insurgent networks in Afghanistan noted previously.

The state of policing in Afghanistan was grim in 2003, when NATO took command of the mission. The ANP was literally non-existent and in its place was a militia answering to local and national authoritarian leaders.[507] The need to deal with this issue – the accountability component of legacy loyalties – was evident from the earliest days of the project but was left un-remediated. It was only in 2009, six years after assuming responsibility, that the NATO command established a training mission for Afghan military and police through the NATO Training Mission Afghanistan (NTM-A). The mandate of the NTM-A was to support the development of capable and self-sustaining Afghan National Security Forces (ANSF) which comprised the Afghan National Army and the Afghan National Police (ANP).[508] In 2012, the British Ambassador to Afghanistan, Sir William Patey, stated: 'the opportunity to train and equip the [ANSF] to fill the power vacuum was missed, allowing the Taliban to return'.[509] This observation holds true for the ANP. Indeed, one could argue that efforts to establish a capable police force to enforce the rule of law were in vain, from 2002 until the majority coalition withdrawal in 2014 and final withdrawal in 2021.

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[505] Ibid.
[506] Ibid.
[507] Ibid.
[508] Nick Barley, 'The NATO Training Mission – Afghanistan: A Game-Changer; Lest We Forget', *Small Wars Journal* (online, 12 May 2015) <https://archive.smallwarsjournal.com/index.php/jrnl/art/the-nato-training-mission-afghanistan-a-game-changer-lest-we-forget>.
[509] Ibid.

Most coalition partners knew that a strong national policing agency was required to provide law and order while the military forces battled the Taliban. Decades of wars had eroded the foundations of the national police force rendering it dysfunctional. The US tried to address this issue by having regular soldiers and contractors train the gendarmerie and police, but this ultimately failed. This should have been conducted by serving police from coalition partners, who have brought to the table the collective hands-on experience of policing communities. That is, the initial distrust of trainers due to background and perceived interest could and should have been defrayed by employing actual police – people who the recruits could at least in part identify with – as indicated by the consistency factor. The US appeared to eventually understand this dilemma and then turned to the Italian Carabinieri to train the gendarmerie, or what was termed the Afghan National Civil Order Police (ANCOP), which operated across Afghanistan rather than within the confines of districts, like the ANP.[510] The ANCOP were well trained by the Carabinieri, with the course running for 16 weeks, as opposed to the 6–8 weeks for the ANP.[511]

The Carabinieri trained over 11,000 ANCOP from 2008 to 2013, often in partnership with the French gendarmerie.[512] The training morphed from a focus on public order to light infantry tactics, to the point that the ANCOP were able to secure contested districts and keep them clear of the insurgency.[513] This capability would be well placed in any future rule of law policy and implementation, as discussed in Chapter 7 and would align well with the 'engagement' factor requirements for a responsive regional focus within the context of central policing management.

6.3.3 European Union Police Mission in Afghanistan (EUPOL) ANP training failure

The EUPOL was established in Afghanistan in 2007, with a mission to support the Afghanistan Government to 'build … a civilian police service that operates within an improved rule of law framework and in respect of human rights'.[514] It followed the German mission discussed above, which

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[510] 'Afghan National Security Forces', *NATO* (Web Page, 26 October 2010) <https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2010_11/20110310_101122-media-backgrounder-ANSF.pdf>.

[511] Brian Brannon, 'ANCOP Recruits Learn Police, Military Techniques', *Defence Visual Information Distribution Service* (Web Page, 12 March 2010) <https://www.dvidshub.net/news/61290/ancop-recruits-learn-police-military-techniques>.

[512] Cornelius Friesendorf, 'Police Assistance as Foreign Policy: Explaining Donor Practices' (2016) 42(2) *Review of International Studies* 377.

[513] Ibid.

[514] European Union, 'EU Police Mission in Afghanistan' (Fact Sheet, January 2016) 1 <https://eeas.europa.eu/archives/docs/csdp/missions-and-operations/eupol-afghanistan/pdf/eupol-afghanistan-factsheet-january-2016_en.pdf>.

had been underperforming in its efforts to train the ANP. According to some commentators, the EUPOL mission, at least in 2007 and 2008, did not perform any better than the German mission.[515]

Over two thirds of those deployed with EUPOL were posted to Kabul in relative safety, with less than one third deployed to the provinces.[516] The main objective of EUPOL was to train high-ranking ANP officials, provide leadership in coordinating training efforts across the EUPOL remit through the International Police Coordination Board Afghanistan (IPCB), and improve police communication and intelligence collection.[517] The IPCB Afghanistan was established in Kabul in 2007 and with it came the introduction of *The International Police Coordination Board Omnibus Agreement and Mandate*.[518] Article 2(6) stated that:

> A unified and common approach to Police Advising, Mentoring, Assisting and Training Programs is required, including the sharing of information on each member's police development and reform programs

The major challenge for the EUPOL mission was motivating foreign law enforcement agencies to mentor and train the ANP in rural and provincial Afghanistan.[519] This is part of the broader challenge of how to involve rural and provincial Afghanistan when promoting the rule of law to Afghanistan, as discussed in Chapter 7. This experience also serves to highlight the importance to success of the factors of engagement and consistency in terms of regional implementation and perception.

6.3.4 NATO Training Mission Afghanistan

The launch of the NTM-A in 2009 saw a shift in methodology of police training to a military method, which was at odds with the German civilian-centric model, which in turn was based on the domestic separation of laws in Germany between the police and the military, following World War 2 atrocities.[520] The approach by NATO and the US prioritised the training of as many ANP as possible to prepare for the counterinsurgency of the Taliban. However, this approach did not focus on longer term institutional change.[521] The US training relied more on use of force training for survival than the

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[515] Christopher S Chivvis, *EU Civilian Crisis Management: The Record So Far* (RAND Corporation, 2010) ch 3.
[516] Ibid.
[517] 'IPCB Mandate', *International Police Coordination Board of Afghanistan* (Web Page) <https://ipcb.wordpress.com/about/ipcb-mandate/>.
[518] Ibid.
[519] Ibid.
[520] Codrin Timu and Martin Ibler, 'The German Separation between Police and the Offices for the Protection of the Constitution: Legal Framework' (2016) 2 *Constitutional Law Review* 36.
[521] Feyyaz Barış Çelik, 'The "5,000-Kilometre Screwdriver": German and French Police Training in Afghanistan through the EU and NATO' (2021) 7(1) *Global Affairs* 27, 32.

German civilian model, which was based on the protection of human rights, putting the German and US training methods at odds. Once again, the lack of consistency in the form of a clearly planned, integrated, and adaptable policing project was evident even in this new shift of focus.

The French commitment to NTM-A, by contrast, was more tailored to the needs of the ANP, albeit this commitment came later in the mission following an initial reluctance to take part in the conflict.[522] France argued that the security situation in Afghanistan required the ANP to be trained in counterinsurgency tasks, which was the basis of the training model that the AFP provided in Tarin Kowt in 2010–2011. The French viewed the German-led EU mission as a failure and considered the EU model of civilian police training, which had been effective elsewhere, such as West Africa, as unsuited to Afghanistan, where security on the ground was so poor.[523] The French commitment to the NTM-A remains a very instructive blueprint for future policing operations into Afghanistan. This commitment consisted of gendarmerie that were paramilitary in nature, with origins dating back to the Napoleon era, using a hybrid police and military model.[524]

The French position was that the ANP played more of a gendarmerie role than a strict policing one and that the ANP should act to protect the population in a paramilitary fashion while the military combatted adversaries.[525] This position was certainly appropriate while the Taliban were the insurgency and could form a blueprint should the Taliban once again be forced out of power. This approach also resonated with the need to prioritise local trust by acting against the direct threats experienced by the population – particularly of organised criminal activity and militias – by developing an appropriate capability designed for these ends. Hence the French voted in favour of the NATO-led mission in 2009 for the training of police through the Police Operational Mentoring and Liaison Teams (POMLT), which were military led, not civilian. The French training model was intended to create a robust and battle-ready ANP and was highly regarded by US and NATO officials. This deployment in 2009 was through the European Gendarmerie Force, which consisted of donor country members from France and 'four other European states with paramilitary police forces, namely, Italy, the Netherlands, Portugal and Spain'.[526]

The fractious, diverse, and often un-coordinated history of ISAF and NATO policing endeavours in Afghanistan is clear testament – in the negative – to a failure to consider the key factors identified in Chapter 2. That is, the analysis as set out above clearly indicates that the absence of these factors is

[522] Ibid 28.
[523] Ibid 34.
[524] Ibid.
[525] Ibid.
[526] Ibid 36.

both correlated with, and arguably a contributory cause of, the overall failure of this policing project. But the NATO/ISAF policing project was not the only rule of law related project, and the next section of this chapter details the UN presence of UNAMA in Afghanistan, which had been in place since the NATO invasion in 2001.

6.4 United Nations Assistance Mission in Afghanistan (UNAMA)

The United Nations Assistance Mission in Afghanistan (UNAMA) was deployed to assist the Afghan Government and its people to achieve stability and peace. The mission aimed to achieve this by ensuring Afghanistan was led by Afghans and that it was premised on a culture of peace built upon a strong foundation of the rule of law.[527] UNAMA remains in Afghanistan, but is now more focused on monitoring issues such as the detention of women and girls, noting that the Taliban has little interest in the rule of law.[528]

6.4.1 The UNSC UNAMA mandates

UNAMA was set up in March 2002 by way of invitation by the then Government of the Islamic Republic of Afghanistan GIRoA and through UNSC Resolution 1401, and as laid out in the UNSC Report S/2002/278 by the UN Secretary General. The mandate in that report was as follows:

> (a) Fulfilling the tasks and responsibilities, including those related to human rights, the rule of law and gender issues, entrusted to the United Nations in the Bonn Agreement, which were endorsed by the Security Council in its resolution 1383 (2001).
> (b) Promoting national reconciliation and rapprochement throughout the country, through the good offices role of my Special Representative.
> (c) Managing all United Nations humanitarian relief, recovery and reconstruction activities in Afghanistan, under the overall authority of my Special Representative and in coordination with the Interim Authority and successor administrations of Afghanistan.[529]

6.4.2 The changing mandates from a changing landscape

The mandate of UNAMA changed over the duration of the Afghanistan mission following the Bonn Agreement, commencing in 2006.[530] The 2006 report from the Secretary-General added to the UNAMA mandate building national disaster management capacity, providing advice for the peace

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[527] SC Res 2513, UN Doc S/RES/2513 (2020).
[528] 'UNAMA Deeply Concerned Over Detentions of Afghan Women and Girls', *UNAMA* (Web Page, 11 January 2024) <https://unama.unmissions.org/unama-deeply-concerned-over-detentions-afghan-women-and-girls-0>.
[529] *The Situation in Afghanistan and Its Implications for International Peace and Security*, UN GAOR, 56th sess, Agenda Item 43, UN Doc A/56/875-S/2002/278 (18 March 2002) [97].
[530] SC Res 1662, UN Doc S/RES/1662 (2006).

process and providing good offices. The report mandated UNAMA to provide technical assistance in the disbandment of illegal armed groups (an important accountability component insofar as militia demobilisation and legacy loyalties must be addressed) and support the Independent Electoral Commission as well as manage all UN humanitarian relief, recovery, reconstruction and development activities in Afghanistan.[531] In the first four years of UNAMA's presence in Afghanistan, the UN had started to mandate quite specific tasks particularly in relation to elections, disaster management and disbandment of illegal armed groups. In 2007, the UNSC stressed that UNAMA should promote a more coherent international engagement in support of Afghanistan, along with the Afghan government and the UNSC.[532] The UNSC widened this coherent approach in 2008, when it requested UNAMA to cooperate with ISAF to improve civil/miliary cooperation across Afghanistan.[533] It is fair to say that in terms of the need for consistency of a detailed, integrated, planned mandate, UNAMA offers a general indicator of what partial success in this respect can look like, even though it was not specifically focused on policing.

The 2010 resolution provided for a very specific rule of law obligation on UNAMA to support and strengthen efforts to improve governance and the rule of law including transitional justice and to combat corruption at the local and national levels.[534] In 2011, the UNSC called for a complete review of UNAMA's mandate but otherwise extended UNAMA's tenure in Afghanistan.[535] The years 2013-2014 saw UNAMA release a number of reports into the dire situation in Afghanistan in terms of civilian deaths and torture along with the handover and transition of Afghanistan back to Afghan control.[536] The years of 2015-2018,[537] saw an increase in concern by the UNSC for the protection of women and children with four separate resolutions obligating UNAMA to continue to report on these human rights abuses. There was little change to the UNAMA mandate from 2019 to 2023, with the UNSC extending its tenure in Afghanistan.

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[531] *Report of the Secretary-General: The Situation in Afghanistan and its Implications for International Peace and Security: Emergency International Assistance for Peace, Normalcy and Reconstruction of War-Stricken Afghanistan*, UN Doc S/2006/145 (7 March 2006).
[532] SC Res 1746, UN Doc S/RES/1746 (2007) para 4.
[533] SC Res 1806, UN Doc S/RES/1806 (2008) para 4(b).
[534] SC Res 1917, UN Doc S/RES/1917 (2010) para 5(b).
[535] SC Res 1974, UN Doc S/RES/1974 (2011) para 43.
[536] SC Res 2096, UN Doc S/RES/2096 (2013); SC Res 2145, UN Doc S/RES/2145 (2014).
[537] SC Res 2210, UN Doc S/RES/2210 (2015); SC Res 2274, UN Doc S/RES/2274 (2016); SC Res 2344, UN Doc S/RES/2344 (2017); SC Res 2405, UN Doc S/RES/2405 (2018).

6.4.3 The UNAMA reports on promotion of the rule of law

UNAMA has a broad footprint across Afghanistan by way of its Good Offices network, which assists in high-level mediation and conflict prevention.[538] This is a great concept in a country with overall reasonable security, and it is a credit to the members of UNAMA that they braved some of the more volatile and dangerous locations of their offices. The 20th office was opened in Sar-i-Pul in the north of Afghanistan in 2009. There was talk of opening a further three, but whether this happened cannot be confirmed, given the Taliban's stance on international law and organisations.[539] Nevertheless, this clear UNAMA recognition of the need for regional focus and perception was a testament to the consistency and engagement factors identified in Chapter 2, especially with regard to the components of equal regional implementation, avoiding a centre-focused perception (and thus perceived irrelevance). The success of the Good Offices network (on which more below) also offers a case study into how the transparency component of explaining projects and programs to the community might be achieved.

6.4.4 Prisons

The UNAMA Rule of Law team have consistently fought and advocated for the rights of prisoners throughout Afghanistan**.** In 2016, UNAMA reported on the prison system in Afghanistan through UNAMA rule of law field officers stationed in the Good Offices, who had been assigned to assess the health of Afghanistan's prison system. UNAMA reported that access to health services in prisons had improved, through UNAMA's work with the Afghan Government.[540] But the report painted a grim picture of life in prison especially for women and the lack of access to same sex medical practitioners and psychological and psychiatric care. The report concluded that Afghanistan needed to do more to discharge its duty of care to prisoners under domestic laws to satisfy the minimum standards of the Mandela Rules.[541] The Mandela Rules, named after Nelson Mandela, who spent 27 years in prison, consist of 122 rules, as adopted by the General Assembly of the United Nations, and aim to protect the rights and meet the minimum legal standards of prisoners' rights.[542] A future policing intervention

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[538] 'Good Offices', *United Nations Assistance Mission in Afghanistan* (Web Page) <https://unama.unmissions.org/good-offices>.
[539] 'More Offices for UNAMA in Afghanistan', *UNAMA* (Web Page, 22 May 2009) <https://unama.unmissions.org/more-offices-unama-afghanistan>.
[540] UNAMA Rule of Law Unit, *Assessment of Afghanistan Prison Health Services* (Report, March 2016) 23 <https://unama.unmissions.org/sites/default/files/assessment_of_afghanistan_prison_health_services_-_english.pdf>.
[541] Ibid 27.
[542] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) Resolution Adopted by the General Assembly on 17 December 2015 [on the report of the Third Committee (A/70/490)]*, UN Doc A/RES/70/175 (17 December 2015) <https://www.un.org/en/events/mandeladay/mandela_rules.shtml>.

in Afghanistan would benefit from the expert knowledge of UNAMA in terms of these prisoner's rights and internment conditions. This thesis recommends that UNAMA remains mandated to assist Afghanistan to lead this part of the rule of law process, noting the enormous benefit that an intervention would gain from UNAMA and its Good Offices Network. This will ensure that 'consistency' (particularly integration) is applied to the planning stage of a future policing intervention into Afghanistan.

6.4.5 Corruption

The UNAMA Rule of Law Team have worked tirelessly on issues of corruption in Afghanistan, lending technical expertise and providing assistance in seeking donor support for the Afghan Government in curbing corruption. UNAMA is mandated by the UNSC, to support the Afghan Government to enforce governance of the rule of law in relation to corruption.[543] UNAMA, as stated in the report of 2017, was able to assist the Afghan Government appoint anti-corruption bodies and a High Council on the rule of law, to meet its commitments under the *UN Convention against Corruption* (UNCAC).[544] By 2017, UNAMA, had enabled and assisted the then Afghan Government to achieve high level leadership in the fight against corruption, which was a notable shift away from what had been a deeply imbedded culture of corruption.[545] The current situation in relation to corruption is unknown under Taliban rule, and any return to Afghanistan will require UNAMA to assist in ongoing efforts provide technical support to an interim administration on this issue. This aspect of the UNAMA experience, and its relative success (until the Taliban resumption of power) clearly indicates the importance of early action against corruption generally (a component of the transparency factor), as well as the need to deal with corruption as both a general mandate-systemic issue (accountability) and a specifically policing recruitment (transparency) issue.

6.4.6 Peace initiatives and regional security

The real strength of the 'good offices' approach is seen in the example of the Kandahar UN Office in 2017. On 23 April 2017, local government officials, UN members and community elders met in Takhta Pul to discuss development projects and peace initiatives. This meeting concluded that there were infrastructure issues and poor security. One positive outcome reported at the meeting was the new confidence in the police from the population mostly made up of melon, grape and pomegranate farmers. It therefore appears that UNAMA was, working innovatively in the rule of law to create

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[543] SC Res 2344, UN Doc S/RES/2344 (2017).
[544] UNAMA, *Afghanistan's Fight Against Corruption: The Other Battlefield* (Report, March 2017) 1 <https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_the_other_battlefield_-_april_2017-english_2.pdf>.
[545] Ibid 58.

conversations and encourage a feedback loop to the government of the day around some of the main issues that it was mandated to report on, namely peace, security and regional cooperation.[546]

While UNAMA made inroads in supporting the rule of law as mentioned previously, it found the task of advocating for peace and stability much more difficult, noting that ISAF and the ANSF were not doing enough. In its annual report released in February 2018, it announced that more than 32,000 Afghan civilians had been killed and over 60,000 injured in the last decade alone.[547] In February 2019, the High Commissioner for UNAMA stated that the number of children killed in 2018 was the highest on record, with many thousands more children handicapped for life because of attacks on medical facilities and schools. She further stated that the security situation was dire and was preventing many Afghans from enjoying their economic, social and cultural rights.[548]

Many of these civilian casualties were inflicted by suicide bombers from anti-government entities, mainly Daesh/Islamic State Khorasan Province (ISIS-K) but not so much from the Taliban.[549] ISIS killed 63 innocent people at a wedding in Kabul on 17 August 2019 at the height of peace talks between the US and the Taliban. This occurred in an area of West Kabul which consists mainly of ethnic Hazaras who are predominantly Shia and have withstood constant suicide attacks from ISIS in recent years.[550] This could be attributed to a failure by ISAF and the ANSF to protect civilians and drive the insurgency from populated areas and a premature exit by the bulk of ISAF forces in 2014.

The UNAMA 2018 report on protection of civilians (POC) went a step further by stating that civilian casualties from attacks deliberately targeting civilians by Daesh/ISKP had more than doubled, from 843 in 2017, to 1,871 in 2018, mainly from suicide and complex attacks directed at civilians, including deliberate sectarian-motivated attacks against the minority Shia Muslim population.[551] The persecution of Shias is not a new phenomenon, as outlined in the UNSC Resolution.[552] In its preamble, that resolution stated: 'Concerned also by the increasingly ethnic nature of the conflict, by reports of ethnic and religious-based persecution, particularly against the Shiites, and by the threat this

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[546] 'Strong Community Ties Crucial for Good Governance, Kandahar Leaders Say at UN Event', *UNAMA* (Web Page, 23 April 2017) <https://unama.unmissions.org/strong-community-ties-crucial-good-governance-kandahar-leaders-say-un-event>.

[547] UNAMA, *Afghanistan Protection of Civilians in Armed Conflict Annual Report 2018* (Report, February 2019) <https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2018_final_24_feb_2019_1.pdf>.

[548] Ibid.

[549] Ibid 1.

[550] Aleem (n 401).

[551] UNAMA, *Afghanistan Protection of Civilians* (n 547) 2.

[552] SC Res 1193, UN Doc S/RES/1193 (28 August 1998).

poses to the unity of the Afghan State'. This assessment, from a UNAMA perspective, is demonstrative of an international intervention by NATO and ISAF that had failed Afghanistan in the rule of law. It is certainly not a criticism of UNAMA which was not equipped or mandated to enforce the rule of law but rather was mandated to promote it. Nevertheless, even within these limitations, it is clearly arguable that the UNAMA Good Offices network, with its regional presence and resourcing, integration with a coherent mandate, responsiveness to local concerns, focus on explaining projects and shifting perceptions, and its early action on corruption, offers a useful if limited demonstration of what can be achieved where the consistency, accountability, transparency, and engagement factors and their key components are sectorally implemented.

6.5 The current situation – The stepping off point for the next stage of analysis

Sadly, however, it seems that history is repeating itself following the withdrawal of all international forces, and the condemnation of what is essentially 'ethnic cleansing' of primarily Hazarian Shias, is falling on deaf ears.[553] The ISKP have been identified as one of the main perpetrators of violence against Hazarian Shias, but despite Taliban efforts to curb these attacks, insufficient inroads have been made to eliminate the death toll.[554]

The Taliban's ploy prior to becoming the Islamic Emirate of Afghanistan (IEoA) was to attack civilians with vehicle-borne improvised explosive devices and suicide bombers as a retaliation mechanism when negotiations over a peaceful resolution failed or prisoner exchanges with the US fell through.[555] The position of the former Afghanistan Government was to criticise the Pakistani intelligence service for providing recruits to the Taliban ranks. An interesting statement from the same source points the finger squarely at UNAMA and donor countries.[556] The Afghan legal system is weak, corrupt, and now predominantly under the control of the Taliban.[557] The banking system has been the scene of major scandals, and the impact of war and the new government have blocked or

[553] 'Individuals of Hazara Ethnicity and other Shias', *European Union Agency for Asylum* (Web Page, January 2023) <https://euaa.europa.eu/country-guidance-afghanistan-2023/3142-individuals-hazara-ethnicity-and-other-shias>.
[554] Fereshta Abbasi, 'Attacks Target Afghanistan's Hazaras Inadequate Protection Provided for Community Long at Risk', *Human Rights Watch* (Web Page, 3 May 2024) <https://www.hrw.org/news/2024/05/03/attacks-target-afghanistans-hazaras>.
[555] 'Suicide Bombers Attack Afghan Police Academy', *Tribune Content Agency* (2015).
[556] 'Pakistani Agents "Funding and Training Afghan Taliban"', *BBC News* (online,13 June 2010) <https://www.bbc.com/news/10302946>.
[557] 'Afghanistan: Collapse of Legal System is "Human Rights Catastrophe"', *UN News* (Web Page, 20 January 2023) <https://news.un.org/en/story/2023/01/1132662>.

disrupted both trade and investment. In short, the civil sector is even weaker than the security sector.[558]

So, what does this mean for the criminal justice system that is tasked with bringing to justice perpetrators of criminal and terrorist acts against the Afghan people and by extension the government? Much of the security obligation rests with the ANP, but do they have the capacity and logistical support to fulfil this role? What of witnesses and primary or secondary surviving victims of terrorist acts or crimes against the person and property. How will they be protected in order for the perpetrators of these crimes to be brought to justice?

The reports from UNAMA indicate that the rule of law was failing prior to the most recent Taliban takeover, as evidenced by the latest report on anti-corruption (drafted before the current Taliban Administration) in Afghanistan, which showed that efforts to curb corruption were futile. The report states that the lack of effective investigation and subsequent prosecution is 'worrisome'.[559] Afghans had simply forgotten their rights after years of war and conflict.[560] The Afghan government had also time and time again failed the people by not curbing violence in Afghanistan.[561] Reports from UNAMA demonstrate that security was still the main challenge and barrier to the provision of justice services, with 13 judges and 3 court staff killed in 2019, alone.[562] Perhaps equally concerning was the lack of proper investigation into these killings and the lack of indictments or identification of offenders.

There are concerning signs that the westernised approach to the implementation of a rule of law system has failed absolutely. Security and eradication of criminal groups cannot occur without the support of the broader population outside of the capital and the prioritisation of the protection of the judiciary and witnesses to crimes. Lawmakers are the constant target of criminal groups, which in turn

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[558] Daniel F Runde et al, *The Future of Assistance for Afghanistan: A Dilemma* (Centre for Strategic and International Studies, 13 June 2024) <https://www.csis.org/analysis/future-assistance-afghanistan-dilemma>.
[559] 'Local Statement by the Ambassadorial Anti-corruption Group on Good Governance, Anti-corruption and Rule of Law', *UNAMA* (Web Page, 9 July 2020) <https://unama.unmissions.org/local-statement-ambassadorial-anti-corruption-group-good-governance-anti-corruption-and-rule-law/>.
[560] 'New UNAMA Radio Programme on the Rule of Law', *UNAMA* (Web Page, 9 January 2010) <https://unama.unmissions.org/new-unama-radio-programme-rule-law/>.
[561] Hasht-e-Sobh, 'Paper Slams Afghan Government for Failing to Ensure Law, Order', *BBC Monitoring South Asia* (16 September 2018).
[562] 'Afghanistan's Fight Against Corruption, Crucial for Peace and Security', *UNAMA* (Web Page, June 2020) <https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_crucial_for_peace_and_prosperity_english.pdf/>.

prevent the implementation of a rule of law system.[563] The withdrawal of coalition troops from Afghanistan in 2021 was grossly premature and left the country on the brink of collapse once again.[564]

A policing intervention should re-enter Afghanistan and provide the much-needed security to enable anti-corruption reform, proper consultation and linking provincial local law to the rule of law system as consistent with the rule of law factors proposed in this thesis for assessment and design of policing projects. This approach can utilise the existing expert knowledge of UNAMA, and the Afghan wide reach it has through its Good Offices Network in order to engage with trusted elders within in the communities to ensure that a cross section of main concerns of the population can be canvassed and then passed on to a policing intervention.

6.6 Conclusion

Unfortunately, repeated failures in the training of police in Afghanistan were a common feature of the international mission in Afghanistan. It was a compounding of failures and a lack of any really coordinated effort – a failure of consistency. Primacy was given to raising, training and sustaining the ANA but less importance and commitment was given to the ranks of the ANP – a failure of accountability. German training efforts were largely left unmonitored for six years and US efforts to conduct parallel training were poorly coordinated and performed by out-of-touch contractors who were not serving police members in the US.

The international efforts were constrained from the beginning, as Afghanistan in 2001 had not had a functioning police force for over 20 years, due mainly to the Soviet invasion in 1979 and the paramilitary tasks required to repel mujahideen and the subsequent deterioration of the police following the departure of the Soviets and the arrival of the Taliban.[565] The rule of law factors identified in this thesis, particularly the early provision of public security through transparency and accountability in terms of recruitment and training, and regional implementation, should be integrated alongside a protective military force to enable the proper and coordinated establishment of an Afghan police force.

The German efforts that followed the enactment of the Bonn Agreement in 2001 were widely accepted as a failure, with one German diplomat reported to have stated: ‘we had produced a cadet

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[563] Sune Engel Rasmussen, ‘Killing of Former Afghanistan Lawmaker Highlights Plight of Women Under Taliban’, *Wall Street Journal* (online, 17 January 2023) <https://www.wsj.com/articles/killing-of-former-afghanistan-lawmaker-highlights-plight-of-women-under-taliban-11673969588>.
[564] ‘Afghan Observers, UK Concerned Over “Premature” US Withdrawal’, *BBC* (2021).
[565] Chivvis (n 515) ch 3.

shop, but completely ignored the mission on the ground'.[566] The civilian-centric approach by Germany failed as it was dealing with an insurgency as opposed to the domestic policing issues usually faced in the West in peace time. There was also a distinct lack of appetite in Germany to be dealing with the problem of policing in Afghanistan and a preference for EUPOL to oversee and manage the training of the ANP.[567] The failure of the German training mission in Afghanistan was observed by German Chancellor Angela Merkel on her visit to Kabul 2007, where she famously stated that 'if there is one area in which Germany should do more, it is in building up the police force'.[568] This acknowledged failure also indicates the importance of early and integrated mandate planning and resourcing, accompanied by engagement with customary elders in the discussion on police training and subsequently sending suitably qualified professionals to assist in a consistent approach to police training with an extra legal measures mandate that is mutually enforced.

The donor countries involved in the training also had conflicting domestic and political viewpoints, which further destabilised the mission and created obstacles to consistency and continuity. There were disagreements about what policing model to use and the type of commitment to be given to the mission.[569] It was also said that France's commitment to NATO was more out of keeping NATO as a military alliance than one of genuine commitment to the training of Afghan police. That said, the commitment of the gendarmerie to NATO and the training of the ANP was well received and highly regarded and, I will argue, should be the base of police training for a future international police-led mission into Afghanistan if and when the Taliban are removed from power.

UNAMA did the very best it could to coordinate rule of law efforts with ISAF and the Afghan Government as mandated by the UNSC across areas of corruption, prisons, protection of civilians and Good Offices. UNAMA made significant inroads in corruption and prison rights but the failing security situation in Afghanistan and the lack of coordinated ISAF effort would make the UNAMA rule of law objectives difficult to sustain.

ISAF was seeking to impose a particular westernised model of the rule of law that was heavily focused on security and law and order rather than a responsive model of rule of law tailored to Afghanistan that built upon and strengthened indigenous and local cultures of the rule of law. There was too much focus on counterinsurgency and some real missed opportunities to advance the rule of law in those first five years. The rule of law essentially took a back seat. The key response in a new

[566] Ibid 18.
[567] Çelik (n 521).
[568] Ibid 30.
[569] Ibid 38.

policing intervention must be a parallel approach to providing security so that the four key factors of consistency, accountability, transparency, and engagement can be advanced. The rule of law mandate from the UNSC must be prioritised alongside security, and it must clearly and consciously acknowledge and operationalise these factors.

The ISAF / NATO experience also indicates that there was an insufficient focus on policing and too great an emphasis on military intervention.[570] The disproportionate focus away from policing saw the training of police and police recruits being conducted by poorly qualified contractors and in some instances by military actors. The training of police was in many instances unsuitable for the types of policing required in Afghanistan, leading to a decade of missed opportunity. There was a cascading effect of poor police training by coalition partners. Germany failed in its attempts to train police, and this continued with EUPOL, NATO and the US. There was also a distinct lack of continuity and communication between coalition partners about the models best suited to the types of policing required in Afghanistan. The mistake of sending contractors and unsuitable and poorly trained police to Afghanistan must not occur in a new policing intervention. As suggested by Hughes and others, police must be suitably qualified along with other technical judicial experts that deploy with an intervention. Police must be given appropriate pre-deployment training on what is required to train and mentor the ANP from an Afghan perspective as opposed to a westernised approach, which failed Afghanistan.

There is no certainty that the ANP is intact or now under the control of the IEoA and the Ministry of Interior. It can also only be assumed that the laws that both enable and empower the ANP to enforce the law are still intact albeit that they may have been abolished by the IEoA, although it is difficult to assess if that is the case under the current regime. As noted at the outset of this chapter, a returning police intervention may need to start again with a rebuild of an Afghan Police Force and the ANA along with a reassessment of the legal system depending on how much damage has been done by the Taliban.

The next chapter therefore looks at an effective legal architecture for a new policing intervention in order to promote a long-term sustainment of the rule of law, owned by Afghans for Afghans. Employing the assessment and design methodology developed in Chapter 2, the next chapter will seek to take stock of the failures identified thus far with a view to providing suggestions for inclusions into systems and laws as well as improvements to a number of areas that participate in the enforcement of the rule of law.

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[570] Anthony H Cordesman and Aaron Lin, *Afghanistan at Transition: Lessons of the Longest War* (Center for Strategic and International Studies, 2015) 120.

Chapter 7
Legal architecture for a more effective policing mission

7.1 Introduction

This chapter takes a closer look at ISAF and coalition efforts to promote the rule of law through their actions and activities with a view to scrutinising the extant laws of Afghanistan in order to analyse whether the legal architecture of Afghanistan is able to support a rule of approach from a new policing intervention. As with Chapters 3 and 4, the method of analysis is to employ the four factors and their components as the criteria for both assessment and design.

To this end, the chapter begins by analysing the coalition efforts to establish the rule of law in Afghanistan and where it failed as a collective. The examination then turns to the current state of criminality in Afghanistan and the status of the criminal justice sector and its institutions, with deliberate case study assessments of Guantanamo Bay and Abu Ghraib to assist a future intervention in the proper treatment of those that are interned on a return to Afghanistan. The chapter concludes with an assessment of domestic and international laws and how they may support a new police-led intervention in Afghanistan in establishing the rule of law in Afghanistan.

7.2 Efforts to establish the rule of law in Afghanistan

The introduction of the rule of law in Afghanistan was in many respects actually designed to sate the needs of the US Administration, First World invaders and coalition collaborators. The motive of the US and its allies to invade Afghanistan may have varied to some degree but the rule of law was an afterthought that was hastily put together without consultation and as part of an exit plan. It is disingenuous to prematurely discharge the obligation of law and order in a country in post-conflict disarray. Rather than mock the obvious inadequacies of the rule of law as it was and has been applied in Afghanistan, it is important to find proper and sustainable solutions that are incremental, guided by contributing nations and have long-term goals.

There are steps that must be taken in post-conflict situations prior to any thoughts of introducing rule of law concepts. Security needs to be re-established through conflict prevention followed by enforcement of peace and post-conflict peacekeeping.[571] These steps are not critically sequential and

[571] United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (Guidance Material, 2008) <https://www.un.org/ruleoflaw/blog/document/united-nations-peacekeeping-operations-principles-and-guidelines-the-capstone-doctrine/>.

may indeed require an amount of flexibility should a country fall back into conflict, which unfortunately has occurred in Afghanistan. These steps range across the broad and the systemic, through to the specific and sectoral. Recruitment is a systemic issue. An example of a sectoral issue is a beefed-up witness protection program, which is essential to support the proper implementation of the rule of law (as is discussed below). But such a program will only be successful if security is enforced by a coalition force that re-enters Afghanistan and provides the protection required to prevent any further regression. It is absolutely essential to have a flexible post-conflict plan for contributing nations prior to the implementation of any rule of law system in order to sustain any system put in place upon withdrawal.

The UN General Assembly has provided that 'human rights, the rule of law and democracy are interlinked and mutually reinforcing'.[572] The UN provides that a strong rule of law will create the fertile ground required for economic recovery and development. A strong rule of law must also address immediate issues such as corruption and poverty. Atoning for the suffering of the people creates loyalty to an interim government and a system where people feel protected enough to report crime and other issues affecting the community.

This also points to the critical transparency and accountability components of perception: it is essential to have the support and loyalty of the people when implementing post-conflict reform. This issue has multiple interlocking dimensions, as identified in the factors developed in Chapter 2. Maley, for example, argues that Afghans have less trust of the State court system and are more satisfied with traditional mechanisms of delivering justice as seen through the practice of customary law.[573] The rule of law blueprint for this thesis for Afghanistan therefore prioritises engagement by (for example) proposing a hybrid model involving formal state systems and customary law as posited by Maley – an innovation which would also speak to necessary transparency purposes.[574] The long-term suffering of the Afghan population due to constant conflict and invasion has created a complete distrust of the westernised approach (a debilitating obstacle to the consistency components of perception of trainers and projects) and much needs to be done to win back that trust. What is needed is a strong coalition commitment to a long-term deployment of forces to drive out those elements that stand in the way of progression. But it also must include a professionalised commitment of police and judicial officers along with a strategic diplomatic approach to neighbouring countries such as Pakistan to stem the tide of the Taliban and other such forces.

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[572] 'The Rule of Law in the UN's Intergovernmental Work' (n 451).
[573] William Maley, 'State Strength and the Rule of Law' in Srinjoy Bose, Nishank Motwani and William Maley (eds), *Afghanistan: Challenges and Prospects* (Routledge, 2017) 63.
[574] Ibid.

7.3 Specific rule of law mandate issues for consideration

To achieve a strategic, integrated, and coherent approach to rule of law mandates, the UN has traditionally sought to work with nations in post-conflict situations in an effort to support national institutions that uphold the rule of law in order to prevent further conflict. The UN can also assist in the de-escalation and resolution of disputes, particularly those that violate human rights and humanitarian laws. This type of assistance in Afghanistan is essential to restore the balance required and may also require the implementation of an international – or better, given the need for local trust and perceptions of accountability, a hybrid[575] – tribunal to hear international humanitarian law (IHL) and International Human Rights (IHR) violations. Such hybrid tribunals have been a feature of rule of law mandates in (for example) Cambodia,[576] Kosovo[577] and Sierra Leone,[578] which were countries likewise subject to long-term civil war and international interventions of varying success.

This consideration could therefore suggest the development of a hybrid tribunal model given the consistent breaches of both IHL and IHRL rights in Afghanistan by the Taliban and other insurgent networks protected by the Taliban in Afghanistan. The rule of law requires that legal processes, institutions and substantive norms are consistent with human rights, including the core principles of equality under the law, accountability before the law, and fairness in the protection and vindication of rights. There is no rule of law within societies if human rights are not protected and vice versa. The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality. The rule of law has played an integral part in securing economic, social and cultural rights in national constitutions, laws and regulations. The rule of law and human rights have a close relationship, which is demonstrated by the adoption of the Universal Declaration of Human Rights which states that human rights should be protected by the rule of law.[579] This point has clearly been ignored by countries such as the US in Afghanistan, as I will address further below. According to the UN, the rule of law at a national level is crucial in eradicating poverty and giving individuals a voice

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[575] 'Hybrid Courts', *International Crimes Database Project* (Web Page, 2013) <https://www.internationalcrimesdatabase.org/courts/hybrid>.
[576] 'International or Hybrid Tribunal: Case 002/02', *Centre for Justice and Accountability* (Web Page, 2025) <https://cja.org/what-we-do/litigation/khmer-rouge-trials/international-hybrid-tribunal-002-02/>.
[577] *Kosovo Specialist Chambers & Specialist Prosecutor's Office* (Web Page, 2025) <https://www.scp-ks.org/en>.
[578] Eileen Skinnidier, 'Experiences and Lessons from "Hybrid Tribunals": Sierre Leone, East Timor and Cambodia' (Conference Paper, Symposium on the International Criminal Court, 3–4 February 2007) <https://icclr.org/wp-content/uploads/2019/06/ExperiencesfromInternationalSpecialCourts.pdf>.
[579] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) preamble.

by providing justice and remedies. It is universally recognised that unequal distribution of natural resources can lead to violent conflict.[580]

Another key area of concern is the law to be enforced. Establishing the rule of law after an invasion is also an implied obligation under art 64 of the Fourth Geneva Convention, which enables an occupying power to establish provisions that administer effective and orderly government in the occupied territory.[581] This is not to be interpreted as a replacement of the local penal codes or laws of the occupied territory but rather a measure to give the occupying power the ability to fulfil its obligations under the Geneva Conventions and the Hague Convention and its article regulations.[582] It is complementary to local law and should not be seen as the primary rule of law. This is perhaps the root of the contemporary problem with the rule of law in Afghanistan, as local law and customs (cognisance of which is a key component of the engagement factor) have time and time again been ignored and disregarded. The issue is that the Fourth Geneva Convention itself is silent on customary or local law and only refers to penal codes for those that require prosecution. Therefore, the problem seems to stem from the fourth convention of 1949, which should be amended to include, or at least interpreted as including, recognition of local and customary law given the poor reach of penal codes in some post-conflict countries. This would prevent western countries from simply ignoring and circumventing their existence in countries like Afghanistan where there is a large rural population that settles disputes by way of local laws and customs rather than then the penal codes of the capital and the main provinces. Such a measure would thus support broader popular engagement with the rule of law project.

A third issue is the integration of rule of law mandate tasks or mission. The move to implement the rule of law in Afghanistan was slow and was never really properly achieved, especially if one assesses it against the necessarily linked areas of human rights and eradication of poverty, which seem to be the test for a high-functioning rule of law system.[583] UNSC Resolution S/RES/1378 (2001) seemingly demonstrated an intention to set the right tone for the conflict. Importantly the resolution strongly encouraged the Afghan people to set up a transitional administration that should be fully representative of all Afghans, respect human rights and address the urgent need for humanitarian assistance.[584] This is important as Afghanistan's track record in relation to civil and political human

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[580] Thomas F Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton University Press, 1999) 134.
[581] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').
[582] *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land* (18 October 1907).
[583] 'The Three Pillars', *UN and the Rule of Law* (Web Page) <https://www.un.org/ruleoflaw/the-three-pillars/>.
[584] SC Res 1378, UN Doc S/RES/1378 (14 November 2001).

rights has often been accompanied by failed poverty eradication schemes, which has militated against the vital coherence and integration across the wider mandate that is necessary for rule of law gains. The various invaders of Afghanistan were little better in this regard.[585]

A fourth concern is resourcing. The world and the UN were acutely aware of the dire situation in Afghanistan a number of years prior to the events of 9/11 in the US. UNSC Resolution S/RES/1076 (1996),[586] was a plea from the UN to Afghanistan amid growing global concerns about military tensions, human rights abuses, terrorism and drug trafficking. The Taliban were the controlling government then and were enforcing a cruel interpretation of Sharia law on the people in what was essentially an abuse of human rights. Two years later, the Taliban were attacking and killing UNAMA personnel,[587] providing a safe haven for Osama bin Laden and Al Qaeda,[588] and violating the rights of Afghanis, especially women and children. The 2021 version of the Taliban has certainly not changed or deviated from its cruel objectives, as stated previously in this thesis, and that cruelty has extended to attacks on religious and ethnic minorities, despite the peace agreement with the US in 2020.

The invasion of Afghanistan by US and coalition forces in 2001 did little to curb the ongoing abuses of the population or the unequal distribution of natural resources and wealth. When the US and coalition forces eventually reached what they thought was a point of security and stability, the strategy on the rule of law was misconceived and poorly managed. Those efforts were bogged down in building police force numbers within the ANP and the construction of courts and ministries at the central state level, which were vastly inefficient, uncoordinated, and completely inadequate despite the resources expended. This paved the way for the Taliban to enforce and reinforce its own brutal system of law which, despite its violent nature, was nevertheless effective and relied upon by the people in some of the Taliban-controlled provinces in Afghanistan.[589] The Taliban were simply able to out-govern the Karzai government at the local level and used a court system and dispute resolution process to do so. To the people, this provided a sense of justice as it was public and provided oversight of land and neighbourhood disputes. It was justice being seen and therefore it was trusted. The rule of law blueprint approach to Afghanistan, as identified in Chapter 2 of this thesis, would see a dual approach to implementation of security and the rule of law. One of the greatest errors of ISAF was to focus primarily on security in Afghanistan which meant that the rule of law was put to the side

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[585] International Crisis Group, *After the Aid Axe: Charting a Path to Self-Reliance in Afghanistan* (Asia Report No 350, October 2025) <https://www.crisisgroup.org/rpt/asia-pacific/afghanistan/350-after-aid-axe-charting-path-self-reliance-afghanistan>.
[586] SC Res 1076, UN Doc S/RES/1076 (22 October 1996).
[587] SC Res 1193, UN Doc S/RES/1193 (28 August 1998).
[588] SC Res 1267, UN Doc S/RES/1267 (15 October 1999).
[589] Kilcullen, 'Deiokes and the Taliban' (n 28) 44.

for at least the first five years of occupation. The proper approach of equal application of security and rule of law would have paid forward for ISAF and Afghanistan in those police; prisons and the judiciary could have been well advanced in enforcing Afghanistan law. This would have made some inroads in eliminating any support for the manner in which the Taliban enforced the law. In some respects, ISAF had paved the way for the Taliban to enforce the law as the population had already been subjected to those methodologies prior to the Taliban taking over Afghanistan.

The failure by the West in the enforcement of the rule of law was, consequently, in many ways defined by its fundamental disregard for what works in Afghanistan, along with a parallel disregard the extant criminal laws (which at least had some buy-in, through long-term existence, from the population) which were simply ignored by the ISAF. This stemmed from the US and coalition installation of a puppet administration in Karzai, when the return of Zahir Shah (the old king) in 2002 could have revived the tribal system and hence given Afghanistan a highly influential figure who could have 'breathed new life into the tribal system'.[590] There is ongoing impunity for those that abuse power, and commentators like Maley argue that 'unconstrained power is a recipe for instability'.[591] So the lesson here is that power that remains unchecked, whether it be local or centralised, is likely to cause ongoing conflict and/or injustice.

It is also reasonably open to suggest, as Miakhel does, that the Bush administration was more interested in hunting and tracking down Osama bin Laden and Al Qaeda than in long-term investment in security and stability through the rule of law, especially in the first few years post-invasion.[592] There was a real lack of interest from the US and coalition from 2001 to 2003 in rebuilding the Afghan National Police (ANP), with the rule of law effort only commencing in earnest in 2006 and much of this effort contracted to organisations from the US who possessed little to no police experience. In reality implementation of the rule of law effort only legitimately commenced with the deployment of police from donor countries such as the European Union and Australia in around 2008–2014. Six years is not sufficient to build a professional national police force to enhance security and improve the rule of law. In reality, this undertaking required a whole generation of assistance in order to reinforce change and to make it second nature to the next generation of Afghans.

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[590] Vendrell (n 478) 56.
[591] Maley, 'The Rule of Law and the Weight of Politics' (n 27) 78.
[592] Shahmahmood Miakhel, 'Human Security and the Rule of Law: Afghanistan's Experience' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 84, 91.

7.4 Afghan National Development Strategy (ANDS)

The ANDS document is a good starting point to assess both the recent and potentially future Afghan work on the rule of law. The ANDS was first established by the Afghan government in 2008 and was developed following an assessment of the tumultuous and violent period of 2002–2008. The ANDS, although touted as an Afghan document, has a heavy western influence which is evident in the chapter 'Governance, Rule of Law and Human Rights'. There is no mention of the involvement of customary or local law in the document, only that transitional justice must involve national stakeholders and justice institutions.[593] Remarkably, the ANDS acknowledges that customary legal systems continue to operate but – in direct contradiction to the engagement factor – there is no strategy to include those systems in rule of law reform. In fact, the ANDS states that significant resources will be provided to 'the National Assembly, the judicial system, including the courts, the AGO, the police, and the Ministries that administer much of the legislation', but no such allowance was made for customary legal systems.[594] This is a huge oversight as the judicial system does not reach many of the provinces (again, a consistency issue), some of which act as gatekeepers to the capital and the bigger, more populated provinces.

The forecast period for the initial ANDS was 2008–2013 and the objective of the policy was to achieve the following three outcomes:

- security
- governance, rule of law and human rights
- economic and social development.

It is interesting to see that security was the number one priority of the Afghan government as it is consistent with the three pillars that the UN was founded on in 1945:

- Article 1(1) – international peace and security,
- Article 1(3) – human rights, and
- Article 1(2) – development.[595]

But it is also an admission of sorts that the security situation in Afghanistan at the time of the writing of the ANDS remained a concern. This seemingly set the scene for and suggested that the rule of law

[593] Islamic Republic of Afghanistan, *Afghanistan National Development Strategy* (Report, 2008) 64.
[594] Ibid 69.
[595] *Charter of the United Nations*.

was a band-aid solution to a serious wound that had gone largely unattended for seven years. As noted above, it is probably accurate, albeit entirely unsatisfactory, to simply state that the coalition forces were only focused on their own mission objectives, not upon a practical or realisable rule of law mandate.

The preamble to the ANDS stated that by 2020 the vision for Afghanistan was that it would have a stable Islamic constitutional democracy and be at peace with itself and its neighbours. The vision also included justice for all and equal rights.[596] In analysing the ANDS, the first point to make is the timing. It was originally written to cover the period 2008–2013, which was remarkably coincidental to the proposed withdrawal of US and coalition troops in 2014. It appears rushed and unrealistic, although Afghanistan was able to effectively draft a revised Constitution in 2004 that included equal rights and freedom of speech for women. There were also other notable achievements that stemmed directly from the Bonn Agreement of 2001, which included the implementation of a transitional government set up with the objective of developing a legitimate democratic state. In 2006, Afghanistan allegedly started recruiting and appointing judges and a chief justice in an attempt to reinstate the rule of law. It is very difficult to legitimise this claim as many of Afghanistan's court proceedings are closed to the public due, in large part, to threats to judges and the judiciary in general.

Lastly, the document makes a stunning statement in relation to the rule of law: that disarmament, demobilisation and reintegration of ex-combatants had been completed, the national army and police forces were close to full strength, and that Afghanistan was no longer a safe haven for terrorists.[597] This had not occurred and is in fact completely untrue – there were and remain countless examples of Taliban atrocities against the people in recent times with a 60% increase in casualties from improvised explosive devices (IED) since October 2020.[598] It is difficult to believe that the Afghanistan government would have subscribed to publishing such misleading facts without obtaining them first from the coalition forces invested in the mentoring and training of the ANSF, unless of course this type of misrepresentation by the coalition was intentional. These facts were simply false and appear to have been framed to allow for the premature withdrawal of coalition forces.

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[596] Islamic Republic of Afghanistan (n 593) i.
[597] Ibid 2.
[598] Shadi Khan Saif, 'Lawmaker Survives Bomb Attack in Afghanistan, 9 Killed', *Anadolu Agency* (online, 20 December 2020) <https://www.aa.com.tr/en/asia-pacific/lawmaker-survives-bomb-attack-in-afghanistan-9-killed/2082846/>.

Since the coalition withdrawal of 2014, Afghanistan fell back into a dangerous state.[599] It is frustrating for all of those who have served and/or paid the ultimate sacrifice fighting the Taliban to provide freedom to Afghanistan to see Afghanistan handed back to the Taliban to control.

7.5 The Afghan Constitution

Afghanistan is a deeply religious country, and this is enshrined in the 2004 Constitution.[600] Articles 1 to 3 of the Constitution confirm the importance and influence of Islam in Afghanistan. More specifically article 3 states: 'No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.' Article 3 certainly makes it quite difficult to embrace new laws without deference to Islam. That in itself is not an unachievable task provided they do not contravene the tenets of Islam.

Afghanistan has had a number of iterations of its Constitution and with those iterations has come change mainly in the form of promotion of human rights and acceptance of other religions, although on a limited basis. The current Constitution is modern and affords positive change. It affords equality and promotes prosperity. It is refreshing to see for the first time Afghanistan adopt within its Constitution recognition of human rights in article 6 with greater articulation and elaboration in Chapter 2. Article 7 recognises all tribes and the equal rights that should be afforded to them, which is a far cry from the distant past, particularly during the Russian invasion and the pervasive nationwide effect of communism.

The current Taliban administration, however, is anti-constitution, which should come as no surprise given their abhorrent treatment of women and their extreme application of Sharia law.[601] There is no legal system in the eyes of the Taliban but restrictive decrees and coercive control of the population that will, as Maley states, 'eventually come back to haunt them if other mechanisms of regime maintenance begin to fail'.[602]

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[599] Kelly Magsamen and Michael Fuchs, 'The Case for a New U.S. Relationship with Afghanistan', *Center For American Progress* (Web Page, 29 July 2019) <https://www.americanprogress.org/issues/security/reports/2019/07/29/472611/case-new-u-s-relationship-afghanistan/>.

[600] *Constitution of the Islamic Republic of Afghanistan* (2004).

[601] William Maley, 'Taliban Rule and Anti-Constitutionalism', *Australian Institute of International Affairs* (Web Page, 23 August 2023) <https://www.internationalaffairs.org.au/australianoutlook/taliban-rule-and-anti-constitutionalism/>.

[602] Ibid.

The pre-Taliban Constitution attempts to be inclusive and far reaching with an emphasis on prosperity and growth. Article 22 provides for the equal treatment of men and women. This principle is clearly against one of the policies of the Taliban who, through strict interpretation of Sharia law, would have the rights of women diluted. Therefore, extreme interpretations of Sharia law, as adopted by the Taliban and now the IEoA, contradict the Constitution. Any doubt as to the opposition to Taliban rule should now be clear. The population collectively opposes the brutality of this rule.[603] In essence the Constitution is not an obstacle to criminal law amendments, adoption of additional policing powers and the creation of a witness protection Act.

An article of particular interest for this thesis is article 26, which states: 'Crime is a personal act. Investigation, arrest and detention of an accused as well as penalty execution shall not incriminate another person.' In the absence of explanation, it is difficult to decipher what is meant by the incrimination of another person in the investigation, arrest and detention of a person responsible for a personal crime. But it may provide a vehicle for the enactment of relevant domestic legislation that assists police and the judiciary to enforce criminal justice consistent with article 28. The rule of law factors identified in Chapter 2 of this thesis, would serve to promote changes to the domestic legislation that are consistent with the Constitution and involve input from informal customary areas of law in Afghanistan. In this sense it would make it far more practical and palatable for a wider and decentralised Afghanistan to accept powers bestowed on police officers to enforce the law in the provinces.

Article 30 provides for the protection of persons of interest or alleged offenders and staves off unlawful interrogation as a means to prosecute. This article is mirrored in many of the Evidence Acts in Australia, for example, and makes unlawful actions of police that adduce evidence through violence, duress or oppression.[604] The protection of alleged offenders is extended through article 31 with the provision of a 'legal aid' defence lawyer depending on the financial capacity of the alleged offender. It also acts to make privileged conversations that the alleged offender has with his or her lawyer.

Affording these rights to alleged offenders must be balanced against the protection of witnesses in the criminal justice system. There is very little in the Constitution on the rights of victims of crimes albeit there are some general protections against trespass and property. Perhaps more should be read into the articles on equal rights and protection of property but nevertheless this issue is a concern as it is not

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[603] Arman-e Melli, 'Afghan People Oppose Taleban's "Islamic Emirate" Office – Paper', *BBC Monitoring South Asia* (23 June 2013).
[604] See *Evidence Act 1995* (Cth) s 84.

express but implied. Equally, the Constitution could impliedly fill the cultural gaps at a rule of law level noting the inclusion of tribal rights. This would align well with the rule of law blueprint in this thesis of ensuring that the policing intervention has been professionalised and the rule of law is brought to the provincial level and not confined to a formal state level.

7.6 Resources

There are other factors that impede the implementation of the rule of law in Afghanistan such as poor infrastructure, legal resources and equipment. There are also huge discrepancies in the legal training of judges particularly of those in the lower courts, with only 44% having received university-level training.[605] The former administration, GIRoA, was forced to provide protection for judges in 2011 and did so by introducing a new unit called the Judicial Security Unit (JSU) which was an excellent development and a good introduction of a scheme that could be expanded into general witness protection. The JSU was very much a US-driven project developed by the US Marshalls.[606]

The JSU was also known by other names such as the Judicial and Witness Security Protection Unit, the Court Security Unit, and the Afghan Marshals Service.[607] It was also formed as part of a specialised unit of the Counternarcotics Police of Afghanistan under the Ministry of Interior. The US built a $4.5 million compound to house the JSU in 2009.[608] Does the unit still exist, or does it now come under a different banner? What of the $4.5 million purpose-built complex? At the time of writing this thesis there was no evidence of the continued existence of the JSU or any its iterations or information on what became of the purpose-built complex. What is startingly clear is that the efforts to assist rebuilding Afghanistan and the results thereof are for nothing while the Taliban are in power given their disregard for judges and the broader judiciary. The rule of law method adopted in this thesis would see the implementation of recognisable consistency (planned and integrated), accountability (avoiding legacy agendas), transparency (early action against corruption and organised crime so it does not contaminate the judicial system), and engagement (regional relevance) as therefore essential to any future deployment into Afghanistan of judicial, penal, human rights, and other relevant specialists, who with specialist civilian police will make up collegial ‘rule of law’ teams.[609]

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[605] Marie L Greenman, ‘Curbing Corruption in Afghanistan’s Courts’ (2013) 26(4) *Georgetown Journal of Legal Ethics* 695.
[606] Office of the Special Inspector General for Afghanistan Reconstruction, *Actions Needed for a More Strategic Approach to U.S. Judicial Security Assistance* (Report, 2009) <https://www.govinfo.gov/content/pkg/GOVPUB-S-PURL-gpo4966/pdf/GOVPUB-S-PURL-gpo4966.pdf>.
[607] Ibid.
[608] Ibid.
[609] *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305–S/2000/809 (21 August 2000).

To conclude this section of the analysis, it is clear that consistent and corroborative application of the rule of law is critical for any future policing project in Afghanistan, particularly ensuring continuity through mentoring, training and the rebuilding of infrastructure. Perhaps the efforts of the US in training and establishing the JSU were then redirected elsewhere, and the unit was subsumed into the ANP and then abandoned completely by the Taliban. It is difficult to tell but for the purpose of this thesis it must be assumed that witness protection and the other essential attendants of a judiciary, prosecution, and policing system is a blank canvas that needs to be redeveloped. This is by no means a criticism of the former GIRoA as financial pressures following limited international financial donations post-2014 may have led to budgetary restrictions. This will ultimately be a matter for a new rule of law mandate and for the implementation of a new international peace operation in Afghanistan, after the Taliban era. A future policing intervention will rightly involve UNAMA – who already have a footprint on the ground in Afghanistan and a mechanism (good offices) which reflects the four key factors identified for assessment and design of policing programs – to assist with the coordination of the intervention with a new administration and who can advocate to international donors for funding, given this was a previous function of UNAMA. The involvement of UNAMA can occur at the same time as the enforcement of security and the application of the rule of law blueprint of this thesis. This will take a coordinated effort of the UNSC, UNAMA and a mandate that is police led, and military backed, which is essential for Afghanistan.

7.7 Police powers and the state of the judiciary

The criminal legal system in Afghanistan is confusing as it consists of a framework of what westerners would term statutory law, Sharia law and the jurisprudence of the courts.[610] Crime is well defined in the Afghani Secular Penal Code of 1976,[611] and the Afghani Constitution 2004,[612] but prosecutions must occur under the jurisdiction of a Republican Government of Afghanistan. By definition, it is difficult to see how these articles apply to current-day Afghanistan, noting it is ruled by an Islamic government in the Taliban who have a preference to apply the strict tenets of Sharia law rather than follow the written laws of Afghanistan.[613]

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[610] Ahmed Hamdy Tawfik, 'The Concept of Crime in the Afghan Criminal Justice System: The Paradox between Secular, Tradition and Islamic Law: A Viewpoint of an International Practitioner' (2009) 9(4) *International Criminal Law Review* 667, 668.

[611] See Afghani Secular Penal Code of 1976 art 14.

[612] See *Constitution of the Islamic Republic of Afghanistan* (2004) art 130.

[613] Akmal Dawi, 'Taliban Undertake Speedy Overhaul of Afghanistan's Justice System', *VOA South and Central Asia* (online, 28 September 2023) <https://www.voanews.com/a/taliban-undertake-speedy-overhaul-afghanistan-justice-system/7289101.html>.

This means that judges cannot base decisions on a prosecutor's investigations, as Sharia law does not permit the use of prosecutors and the Taliban have dissolved the former government's Attorney-General's Office.[614] The Taliban have also persecuted former prosecutors who had built criminal cases against them, and have set free thousands of prisoners across Afghanistan, who have carried out reprisal killings of prosecutors and judges. As the Taliban do not apply or abide by the Constitution and the Penal Code, 'they will eventually fail. They are not going to last.'[615]

Therefore, any new commitment to a policing project within a peace operations mandate in Afghanistan must embrace these three origins of criminal law to synthesise with the needs of the population in relation to justice – a key factor in the engagement component of incorporation of customary processes and mechanisms for policing and justice. Islamic law in isolation does not and cannot resolve disputes that strictly involve breaches or enforcement of civil or criminal law. This is an important distinction in the context of this thesis, as any changes to the criminal or civil laws do not face the complex task of a comparative analysis of Islamic law. The Constitution appears to simply recognise that tribal law is immoveable and impenetrable in the face of other laws that may seek to contradict it. Therefore, a future policing intervention must, as mentioned previously in this thesis, include the views of traditional owners of tribal law when implementing a rule of law mandate in Afghanistan to ensure that the rule of law is far reaching and decentralised.

Any proposed changes to police powers and the provision of a witness protection program should therefore take into account the views of elders in the provinces (a key component of consistency) by way of *shura* or *jirga*. There are no inclusion and equality without deference to legal pluralism and the systems that were well in place prior to the formal institutions. Hence any formal institution of law must coexist alongside the traditional systems of *jirga* and *shura*.[616] *Jirgas* and *shuras* are quite similar with *jirgas* being more prevalent among Pashtun tribes. A *jirga* involves elders or leaders who sit, often in a circular position. The main purpose of a *jirga* is to resolve disputes or to make important decisions that affect the community such as resolving land disputes. This, if you like, is the enforcement of Islamic law or Sharia law, as embraced by article 3 of the Constitution. It is an oral tradition that does not necessitate the written law and is quite sophisticated. The decisions made under the Pashtun system of *jirga* pay homage to morality and justice (Pashtunwali). Islamic law is very

[614] Ibid.
[615] Stefanie Glinski, '12 Million Angry Men: The Taliban Promised Justice. They Are Hard-Pressed to Provide It', *Foreign Policy* (online, 28 October 2021) <https://foreignpolicy.com/2021/10/28/afghanistan-taliban-justice-sharia/>.
[616] Afghanistan Legal Education Project (n 208) 8.

important as it governs the lives of many Afghans in modern Afghanistan where much of the population prefers the settlement of disputes by way of *jirga* or *shura*.[617]

Did the ISAF embrace *shura* or *jirga* and customary law when mentoring Afghan police? The short answer is no. There was some very good work done in isolation with communities but overall the ISAF failed to deliver what the UNSC mandated, including respect for local customs and Afghan national sovereignty.[618] Part of the issue was that the US continued to fight what they believed was a counterterrorism mission through Operation Enduring Freedom, while the rest of the coalition turned to peace operations (as mandated by the UNSC).[619] The ISAF was 'rather late to recognise … [the] accepted legal codes that originated in Islam and tribal customary law, in Afghanistan'.[620] The approach to the rule of law was too late and the training provided to the ANP so insignificant that it led to corruption and human rights abuses.[621]

7.8 The current state of criminality in Afghanistan

Crime in Afghanistan is certainly not limited to the main centres such as Kandahar or Kabul. Therefore, having the cooperation of the provinces and the tribal leaders is imperative in achieving justice in Afghanistan.[622]

A good Constitution is only as effective as those that enforce it. The prevailing and predominant issue in the Afghanistan criminal justice system is corruption, mainly in the form of bribes in the police, judiciary, prosecution and prison systems.[623] Dealing with this scourge at the outset is a key component of both accountability (corruption systemically), and transparency (corruption within policing specifically). It is unclear that an interim Taliban government is any better prepared to curb corrupt practices than its predecessor. Corruption of the very institutions that are entrusted to protect and enforce criminal justice in the community is perhaps the greatest threat to the security of Afghanistan. Greenman wrote in 2013 that unethical judicial practices remain widespread.[624]

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[617] Barakatullah Advocate and Imran Ahmad Sajid, 'Jirga System in Pakhtun Society: An Informal Mechanism for Dispute Resolution' (2013) 5(2) *Pakistan Journal of Criminology* 45.
[618] Robert Beljan, 'Afghanistan – Lessons Learned from an ISAF Perspective', *Small Wars Journal* (online, 30 May 2013) <https://archive.smallwarsjournal.com/jrnl/art/afghanistan-lessons-learned-from-an-isaf-perspective>.
[619] Ibid.
[620] Ibid.
[621] Ibid.
[622] Adam Baczko, 'Legal Rule and Tribal Politics: The US Army and the Taliban in Afghanistan (2001–13)' (2016) 46(6) *Development and Change* 1423.
[623] Afghanistan Legal Education Project (n 208) 45.
[624] Greenman (n 605).

Therefore, appropriate remuneration of those within the justice system is one way to curb bribes of officials. Financial and physical security concerns tend to be the reasons that judges turn their backs on their ethical obligations in Afghanistan.[625]

In fact, studies found that between 2002 and 2010 there were 15 judges killed by local criminal networks and commanders.[626] Local strongmen remain a threat to the rural provinces due to the anti-government sentiment. The presence of the new IEoA, Islamic State and Al Qaeda forces have grown since the withdrawal of coalition troops from Afghanistan in 2014, as evidenced by the seemingly uncontested takeover by the Taliban in August 2021.

Unfortunately, it is war that has created the corruption of the judiciary. This corruption has extended to law enforcement and administration, with some commentators putting the blame squarely on the illicit drug trade and its pervasive influence on all levels of administration.[627] Perhaps the worst type of corruption is that of judges who are invested in delivering justifiable and fair decisions. It is moot for this thesis to contemplate a witness protection program if the end outcome is no different due to the bribing of judges and prison guards, for example. It is imperative that all stages of the criminal justice system are appropriately remunerated and uncorrupted in order for a witness protection program to be effective. This is of course based on an assumption that the Taliban government will one day be ousted, and a government of the people re-elected. It is therefore essential to any new policing initiative – as indicated above in terms of the assessment and design factors of accountability and transparency – to first conduct a health check of how criminal justice is being delivered in Afghanistan and if it is effective. This is also a component of consistency in terms of a pre-planned, integrated, and resourced mandate for policing and justice. This will prove admittedly challenging as many of the documents located from the courts that pertain to judgments are in Pashtun or Dari and a very difficult to access (thus necessitating this thesis' focus upon western sources).

To the extent that these sources are capable of disclosing the current situation, it is clear that corruption still appears to be a monumental issue in Afghanistan's criminal justice system, which is cited in some research as the most corrupt country in the world.[628] The justice sector is particularly affected due to the lack of recognised legal education, which in itself is outdated and draconian. This poor legal education has had drastic effects on the supply of capable and competent lawyers in the

[625] Ibid.
[626] Ibid 702.
[627] Ibid.
[628] Safa W Osmani, 'Fertile Ground for Corruption: Implementing the Foreign Corrupt Practices Act in the Fragmented State of Afghanistan' (2016) 49(2) *Suffolk University Law Review* 301.

criminal justice sector, which in turn affects the quality of judges, prosecutors and defence lawyers.[629] This has led to widespread corruption in the judiciary, and it is likely that many matters before the courts have a coerced or bribed outcome. Criminal organisations end up thriving and victims are less likely to come forward due to a lack of trust in the system and a grave fear of reprisal. Some state that the lack of broadcast of trial matters has led to corrupt practices such as bribery, nepotism, a misinterpretation of the law and subsequently a very much weakened rule of law system.[630] Intuitively this would suggest a state that is so entrenched in corruption that it becomes an obstacle to justice on an equal footing with insurgency and the impact that it has on security.

The state of security in Afghanistan at the commencement of the second decade of the 21st century will be the key to not just criminal justice but to many other government portfolios including trade. Corruption and organised crime are some of the real issues that present to modern-day Afghanistan. President Karzai himself warned, at the Bonn Conference in Germany in 2011, that 'corruption and a culture of impunity have undermined the development of institutions in terms of strength and capability'.[631] This corruption is the result of 30 years of chronically weak governance and rule of law institutions and sustained conflict. The administration of Afghanistan has nearly shattered with the 30 years of war. One could take from this that the enforcement of law and by extension the rule of law has been corrupted by war, with the main perpetrators being the Taliban and its affiliates. The most serious forms of corruption in Afghanistan are carried out by criminal networks (mafia networks) who have political protection.[632]

These networks have permeated many areas of Afghanistan including the banking institutions, reconstruction and security firms, and drugs with the Taliban. These networks were said to have been in the Parliament of the former government.[633] The serious concern here is, given the level of corruption, how are protected perpetrators to be brought to justice? It would seem any decision to prosecute for a serious offence would result in higher level protection for some offenders and therefore a miscarriage of justice. These networks, known as criminal patronage networks (CPN),

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[629] Mehdi J Hakimi and Erik G Jensen, 'Rethinking Legal Education in Afghanistan: The Law Program at the American University of Afghanistan' (2019) 55(2) *Stanford Journal of International Law* 83.
[630] Hijratullah Ekhtyar, 'Public Trials and Trial Broadcasting as Combating Tools for Judicial Corruption in Afghanistan' (2017) 24(1) *ILSA Journal of International and Comparative Law* 1.
[631] 'Statement by H.E. Hamid Karzai at the International Afghanistan Conference in Bonn, Germany', *Afghan Mission to the United Nations* (Transcript, 5 December 2011) <https://afghanistan-un.org/2011/12/statement-by-h-e-hamid-karzai-at-the-international-afghanistan-conference-in-bonngermany/>.
[632] Tim Sullivan and Carl Forsberg, 'Confronting the Threat of Corruption and Organized Crime in Afghanistan: Implications for Future Armed Conflict' (2013) 4(4) *Prism* 157, 158.
[633] Ibid.

need to be stopped if Afghanistan is to ever achieve justice for perpetrators of serious crimes against the state.

These CPNs are deeply embedded, having carved out political allies for their criminal activities. They stem from the mujahideen commanders' networks and political parties that emerged in the 1980s through to the 1990s, with many of the CPN members filling very senior positions within the Afghan government following the signing of the Bonn Agreement in 2001.[634] The signing of this agreement involved some of these members of the former US-backed Northern Alliance, also known as the United Islamic Front for Salvation of Afghanistan (UIFSA), who had been opposing the Taliban since the Soviet withdrawal in 1989.[635] The group disintegrated until its resurrection in September 1996, which coincided with the Taliban forces' capture of the province of Kabul. It was reassembled as a military front by leaders of the Islamic State of Afghanistan. The Northern Alliance was comprised of primarily three non-Pashtun ethnic groups – Tajiks, Uzbeks and Hazaras – and conducted an armed resistance against the Pakistan-backed Taliban forces. The group's most prominent leader was Ahmad Shah Massoud, who was assassinated in September 2001 by two men posing as journalists believed to be members of either the Taliban or Al Qaeda.[636]

While the alliance did initially suffer from the loss of such a powerful leader, support from allies including Iran, Russia, India and Tajikistan helped restore its position. The logistical support of the flow of arms coming from the West allowed the UIFSA to defeat the Taliban in Kabul. Ultimately, the Northern Alliance was able to gain control over a large part of Afghanistan, which was critical to the installation of the post-Taliban government of Hamid Karzai in late 2001.The Northern Alliance once again dissolved and factions of the fractured group, now installed into more senior positions within the new government, provided passive support for the Taliban from 2003 onwards. The whole scenario is quite circular, complex and generational. The corruption is particularly dangerous within the security ministries and the Afghan National Security Forces (ANSF) as it threatens the combat effectiveness and cohesion of the army and police.[637] This is one of the most critical points of this thesis. It is not beyond the remit of the Criminal Patronage Networks (CPN) to have witnesses and/or victims of serious crimes killed in order to escape prosecution. This thesis will recommend a witness protection taskforce to counter this threat on a return to Afghanistan. The criticality of an

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[634] Ibid 159.

[635] 'The Northern Alliance (or United Islamic Front for Salvation of Afghanistan – UIFSA)', *START* (Web Page, 25 October 2014) <https://www.start.umd.edu/baad/narratives/northern-alliance-or-united-islamic-front-salvation-afghanistan-uifsa>.

[636] Amin Saikal, *Al-Qaeda, the Taliban and the Tragedy of Afghanistan* (Australian Strategic Policy Institute, 9 September 2022).

[637] Cordesman and Lin (n 570).

accountability focus on systemic corruption, and a transparency focus on specifically police corruption is thus once again reinforced.

In summary, there are certainly some challenges that lie ahead for the criminal justice sector in Afghanistan and a lot more needs to be done to give the judiciary confidence that they will remain safe if they make unbiased and reasonable decisions. In 2019, the former Afghan administration wrote to the International Criminal Court in a plea to investigate the situation in Afghanistan in terms of international crimes and the capability of its own investigations and prosecutions.[638] The former government then wrote that it had made significant institutional and structural reform to enable it to investigate and prosecute international crimes. This assertion, however, lacks evidence and, although there have certainly been some inroads in the training of Afghan police, it is difficult to assess that capability in the absence of any reliable data.

The very good aspect of this report to the ICC is that the former government was committed to prosecuting crimes against the state, while acknowledging to the ICC that there remained 'an intensive armed conflict with the Taliban and other insurgents'.[639] This statement in 2019 underscores the importance of a coalition force returning to Afghanistan once more to drive out insurgent forces and to permanently equip the ANSF with the right tools to sustain itself. It is promising to observe that the former administration was committed to justice for its people and acknowledged that their collective human rights must be protected. To that end, the former government stated that it had established an International Crimes Office responsible for the investigations of crimes against humanity and war crimes. It seems that the establishment of this office and the report that was submitted to the ICC in 2019 resulted in a commitment from the ICC to investigate international crimes committed against Afghanistan dating back to 2002.[640] However, Afghanistan must allow the ICC or – perhaps more realistically (as it is more compliant with the assessment and design factors identified in this thesis) a hybrid tribunal – to step in and prosecute these crimes once the Taliban are removed.

But even a hybrid approach will face significant challenges. As discussed previously in this thesis, Afghanistan has been subjected to so much invasion and war that the proper implementation and development of institutions have not been the priority – rather the focus is survival and re-establishment of the economy, feeding its people, and tending to the wounded and maimed. The

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[638] *Situation in the Islamic Republic of Afghanistan (Submissions of the Government of the Islamic Republic of Afghanistan)* (International Criminal Court, Appeals Chamber, Case No ICC-02/17, 2 December 2019).
[639] Ibid 9.
[640] Patricia Gossman, 'ICC Investigation Vital for Justice in Afghanistan', *Human Rights Watch* (Web Page, 11 June 2020) <https://www.hrw.org/news/2020/06/11/icc-investigation-vital-justice-afghanistan>.

withdrawal of coalition forces was simply premature, and any hybrid tribunal will only be effective to the extent that it is part of a police-led military-supported re-entry into Afghanistan to eradicate insurgency, restore security, and properly train and mentor those in the justice sector including judges, prosecutors and police once the Taliban regime again falls.

7.9 Prisons in Afghanistan

It is important to recognise that a non-international armed conflict (NIAC) is a conflict in which at least one party is not a state, the opposing party is an organised group, and the violence has reached a certain level of intensity. This definition was confirmed in the matter of *Tadic* when the International Criminal Tribunal for the Former Yugoslavia found that the threshold for a NIAC was crossed 'whenever there is … protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[641]

In relation to Afghanistan, that armed group was predominantly the Taliban and it is difficult to avoid the conclusion that the situation in Afghanistan will once again become a NIAC despite the Taliban's self-proclaimed status as the rulers of Afghanistan.[642] Therefore there was in the past, and will likely again in the future be a complex prison situation in Afghanistan where those who were interned for participation in a NIAC share the prisons with those who were imprisoned for non-NIAC domestic crimes or acts considered crimes by the IEoA. Of course, the treatment of those who find themselves in either situation should be the same, that is, that they should be treated humanely and not subjected to torture or inhumane treatment.

For those prisoners that have committed offences in a non-NIAC sense, there are domestic laws in Afghanistan that govern their internment. The *Law on Prisons and Jails in Afghanistan 1934* is the instrument that dictates the treatment of inmates in Afghanistan. The opening article states that there is to be one jail and one prison in Kabul and all the provinces and one jail in all other administrative areas. The only articles of this law that relate to the treatment of prisoners are articles 23–27 which state that priests, doctors and barbers should be made available along with appropriate bathing and prayer facilities.

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[641] *Prosecutor v Dusko Tadic aka 'Dule' (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, 2 October 1995) [70].

[642] 'Non-international Armed Conflicts in Afghanistan', *Geneva Academy of International Humanitarian Law and Human Rights* (Web Page, 3 September 2021) <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan>.

Discipline in the prisons is simply made the responsibility of the prison authorities, and authority for inspection goes to the magistrates. Sadly, this is where any tangible efforts to protect the domestic rights of those imprisoned ends and the atrocities begin. The human rights record in prisons in Afghanistan is appalling despite petitions from international bodies. The preference of successive Afghan governments has been to promote those individuals responsible for atrocities and war crimes rather than punish them.[643] The more recent shift in policy in 2017 saw the focus of prosecution for war crimes on crimes by the Islamic State and not the Taliban. This policy needs to change when a new government replaces the Taliban as there can be no loyalty or impunity shown to the Taliban when its reign of terror has caused so much civilian death over many years. As part of peace negotiations in 2020, to secure an agreement that was always going to be unsustainable, 5,000 Taliban were released from prisons. That simply intensified the problem as those released re-joined Taliban forces and now the new government. While prisoners of war cannot be held indefinitely, they can at least be interned until the end of the NIAC and enjoy the freedoms that come with this status.

There are some limited protections of those interned in NIAC situations under IHL. Common article 3 of the Geneva Conventions applies to NIAC situations and reads in part:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[644]

Common article 3 also specifically mentions the International Committee of the Red Cross (ICRC) as an impartial humanitarian body that can assist if the parties to the conflict are agreeable. The ICRC chaired the first conference to draft the Geneva Conventions in 1948 and reviewed the 1929 convention on the wounded and sick.[645] This review led to the decision to remove the term 'reciprocal' in relation to applying the principles of the conventions, with an assumption that they will always apply.[646]

The main issue with common article 3 is that it is not proscriptive about what treatment should be given and what reasonable adjustments need to be made for those interned. The simplicity of common

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[643] Patricia Gossman, 'Afghanistan's Prisoner Dilemma Dispute Over Releases Shows Need to Include Victims' Groups in Talks', *Human Rights Watch* (Web Page, 20 March 2020) <https://www.hrw.org/news/2020/03/20/afghanistans-prisoner-dilemma>.
[644] *Geneva Convention IV* (n 581) art 3.
[645] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 27 July 1929, 118 UNTS 304 (entered into force 19 June 1931).
[646] International Committee of the Red Cross, *Commentary on the First Geneva Convention* (Cambridge University Press, 2016) [367].

article 3 derives from the history of negotiations between the high contracting parties. There were states that opposed any international law limitation on the right of a state to defend itself, and there were those that believed that the full extent of the conventions should apply to a NIAC.[647] A compromise was reached between the states and the result was an article that, on the one hand, restricted the number of rules binding a NIAC, but ensured those same rules would be applicable in a broad range of situations.[648] In assessing this position I am left unsatisfied as to the comprehensiveness of the application of common article 3 to those that are detained in a NIAC. The compromise of the parties back in 1949 has left the door open for states to pick and choose how they will treat those detained in a NIAC as the terms of the article are subjective and weak. The inclusion of common article 3 has simply allowed states to save face by agreeing to the terms of an article that assists those states to abuse the rights of prisoners.

The key component of common article 3 is the concept of humane treatment of those detained in a NIAC. The question remains whether common article 3 sufficiently protects those detained in a NIAC. An assessment of the wording indicates that the parties have no option but to proffer humane treatment to those detained, otherwise the word 'shall' would not have been contemplated. The bigger issue is that the term 'humane treatment' is not defined under common article 3. Now this has its advantages and disadvantages. Being whetted to a definition is problematic as it creates situations where the application is narrow and does not suit the context it is to be applied to. On the other hand, omitting a definition allows for flexibility and for states to apply what they deem humane treatment. This approach is preferred, provided that states document what they view as humane treatment so that military forces are able to follow a set of guidelines when they take persons into custody.

Fortunately, many of the high contracting parties have published guidelines on the treatment of detainees in NIAC situations.[649] The US Department of Defense guideline on the treatment of detainees states that the guideline applies to those that are detained in a NIAC situation.[650] This US guideline defers to common article 3 as the baseline for how detainees are to be treated in a NIAC, yet this current position seems to be at odds with the Bush administration's approach to Afghanistan in

[647] Ibid [385].
[648] Ibid.
[649] International Institute of Humanitarian Law, *The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines* (2021) <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/Copenhagen-Process-Principles-and-Guidelines-EN.pdf>.
[650] Office of General Counsel Department of Defense, *Department of Defense Law of War Manual* (December 2016) 508.

relation to Taliban and Al Qaeda fighters.[651] In fact, the US in these circumstances preferred to keep fighters in Afghanistan locked up indefinitely and justified this by their perceived future threat.[652] Properly managed prisons with high levels of security will be essential for a future policing intervention in Afghanistan and it will ensure 'transparency' in terms of external review of implementation. Those prisons must meet the minimum standard in terms of treatment of all inmates as set out in the Mandela Rules which articulate what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.[653] This will provide some impetus for the population to accept a future policing intervention under a new rule of law mandate, which will go some way to winning back the trust of all Afghans.

7.9.1 Guantanamo Bay case study

The significance for policing project trust and implementation in terms of detention processes is perhaps best indicated in the (again negative) case study of the internment of prisoners of war and those considered unlawful combatants (and future threats) through the analysis of two case studies in Guantanamo Bay and Abu Ghraib. These two prisons, as identified in the analysis below, were responsible for atrocities and serious breaches of human rights. Therefore, the intention of the analysis is to examine those egregious breaches with a view to shaping a prison system in Afghanistan that is complaint with the Madella Rules, treats prisoners with respect and dignity as human beings and is suitable to house what could be significant numbers of Taliban and insurgent groups and criminals in Afghanistan. This will be essential is ensuring that the security factor of the rule of law blueprint is fulfilled and that prison facilities are maintained to accepted international law standards, and an intervention remains and accountable and transparent in their collective actions.

The 'future threats', as mentioned previously, were unceremoniously bundled out of Afghanistan to Guantanamo Bay. But why were Taliban and Al Qaeda fighters sent to Guantanamo Bay when a makeshift detention facility could have been established in Afghanistan? The answer is complex as the motive of the US-led invasion of Afghanistan was in response to 9/11 and the allegation of Afghanistan harbouring terrorists. The US needed somewhere where they could interrogate terrorists without the inherent obligations of common article 3. Guantanamo Bay was an extremely strategic location that the US leased from Cuba on a long-term basis. The US enjoyed de facto jurisdictional freedom over Guantanamo Bay, but importantly, as it was not located on US soil, it was beyond the

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[651] William H Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (TMC Asser Press, 2014) 295.
[652] Ibid.
[653] United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)* <https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf>.

jurisdictional reach of the US federal courts.[654] More importantly, this unique situation also meant that the rights of detainees were very limited as judicial review of prisoners' rights would interfere with the interrogation of 'future threat' detainees. This attitude by the US was consistent with a shift in policy towards protecting the national interests of the US as opposed to the international notions of peace and security. Despite this new approach to detaining prisoners, the Bush administration still stated publicly that it would treat detainees humanely and, in a manner, consistent with the Geneva Conventions.[655]

In reality, the US treated those interred in Guantanamo Bay as unlawful enemy combatants not of POW status and therefore at the mercy of the US government. Prisoners who were NIAC combatants should still be afforded fundamental human rights such as the right to a fair trial, the right to be informed why they are arrested and access to legal counsel. This was confirmed in two cases in the US Supreme Court in the 28 June 2004 rulings in *Hamdi v Rumsfeld*,[656] and *Rasul v Bush*,[657] where the court found that detainees were permitted by law to contest the factual basis for their detention before a 'neutral decision maker'. It also followed that the US Supreme Court had jurisdiction over these issues in Guantanamo Bay. Unfortunately, those interned in Guantanamo Bay were not afforded any protections as it was considered a 'black hole' for legal rights of detainees and the US administration simply ignored the finding of the Supreme Court.[658]

To give a real-life example of those tortured or held without charge it is difficult to overlook Australian David Hicks who went from ordeal to ordeal. He was captured in Afghanistan by the Northern Alliance on 9 December 2001. They tied his hands behind his back and beat him at gun point. Upon being handed over to US special forces, he once again underwent beatings by his new guardians. Hicks was then transferred to the *USS Peleliu* where he was once again beaten and witnessed other captives being tortured. He was then transferred by helicopter to the *USS Bataan* and once on land was again tortured by US officials. Upon arrival at Guantanamo Bay, he was declared an unlawful enemy combatant and endured unspeakable torture. This included being forcibly drugged by doctors who have subsequently been implicated in many other cases of medical torture.[659] He was

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[654] Andrea Birdsall, '"A Monstrous Failure of Justice"? Guantanamo Bay and National Security Challenges to Fundamental Human Rights' (2010) 47(6) *International Politics* 686.
[655] *Memorandum on the Humane Treatment of al Qaeda and Taliban Detainees from President George W. Bush to The Vice President et al*. (7 February 2002).
[656] 542 US 507 (2004).
[657] 542 US 466 (2004).
[658] Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16(4) *European Journal of International Law* 614.
[659] Sondra S Crosby and Gilbert Benavidez, 'From Nuremberg to Guantanamo Bay: Uses of Physicians in the War on Terror' (2018) 108(1) *American Journal of Public Health* 36.

shackled with his hands behind his back for hours and endured prolonged painful positions that resulted in hernias. He was anally penetrated, subjected to extreme cold and heat, starved and deprived of sleep.[660] It is obvious that common article 3 was drafted with a clear intention to abolish this type of treatment of detainees, and this is not an example of treating a detainee humanely and without any adverse distinction. Even if the US regime decided to ignore the Geneva Conventions, there is still the *International Covenant on Civil and Political Rights* (ICCPR).[661] Article 7 of the ICCPR states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' David Hicks not only was subjected to cruelty as articulated in article 7 but was deprived of his liberty for many years without valid reason for his arrest in contravention of article 9. This must not occur in a new policing intervention in Afghanistan. This thesis proposes a rule of law blueprint for assessment and design of policing interventions that has at its core accountability and transparency. In order for a rule of law mandate to work and be followed, an intervention must provide leadership across all areas of the rule of law (a component of consistency in the form of mandate integration) and ensure that all those interned are treated fairly while they await a trial.

7.9.2 Abu Ghraib case study

Abu Ghraib was another case example of where those interned as prisoners of war awaiting trial or release, suffered grave breaches of basic human rights, during the conflict in Iraq. In many respects it is even more informative than the Gitmo case study as it concerned in-country detention practices and thus was much closer to the subject population and more visible to them for that reason. This is significant in terms of the consistency factor around perception of international operators and their roles. Many reports have been written on the conditions in Abu Ghraib, but the ICRC report of February 2004 was one of the first and most important and followed a visit and inspection of the facility. The report focused on the treatment of detainees at the infamous Unit 1A facility where inmates were interrogated.[662] The ICRC directly witnessed detainees kept in isolation naked and on concrete floors for days. When the ICRC questioned and intervened in this conduct the military intelligence office in charge stated that this type of interrogation was just part of the process. Prisoners would be 'drip fed' items of clothes and essentials in exchange for cooperation.[663] The

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[660] Scott Poynting, 'Empire Crime, Rendition, and Guantanamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime* 16, 22.
[661] *International Covenant on Civil and Political Rights*, adopted 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[662] International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment, and Interrogation* (Report, February 2004).
[663] Ibid.

ICRC also witnessed detainees in women's underwear in what could only be described as humiliating behaviour. There were other poor behaviours such as threats, insults, verbal violence and sleep deprivation through bright lights and loud music. Detainees were handcuffed using flexi-cuffs which caused wounds and lesions around the wrists. They were forced to walk the corridors naked as a punishment and often with women's underwear on their head. The ICRC interviewed many of these detainees and found that many of them suffered from serious mental deficits as a result of this treatment including poor concentration, oral expression difficulties, suicidal tendencies and severe anxiety. There was no recognition of detainees' right to know the reason for their arrest or indeed to ask questions about why they had been deprived of their liberty.[664]

Abu Ghraib was also continuously shelled, killing those detained but not the military commanding force who were sheltered in concrete accommodation while the former were forced to shelter in tents. This treatment was in contravention of art 23.1 of the Third Geneva Convention and art 83 of the Fourth Geneva Convention. These articles state that in all places of internment exposed to air raids, shelters must be of adequate construction to protect those who are interned. The military in command of Abu Ghraib should have transferred detainees to other locations that afforded more protection.

These are monstrous betrayals of the protections of IHL in a NIAC situation, and of basic and essential human rights. The report further identified circumstances where US military personnel in June and November 2003 opened fire in circumstances of prisoner unrest by those that had been subjected to what I can only refer to as torture. Five inmates were killed over three separate incidents.[665] There was similar adverse treatment and killings of detainees at Camp Bucca and Camp Cropper.

High contracting states like the US are simply able to play cloak and dagger with the lives of detainees, often with little reprimand or consequence. Who or what will pressure superpowers like the US to afford detainees rights pursuant to the Geneva Conventions? It is well established that, even if we stripped away all of the IHL protections of those detained in a NIAC, that human rights law including the *Convention against Torture*,[666] the ICCPR and customary international law could afford valuable protections.[667] In other words, the legal framework in its current state is sufficient to protect

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[664] Ibid.
[665] Ibid.
[666] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465, UNTS 85 (entered into force 26 June 1987).
[667] Karen J Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 581.

the rights of those detained in a NIAC. Article 9 of the ICCPR is but one example of a right available to those detained.

However, even this brief examination of the two cases of Guantanamo Bay and Abu Ghraib exposes the enormous failures of democratic states to recognise the human rights of these detainees, in circumstances where the law on the treatment of prisoners was seemingly circumvented at every opportunity. It also provides a telling case study of the longer-term effects of failure to cohere with the transparency and accountability factors critical in policing interventions. Even more remarkable is that, despite the atrocities, Guantanamo Bay remains open for business with 15 inmates still interned at Camp 7.[668] It is somewhat of a travesty that the US officials responsible for the torture of detainees both in Guantanamo Bay and Abu Ghraib enjoy the privilege of the Eighth Amendment to the US Constitution which protects citizens against cruel and unusual punishments.

The obvious hypocrisies and double standards of the US administration on the treatment of those detained in a NIAC situation are a strong experiential indicator of the need for future visiting international forces, and a subsequent Afghanistan administration, to learn the lessons of the past and apply IHL and human rights law, as IHL and human rights law are more than sufficient to compel officials to afford detainees their rights. Even if there remains a belief that IHL and human rights law do not apply, then domestic corrections management law should prevail. All states should have a domestic law that ensures that a detainee's human rights are respected, that they are treated humanely and not subjected to torture or cruel treatment of any kind.[669] There are just no excuses for any further torture factories like Guantanamo Bay or Abu Ghraib in the future and perpetrating states must be held accountable.

Consequently, if and when a future policing intervention (as part of a broader mandate) is once again necessary, Afghanistan should immediately be assisted by international donors post-Taliban administration to construct a number of prisons in strategic locations in order to separate the Taliban, Al Qaeda and Islamic State (IS) from the general population that have been interned for domestic criminal offences not related to war crimes, terrorism or similar offences. A 2015 report stated that the IS terrorist group was controlling and running prisons in the Achin district of Afghanistan.[670] Of the

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[668] Phil Stewart, 'US Dramatically Shrinks Guantanamo Prisoner Population to 15 Men', *Reuters* (online, 7 January 2025) <https://www.reuters.com/world/us/us-sends-11-guantanamo-bay-detainees-oman-leaving-just-15-2025-01-06/>.

[669] See *Corrections Management Act 2007* (ACT) s 9.

[670] Ashiqullah Rahhimzoy and Ibrahin Nasar, 'Islamic State Running Prisons Inside Afghanistan', *VOA East Asia* (online, 9 September 2015) <https://www.voanews.com/a/islamic-state-running-prisons-inside-afghanistan/2954886.html>.

127 prisoners that IS held, many were religious leaders, tribal leaders and members of the ANA and the ANP. It is uncertain whether this situation has been resolved as there are no reports to the contrary. In any event, a government that follows the Taliban must wrestle back control of these prisons and prosecute those responsible, amid reports that IS is again blowing people up with explosives.[671]

It seems, though, that Afghanistan has provided a permissive environment in terms of abusing prisoners. A report in 2011 detailed that a number of National Directorate of Security (NDS) and ANP administered prisons were systematically torturing inmates.[672] This followed hundreds of interviews with former prisoners by UNAMA staff across 22 provinces in Afghanistan. The majority of those prisoners had been incarcerated for being responsible for national security crimes such as being Taliban fighters or for facilitating the production of IEDs or the provision of suicide bombers. This is important from a NIAC perspective as a new administration cannot on the one hand write to international bodies such as the ICC condemning the abuse of human rights yet on the other condone an environment where the ANSF are torturing prisoners. An incredible 46% of those detained by the NDS had suffered torture during interrogations. This report was written while the international coalition was still active in Afghanistan, so there may have been some undue influence on the NDS to extract intelligence from NIAC-type prisoners as seen in US facilities such as Guantanamo Bay.

7.10 Witness protection

A very important factor that this thesis proposes for a future police intervention that will comply with the assessment and design factors identified in Chapter 2 is the early provision of public security. The security of Afghanistan is critical as so many other aspects of Afghan governance are dependent on it. As noted above, this is a key component of accountability and transparency. The problem, however, is that the justice system in Afghanistan is failing, or has indeed already failed. Judges are an endangered species, particularly those who are brave enough to find guilt in offenders. While it is important to prosecute person and property offences local to Afghanistan, the real issues that affect security are the ongoing freedom to operate of insurgent networks such as IS and Al Qaeda. While the former administration of Afghanistan wrote to the ICC to request immediate assistance to prosecute, other more immediate steps could be taken by coalition partners to assist in the process in a future policing intervention.

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[671] Ibid.

[672] UNAMA, *Mistreatment of Conflict-Related Detainees in Afghan Facilities* (Report, 10 October 2011) <https://unama.unmissions.org/unama-report-mistreatment-conflict-related-detainees-afghan-facilities>.

A coalition force that returns to Afghanistan must first assist with the deniability of insurgent forces. These forces do not have any special immunity and continue to stand in the way of basic human rights that should be afforded to all Afghans. The 2020 peace pact between the US and the Taliban was a farce, as demonstrated by constant atrocities by the Taliban across Afghanistan against Afghan people and the now hostile overthrow of the former government. This action would be consistent with the critical accountability step of early action against rebel militias in terms of demobilisation and removing their influence as a source of legacy loyalty, especially in terms of policing recruitment.

A redeployment must thus be coordinated with the ICC and the UN and should be swift, and properly pre-planned, integrated, and resourced (as required by the consistency factor). Witnesses to attacks by insurgent forces must be protected, along with victims, complainants and those who work in the justice sector system. What is apparent is that the former ANSF is currently logistically incapable of providing sufficient security and protection for those in the justice system. Therefore, a police-led mission to Afghanistan supported by the military must be developed. It must consist of professionals who can train prosecutors, defence lawyers, judges and academics in the law schools. The international community must pressure the leaders of Pakistan and other neighbouring countries to stop the flow of Taliban across the borders and into Afghanistan once and for all. There must be an undertaking between the countries that the Taliban and other insurgent networks will no longer be tolerated, and everything must be done to stop any further recruitment or replenishment of their ranks.

The police that deploy on a UN mission to Afghanistan must therefore include a speciality in witness protection and/or close personal protection in order to provide mentoring for the ANP in the type of security needed for witnesses, judges, victims and prosecutors for when the accompanying military forces have secured the provinces and a court or tribunal is established to prosecute those accused of war crimes or acts of terrorism. A future policing intervention may draw better acceptance if they were to appropriately conference with elders of customary law where they could draw leverage on how to best win the trust of those in the provinces of Afghanistan, much like the views expressed by Maley and Hughes as noted in Chapter 2 of this thesis.

7.10.1 Witness Protection Program

It is important that those working in the justice sector in Afghanistan, especially the judiciary, feel safe to prosecute criminal insurgent groups that commit crimes against Afghanistan. This may, depending on any ICC decision, include ICC members or hybrid tribunal members who will be assisting with the prosecution of war criminals and others who are responsible for international crimes against Afghanistan. In fact, a UN-led deployment must be on the ground prior to the insertion of any ICC members or other investigators, which makes the implementation of this new mission urgent. The

protection of this team is therefore essential and, at the very least, measures must be incorporated prior to the arrival of mentors, investigators, prosecutors and other professionals.

It may be that initially a UN military force is assigned the task of force protection in order to provide an outer cordon so that a UN team made up of police and criminal justice sector experts can be established. The question is what is witness protection? This area of law enforcement for good reason has been shrouded in mystery since its inception to protect the identities and safety of all those in the program. The Australian witness protection program was introduced in the 1980s with the objective of safeguarding those in the justice system by protecting those who have witnessed criminal acts.[673] The end game, if you like, is to ensure that there are witnesses left alive to give evidence against offenders. Some of the requisite skills of a witness protection officer identified by research include the ability to identify the lack of truth in a witness's narrative, good people skills and the ability to work in isolation. Other skills include time management, flexibility, and an ability to integrate into the murky territory of criminals.[674]

Bringing down the curtain on criminal enterprises is the goal of many law enforcement agencies around the world especially in counterterrorism units like the Australian Federal Police for example, who have foiled many attempted acts of terrorism across Australia. It is also a key component of the accountability factor. It is easy to accept that counterterrorism agencies like the AFP can foil terrorist attacks. We read about it in the paper or on the internet and move on. But not much thought is given to how agencies like the AFP conduct operations to foil attacks and the planning and intelligence that must be conducted prior to any high-risk matter. This is only possible through the enactment of specific legislation that both enables and protects police and other agencies in the pursuit of criminal individuals and groups that commit terrorist offences. Afghanistan certainly has the law to support the prosecution of terrorists and those responsible for war crimes but lacks the vital experience within the ranks of the ANP. Part IAC of the *Crimes Act 1914* (Cth) specifically deals with assumed identities, which is a valuable protection for police working in this area. This assumed identity also extends to those working in the intelligence community, which would have an excellent application in Afghanistan.

The authorisation of an assumed identity under the Australian legislation is applicable to intelligence agencies, those conducting investigations into criminal activity, and to members of the National

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[673] Monica Semrad et al, 'Selecting Witness Protection Officers: Developing a Test Battery for Australian Police' (2014) 15(1) *Police Practice and Research* 6.
[674] Ibid.

Witness Protection Program and any training pursuant to the same.[675] This legislation promotes cooperation among different agencies within the Commonwealth, which is crucial for intra-agency symmetry when conducting any number of tasks associated with the use of assumed identities. Afghanistan is crying out for such legislation and more importantly the protection of witnesses to crime. The AFP has a complex approach to countering terrorism that requires cooperation of the states through Joint Counter Terrorism Teams that consist of AFP and state and territory police force members.[676] The AFP's International Network is a crucial component of Australian law enforcement's efforts to combat the growing threat of transnational crime, including terrorism, within the Asia-Pacific region. Now I am not suggesting for one minute that Afghanistan will need to develop the type of capability that the AFP has in the short term, but a starting point would be international cooperation with the ANP once it has been given the years of mentoring and training required to professionalise a counterterrorism unit, not only in Kabul but throughout the main provinces of Afghanistan. Shared intelligence between the international community and the ANP will ensure that the ANP are abreast of developing issues within and outside Afghanistan's borders.

The AFP currently has 23 officers from the AFP International Network posted within the Asia-Pacific region to work in close liaison with international law enforcement partners. In addition to this network, the AFP has dedicated Regional Cooperation Teams in Jakarta, Manila and Bangkok, as well as a Counter Terrorism Police Advisor based in Jakarta and embedded in the Indonesian National Police headquarters. On a world scale, dedicated Counterterrorism Liaison Officers are also now based in Islamabad, Washington DC and London. This type of cooperation could be mirrored across Afghanistan without the complication of a state-type jurisdiction but with the involvement of the governors of each province. This would ensure that up-to-date criminal intelligence is provided to Afghanistan, especially around transnational criminal offending such as people smuggling, terrorism, gun trafficking and the huge market of drug trafficking.

It is one thing to have a foothold in an international policing liaison network but quite another to have a police force capable of providing the broad level of competency not only to investigate and prosecute an offence but to protect those that are vulnerable in the criminal justice system. A successful investigation and subsequent prosecution must have good evidence, which will most often be delivered by competent witnesses who are willing to come forward and give evidence against perpetrators. The success of many investigations rest on the protection of witnesses from individuals or groups who are intent on silencing them.

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[675] See *Crimes Act 1914* (Cth) s 15KB (2).

[676] 'Countering Terrorism', *Australian Federal Police* (Web Page) <https://www.afp.gov.au/sites/default/files/PDF/countering-terrorism.pdf>.

For developed countries like Australia and the US, witness protection programs have been established through the enactment of very specific legislation. In Australia, the Commonwealth has enacted the *Witness Protection Act 1994* (WPA). The WPA, at s 4, established the National Witness Protection Program, controlled by the Commissioner of the AFP, to provide for the protection and assistance of witnesses. Agreements are signed between those to be protected and the AFP and set out the details of the types of protection and the assistance to be given with penalties for those witnesses who breach a law of the Commonwealth while under protection or a condition of the agreement.[677] The other reassuring component of the WPA is that the identity of the witness cannot be disclosed to the court, which affords a further layer of protection.

But how does a witness protection program actually work, and could it be something that could be incorporated into a national Afghanistan system? It very difficult to determine the actual methods of witness protection programs due to the absolute secrecy that they are conducted, in order to protect the lives and identities of those they protect. Some research in Australia, for example, has examined the requisite skills required of witness protection officers. Witnesses are provided with a new identity and a new residential holding where police protection teams operate around the clock to protect them, depending on the value of the witness, the value of the information, and the seriousness and scope of the offence.

In order to fully embrace a witness protection program, a new Afghanistan government would be encouraged to ratify the 1966 *International Covenant on Civil and Political Rights*, which includes article 15 on the protection of the witness. There are a number of other international instruments that deal with witness protection. The *Convention of the Organization of the Islamic Conference on Combating International Terrorism* stipulates in art 37 that states are

> to undertake all necessary measures to ensure the protection of a witness or expert including the necessary security required by the condition of the witness or expert and of his family, and circumstances of the case and types of expected risks.[678]

The 2006 UN *Global Counter-Terrorism Strategy* calls on UN member states to ensure the measures taken to combat terrorism comply with the norms and standards of international law including, by extension, those related to criminal justice proceedings.[679]

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[677] *Witness Protection Act 1994* (Cth) s 9.
[678] *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, Annex to Resolution No 59/26-P (1 July 1999) art 37.
[679] *United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UN Doc A/RES/60/288 (8 September 2006).

The 2000 UN *Convention against Transnational Organized Crime*[680] would be a useful signpost for Afghanistan to both ratify and enact into its own domestic legislation in order to protect witnesses and victims alike in criminal offences. Article 24 stipulates a number of measures that may effectively protect witnesses:

> a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.
>
> b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

The above mentioned also applies to victims insofar as they are witnesses.

7.10.2 Witness Protection Law

Of great importance is the need for domestic witness protection legislation that governs the way a witness protection program operates. In the volatile neighbouring state of Pakistan an options report was completed in 2018 by the United Nations Office on Drugs and Crime (UNODC) on witness protection policy options in response to terrorism and terrorism-related attacks.[681] Pakistan was subject to 1800 terrorism-related deaths in 2016, making it one of the most terrorism-affected nations in the world.[682]

The UNODC report focused on a number of witness protection programs from countries such as the United Kingdom, Sri Lanka, Germany, South Africa, the Philippines, Colombia, the United States and the European Union.

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[680] *Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).
[681] 'Protecting Witnesses', *UNODC* (Web Page) <https://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html>.
[682] Ibid.

7.11 What specific criminal law changes are required in light of this analysis and application of the four key assessment and design factors?

7.11.1 Suggested amendments to the criminal laws of Afghanistan

When viewed alongside other Acts that purport to provide police with powers, the *Law on Police and Gendarmes 1974* (Police Act) is somewhat antiquated. Afghanistan has gone forward with technology under the influence of the West, and with this advancement should come amendments to the Police Act in order to keep up with the technological advances of criminals and criminal gangs. This is not to suggest that the statute law of Afghanistan can stand alone; quite the contrary. It must complement customary, tribal and Sharia law.

The *Crimes Act 1914* (Cth) in Australia is a good example of legislation that assists a national policing agency across a number of areas including but not limited to the following:

- search warrants
- powers of arrest
- powers in relation to terrorist acts and terrorism offences
- power to obtain information and documents
- assumed identities
- witness identity protection
- protecting vulnerable persons
- investigation of offences and the rights of a suspect
- forensic procedures.

All these important policing areas align with the four factors that form the blueprint of this thesis to a rule of law mandate in Afghanistan. The Durch approach to the rule of law considers public security as essential first factor in addressing law and order in a post conflict situation. Public security will assist a policing intervention to mentor an Afghan Police Force to counter corruption and prevent crime rings through the proper assessment of crime scenes and investigation of suspects, ensuring that borders are controlled in order to cordon and control criminals and insurgent networks.

As Afghanistan continues to develop and arrive at new levels of technology, these areas of law will become more important. For example, the issuing of a s 3E search warrant under the *Crimes Act* in Australia, permits at s 3L the use of electronic equipment to assist in a search when the evidence sought is held on a computer or other electronic device.

The inclusion of these types of amendments will be contingent on the levels of advancement and resources of the ANP. A modern federal policing agency must also have a forensic capability to ensure that crime scenes are properly analysed and relevant materials such as fingerprints are collected in order to identify possible suspects. The proliferation of terrorist attacks continues to plague Kabul and greater Afghanistan. A recent example of a terrorist attack in Afghanistan was on a Sikh temple where militants, believed to be Islamic State extremists, killed at least 25 people in a six-hour siege.[683] It beggars' belief how armed militant extremists are able to attack innocent civilians with little to no detection. There have also been recent attacks on schools in a country under the rule of the Taliban.[684] How this continues to occur now that the Taliban have taken over as the government of Afghanistan is hard to comprehend but it demonstrates systemic issues with current law enforcement in Afghanistan and security in general. It also demonstrates the absence of a strong rule of law.

A national policing agency with a good intelligence unit and well-resourced tactical response unit could arguably prevent any such future attacks. A well-resourced and trained forensic unit is able to properly investigate such crime scenes and collect forensic materials in order to identify and prosecute offenders. This acts as a good general deterrence for any future attacks but is heavily reliant on an uncorrupted judicial system and a strong witness protection program. A strong and effective police force in Afghanistan will win back the trust of the people. Broader cooperation from Pakistan, Russia, India and Iran will also assist in curbing the flow of extremist groups across shared borders.

The inclusion of witness identity protection would provide the necessary mechanisms to support undercover operations in Afghanistan by a new Afghan Police Force, as it would more broadly protect the identity of police who protect witnesses and the assumed identities that they are permitted to use in operations. Given the scope of ongoing terrorist attacks in Afghanistan, the protection of witnesses is critical in eradicating terrorism and the extremist groups that have taken advantage of a weakened state. In order to do this the Police Act would also need the inclusion of a section that protects vulnerable persons, which are defined as both child and adult witnesses. This provision would enable witnesses to give evidence remotely with the location kept secret, which would be more secure for all parties involved. What Afghanistan does not have is specific witness protection legislation.

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[683] Mujib Mashal and Fahim Abed, 'Terror Attack Strikes Afghan Capital as Another City Is Locked Down for Coronavirus', *The New York Times* (online, 25 March 2020) <https://www.nytimes.com/2020/03/25/world/asia/afghanistan-sikh-kabul.html>.

[684] 'Afghanistan: School Bombings a "Reprehensible Attack" on Religious and Ethnic Minorities', *Amnesty International* (Web Page, 19 April 2022) <https://www.amnesty.org/en/latest/news/2022/04/afghanistan-school-bombings-a-reprehensible-attack-on-religious-and-ethnic-minorities/>.

7.11.2 The Penal Code 1976

The Afghanistan Penal Code is comprehensive and not too dissimilar to the Criminal Codes that we have in Australia. Section 2 of the Code from article 23 explains the three different levels of seriousness of a crime: felony at article 24, misdemeanour at article 25 and petty offence at article 26. It is important to note that Afghanistan provides for the death penalty for certain felonies. This is by no means a barrier for domestic law enforcement, but Afghanistan must ensure that the judiciary and a new police force are uncorrupted so that the death penalty is not used inappropriately and is a sentence of last resort.

The Penal Code provides a thorough explanation of what could be expressed as extensions to criminal responsibility from articles 29 to 33, again in reference to the three levels of seriousness. The Code itself remains largely uncontroversial. In fact, article 53 provides for accepted circumstances such as sporting events, surgery and the conduct of making an arrest as exceptions to what would normally be considered an assault. The only exception, as listed in article 54, is that the punishment of a student or son by a teacher or father respectively is permissible provided it is within the limits of religious and other laws. Defences for criminal acts are well explained in the Code as are the punishments available to the judiciary for crimes after a conviction.

Article 49 of the Penal Code provides for circumstances where there has been an alliance in crime, that is, where two or more people have joined together to commit a crime. One of the major issues in establishing the rule of law in Afghanistan is how the criminal justice system deals with crimes committed by criminal networks, gangs or extremists. The security of Afghanistan is contingent on the control of the rampant criminal and terrorist networks that continue to undermine the prosperity of Afghanistan. Other networks such as IS have stepped up efforts to undermine security and terrorise ethnic and religious minorities and this must be stopped in order for Afghanistan to prosper.

So many articles of the Code contain the necessary ingredients for Afghanistan to protect its sovereignty, especially from foreign interference.[685] Although the punishments are severe and perhaps does not reconcile with the standards of many other countries, the intention is clear – do not spy or take up arms against Afghanistan and do not facilitate the entry of the enemy. All the language is there, just not the enforcement. Afghanistan is very much a weakened state, corrupted by invading forces, turned against each other through perverse propaganda and an over-reliance on foreign aid. Much rebuilding of the ANSF took place through the assistance and often the lead of coalition forces,

[685] Penal Code 1976 arts 173–176.

often with the loss of life.[686] But what happens when mentoring coalition forces step away? Underpaid security forces are often plagued with corruption and lack of motivation, as can be seen in countries such as the Solomon Islands where corruption permeated and spread like a pandemic through the Royal Solomon Island Police following the civil war in 2003.[687]

Den Heyer asks the very important question of how do you rebuild a post-conflict state when police were either absent during the conflict or embedded with corruption?[688] It is reasonable to state that Afghanistan's policing crisis can be applied across both of these important issues raised by den Heyer. The ANP were either absent in the provinces at the height of the conflict in Afghanistan or helplessly understaffed and under-resourced. They were also corrupt and linked to criminal networks that harvest the huge drug trade, and profit from land theft, real estate, tax evasion and illegal security forces, to name a few.[689] Sadly, some observers state that the former ANP were perceived as being highly corrupt by the population, which may have actually remobilised some support for the Taliban.[690] This has resulted in a further deterioration of security in Afghanistan and fertile ground for criminal groups to undo any progress that the ANSF and the coalition forces made.

The main two arms of criminality in the former ANP are bribery and extortion. Corruption, according to some commentators, extends to 'extorting illegal tolls; manipulating laws, duties and rules; breaching human rights; and interfering with investigations, arrests and the justice system to obtain financial or personal gain'.[691] This type of activity is preventing Afghanistan from going forward and is eroding the trust of the people.

It is widely agreed that the rebuilding of a nation-state is premised on the strength, honesty and independence of the police force. While the scope of this thesis is restricted to assessing a rule of law model, analysing the policing capability and criminal laws of Afghanistan after the coalition withdrawal, it is superficial to ignore other capabilities and issues as they arise. A well-paid and functioning national police force is only as good as the other armed services that support them. A large land-locked country like Afghanistan cannot be patrolled by the police alone and requires the

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[686] Hugh Poate, *Failures of Command: The Death of Private Robert Poate* (NewSouth Publishing, 2021).
[687] Garth den Heyer, 'Evaluating Police Reform in Post-Conflict Nations: A Solomon Islands Case Study' (2010) 34(1) *International Journal of Comparative and Applied Criminal Justice* 213, 224.
[688] Garth den Heyer, 'Royal Solomon Islands: Rainbows Across the Mountains – The Issue of Police Corruption' in Ronald Hope Kempe (ed), *Police Corruption and Police Reforms in Developing Societies* (Routledge, 2015) 180.
[689] Danny Singh, 'Corruption and Clientelism in the Lower Levels of the Afghan Police' (2014) 14(5) *Conflict, Security & Development* 621.
[690] Ibid.
[691] Ibid 624.

cooperation and logistical support of the Army along with support from the outer-lying provinces. It also requires the support of countries that share a border with Afghanistan. This support extends to the judiciary who must provide unbiased, unencumbered decisions without influence. This means that an amendment must be made to the current arrangements to ensure that there is complete separation of the government and the judiciary, and judicial independence.

Civil servant corruption is also prohibited in the Code.[692] Public officials have therefore always been on notice that fraud, bribery and embezzlement are not tolerated.[693] The Code further prohibits crimes against the internal security of the state, with article 204 stating that anyone using force to overthrow the government shall be sentenced to death, which will be an interesting proposition given the current Taliban reign.

Article 213 introduces crimes relating to criminal gangs and once again provides a blueprint for the criminal justice system of how to dispose of those who either lead criminal gangs (art 213), support them or provide military supplies (art 214). Article 215 provides a 'get out of jail card' to those criminal gang members that separate from the main group at the first warning of the military. This article is rather surprising and should either be removed or amended to be consistent with the laws around *attempt*, where the principle is that the perpetrator is punished irrespective of whether the crime was carried out. This will send a clear message to those that choose to join a criminal gang. One focus of this thesis is the protection of witnesses, and allowing a criminal gang member an amnesty if they adhere to a 'warning' simply undermines the criminal justice system. It would frequently put a protected witness or a judge at risk of reprisal.

Chapters 3 and 4 of the Code deal specifically with bribery, treachery and embezzlement pertaining to a public official and provide specific examples and punishments for such offences. In chapter 8 the Code sets out the punishments for offences that involve transgressions against public officials. We could take this to mean that those who threaten or assault police or the judiciary will be punished for their actions, although a criticism would be that the punishment is light.[694] Again, a useful amendment would be to increase the punishment in article 290 from 6 months' imprisonment to two years and/or a fine. The Code as it stands in this regard is inadequate and is condoning the assault and/or threat of a public official, again undermining attempts to enamel greater respect in the police and the judiciary. It also provides little deterrence.

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[692] See Penal Code 1976 arts 173–176.
[693] Kate Clark, 'The Real Afghan War' (2006) 145(4820) *New Statesman* 12.
[694] See Penal Code 1976 arts 290–296.

Chapter 18 deals with crimes against religions, which is most interesting in the context of this thesis given recent attacks against the Shia minority and a Hindu area of Kabul.[695] Section 2 of the Code deals with crimes against individuals and is mainly uncontroversial other than article 427 which in effect makes homosexuality a crime punishable by death. This article is clearly influenced by Sharia law and should be abolished to support a progressive, forward-moving society.

7.11.3 Criminal Procedure Code 2014

The Criminal Procedure Code (CPC) was approved by the Afghan Parliament on 26 January 2014 and endorsed by the President on 13 February 2014. Article 2 of the CPC provides that the purpose of this Code is as follows:

1. The quick and comprehensive detection of crime, identification, arrest and prosecution of the suspect or accused person.

2. Investigation of the crime using technical tools and professional methods.

3. Initiating claims against the accused person based on incriminating evidence.

4. Fair trial, as no innocent shall be punished and no criminal shall be exempt from prosecution.

5. To safeguard individual rights of the suspect, accused person, convict, and victim and to protect the rights of the society while executing investigation and prosecution.

6. To protect and respect the rights, personality and human dignity of the victim, suspect, accused person, and the convict.

7. Retraining criminals to create the ideology to obey the provisions of Shari'ah and the enacted laws, respect religious beliefs and to observe morality, manners and rules to live peacefully in a society.

8. Safeguarding public order, security and rule of law in the country.

9. Prevention of crime and violation of law.

This article goes directly to the objective of this thesis and that is the detection of crime, identification of suspects and the prosecution of the offence. More specifically section 5 of article 2 states that the Code purports to safeguard the individual rights of the suspect, accused person, convict and victim, and to protect the rights of the society while executing investigation and prosecution.

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[695] Ehsanullah Amiri and Jessica Donati, 'Attack at Sunni Mosque in Kabul Kills at Least 12', *The Wall Street Journal* (online, 14 May 2021) <https://www.wsj.com/articles/attack-at-sunni-mosque-in-kabul-kills-at-least-12-11621004875?page=1/>.

It seems that the only effective way to do this is to offer physical protection by way of the police. Criminal gangs are rife in Afghanistan, as will be discussed in the next chapter, particularly organised crime and reprisals against whistleblowers. If organised crime has the police in its back pocket, then justice cannot be served.

And then, as if by divine intervention, the CPC provides a whole chapter on witness protection.[696] The code was drafted at a pivotal moment in time for Afghanistan, when the bulk of the coalition had transitioned out of Afghanistan. It was decided that post-2014, Afghani citizens needed protection in the criminal justice system. Article 53 in essence allows a witness to give evidence behind a curtain, through a voice changer or remotely. This is consistent with Australian and British laws.[697]

Article 54 seems to go somewhat further and provides that the physical security of witnesses will be protected in circumstances where a witness or relative of a witness is at risk due to threat or menace or other similar action. The article also provides further examples of where protection is required when the witness is a child, or the witness has suffered serious physical or mental harm as a result of the crime.

Interestingly article 54 states that security forces are required to protect witnesses on direction from the prosecution's office and the court until the danger of the situation has passed. A witness or relative of a witness may apply to the prosecution's office for protection during the investigation and trial process. The process of an investigation and a trial is often long and drawn out.

Chapter 3 is prescriptive of crime investigation and acts as a blueprint for police in the detection of a crime and the requirement to notify the prosecution as soon as a crime is detected. Chapter 7 deals with the covert surveillance of suspects and accused persons and includes listening to conversations made via phones, computers and the internet. Covert surveillance also extends to banking and financial transactions, which is crucial in a country that is often hampered by financial corruption.[698]

Of some criticality to this thesis is article 113 of chapter 7 which lists the following crimes where covert surveillance measures may be taken against the suspect or accused person:

1. Crimes related to terrorism, money laundering and financing terrorism.

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[696] See *Criminal Procedure Code 2014* (Afghanistan) ch 7.
[697] See, eg, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 3.
[698] Amiri and Donati (n 695).

2. Crimes stipulated in the law against internal and external security.

3. Crimes related to drugs and intoxicants.

4. Corruption crimes.

5. Kidnapping and human trafficking crimes.

6. Murder crimes.

7. Crimes related to threatening of the witness, judges and prosecutors and family members of each of them under their investigation when committed for the purpose of preventing application of justice.

8. Crimes stipulated in Statute of the International Criminal Court and Final Document of Rome Diplomatic Conference.

All of these crime types are most relevant to this thesis, so this informs the police in particular and the Taliban administration of the types of resources and technology required to implement this capacity.

Article 113 certainly lays down the law of what crime types require critical attention in Afghanistan in terms of surveillance, detection and prevention. Of note for this thesis is article 113(7) which relates to the protection of judges, witnesses, prosecutors and their families. Unfortunately, at the time of writing this thesis there were no background materials to inform the writer on how this legislation was drafted and on what basis article 113(7) was included. We must therefore assume that the legislators intended the government of the day to fill in the details of a security attachment that could provide witness protection as required. We again have the narrative to support witness protection, but how the program is implemented and whether it is sustainable are critical here, as current research provides little clarity as to whether a protection unit has been established.

The CPC certainly confirms that the Afghanistan criminal law system is inquisitorial in nature. Chapter 10 provides step-by-step instructions for prosecutors and demonstrates the heavy involvement they have in the investigation and the involvement in the crime scene. This is quite remarkable really given the experience in the British system of law where the office of prosecutions remains quite separate from the investigation. A great deal of work will need to be done by an international peace operation force to re-establish a competent prosecutorial unit, noting that the Taliban have all but abolished them.

7.12 Accommodating international instruments in light of this analysis and application of the four key assessment and design factors

Afghanistan joined the United Nations on 19 November 1946 and has ratified a number of important conventions and treaties since. The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was ratified in 1987 and prior to that the all-important *International Covenant on Civil and Political Rights* (ICCPR) in 1983.[699] The ICCPR seems to accord well with chapter 2 of the Afghanistan Constitution 2004 on the fundamental rights and duties of citizens. Importantly there is a consistent approach to eliminating all forms of discrimination and ensuring that men and women enjoy equal rights. The Afghanistan Constitution also forbids any form of torture, particularly methods used to extract the truth from those that are under arrest. The Taliban's Intelligence Agency are holding individuals against their will indefinitely and torturing them.[700]

This is yet another crucial point in this thesis in terms of post-conflict policing. The Afghan people must have faith in the police to deliver justice with full adherence to the law. Articles 29 and 30 forbid forced confession and torture to extract evidence and the ICCPR comprehensively sets out the rights of individuals, particularly those charged with criminal offences, which is the main focus of this thesis.

As a signatory to the ICCPR, Afghanistan has committed to article 14, which in summary states that everyone is entitled to a fair and public hearing by a competent judicial system. There has already been discussion in this thesis about this issue, but public hearings are seemingly not occurring in Afghanistan, which has undermined the people's faith in the judicial system and the paved the way for corruption or at the very least perceived corruption in the judiciary (what is left of them) and the other key actors. It is therefore a critical recommendation of this thesis that the hearing of a criminal matter be made as public as possible to ensure that the people can see justice being done.

The former administration of Afghanistan was a member of the International Criminal Court (ICC) and made recent good use of its services, with an application made to investigate and prosecute war crimes.[701] It may indeed be the case that a new administration post-Taliban will require the services of the ICC to investigate the atrocities of the Taliban during this current tyrannical reign.

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[699] Afghanistan acceded to the ICCPR, which carries the same legal obligation as ratification.
[700] Dawi (n 613).
[701] *Situation in the Islamic Republic of Afghanistan (Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-02/17, 5 March 2020).

7.13 Firearms

The issue of firearms offences in Afghanistan is an interesting one as it seems that there has been a significant increase in the number of Afghans who carry firearms. Haleem stated in 2016 that in almost every village in the countryside, villagers are seen to be openly carryings weapons without licences.[702] Residents of the fortified Kabul are said to keep guns at home for what they say is self-defence and security measures.[703] It is terribly hard to criticise the carriage of unlawful (or lawful) firearms in Afghanistan in the context of the highly unstable security situation and the general distrust of the police and the broader criminal justice system. It has already been established that there is wide-ranging corruption in the ANP and the judicial system; hence the public feel that they need to take matters into their own hands. Kabul alone has been subject to attack after attack on the population, particularly the religious minorities. It is an issue that needs to be addressed, however, as there is also an absence of a prohibited firearms statute. Many of those who carry firearms to protect themselves state that they

> hate weapons and armed groups, but armed people roaming around recklessly shows that the government has failed to disarm such irresponsible groups and because we feel insecure myself and many others have been forced to carry arms.[704]

Interestingly the same article states that the many people seen to roam Afghanistan carrying weapons and claiming self-defence are contributing to the security crisis. The carriage of firearms has to be linked back to legislation, enforcement and the ANP's capability to provide security.

7.13.1 Prohibited Weapons Act

There does not appear to be a Prohibited Weapons Act in Afghanistan nor is there mention of prohibited firearms in any of the criminal laws. This may not have been an issue when the US and coalition forces provided security in Afghanistan, but the withdrawal of those forces has seen a return to security issues which has led to the carriage of firearms by the general population and an ANSF ineffective in curbing the security threats of the IS, Al Qaeda and other criminal groups. While the population is entitled to defend itself from internal security threats in the absence of a trusted and competent police force, this carries with it a lethal capability in the hands of citizens who are not only capable of self-defence but the perpetration of crime. Afghanistan must have laws to prohibit the possession of illegal firearms. It is perhaps premature to introduce such laws until those entrusted to enforce the law and protect citizens do so effectively and win back the trust of the people. The

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[702] 'Afghanistan Sees Rise of Gun-Toting Citizens Amid Ongoing Security Threats', *Xinhua News Agency* (China, 21 February 2016).
[703] Ibid.
[704] Ibid.

security situation in Afghanistan is currently far too unstable to prohibit the possession of firearms by the population.

Once Afghanistan has achieved stability then it would be prudent to draw a line in the sand in terms of what constitutes a prohibited weapon in order to protect a new police force from criminal networks that carry illegal firearms.

7.14 Diversion of the poppy market

It would have been a better strategy to provide a world economy for the medicinal use of opium rather viewing the growth of poppy fields as illicit or unlawful. There are a wide range of legal medications that require opium as the main ingredient to make them effective, including oxycodone, oxymorphone, morphine, codeine and fentanyl.[705]

It is still beyond belief that the legal uses of opium are overlooked, although some data illustrates that one third of the opium production in Afghanistan is exported as raw product, although the end production of that raw product is unknown.[706] It would be a far better option for Afghan farmers to harvest poppies for legal medicinal purposes than for illicit purposes as the funds would be regular and filtered through a fair and strong government. This would wrestle control back from non-state actors in the illicit drug market and ensure that valuable taxes and revenue remain in Afghanistan. Simply replacing crops with wheat and other fruit crops is not the complete answer as many parts of Afghanistan have conditions that are not conducive for these types of crops. Poppy crops are well known to grow in poor soil and in harsh conditions despite being labour intensive.[707] In fact opium production is worth somewhere between 6–11% of gross domestic product so to simply eradicate its production when it has been part of Afghanistan's farming scene for centuries is simply not the answer; rather it is policing it that is important. Setting up local infrastructure and opportunities for young people are the key along with diversification of agriculture to combine with poppy fields. Many lessons for crop production and diversification would be best learnt from Australia, which is not only the driest continent in the world but innovative in terms of its agriculture, irrigation and access to renewable energy systems.

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[705] 'Prescription Opioids Drug Facts', *National Institute on Drug Abuse* (Web Page, June 2021) <https://www.drugabuse.gov/publications/drugfacts/prescription-opioids/>.
[706] United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2018: Challenges to Sustainable Development, Peace and Security* (Report, July 2019) 2 <https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_opium_survey_2018_socioeconomic_report.pdf>.
[707] Ibid 4.

In the current climate in Afghanistan, many people rely on the production of opium to simply survive in the absence of other options. Afghanistan saw a severe lack of rain and snow in the 2018 season which had devastating effects on opium production and the estimated 190,700 people that it employs, mainly in the south. A 2018 report by the UNODC stated that 53% of headmen in opium-producing villages allege that they were under the control of insurgents and non-state actors compared to only 26% of headmen from non-opium-producing villages.[708]

This statistic has devastating effects on the access to government-controlled medical and educational facilities, noting the Taliban view on the education of females. This is yet another critical point in this thesis in the search for a more secure and less corrupt Afghanistan. A line must be drawn in the sand by the next Afghan government and greater logistical support and recruitment given to the ANSF to prevent the progress of the insurgency and the 'Stockholm syndrome' effect that it has had on the population. There is not a single doubt that a coalition force will need to re-enter Afghanistan to drive back the Taliban and set up the ANSF to arrest and prosecute the Taliban and their affiliates as criminals to send a clear message to the insurgent networks who have ambitions to prevent progress.

Hence, and in hindsight, the US and coalition partners should have focused on transnational criminal issues such as human, drug and weapons trafficking with a focus on the porous borders of Afghanistan rather than crop eradication. A strong, well-paid and resilient ANSF must be supported now by way of a combined police-led and military-supported mission. This mission must focus on the protection of informants, victims and witnesses and be politically supported by way of an agreement between bordering countries to stop interfering in Afghan business and to give the country time to recover from the wounds of war and devastation. Foreign friendly forces assisting Afghanistan should not spend the entire mission watching for unwanted foreign interference – the job will be hard enough facing the existing insurgents within the borders.

7.15 Conclusion

The signing of a peace deal between the Taliban and the US should have been a sign of some hope that a country that has suffered so immensely from 'domestic violence' can begin to recover. Sadly, that peace as noted throughout this thesis is unlikely to be realised with the Taliban in control of the country. A future recovery, minus the Taliban, must come from the trust of the complex population of Afghan people. There must be a unity of sorts from the people, as seen many times in the history of conflict in Afghanistan when faced with the adversity of war and invasion. Building that unity is by no means a simple task, which is why this thesis has included a focus on the history of invasions. The

[708] Ibid 6.

great wars were really an opportunity for Afghanistan to become a united front against the British who were simply using Afghanistan as a pawn to prevent the Russians from gaining strategic ground into the ports of India. While an invasion can provide an invaded population with a sense of unity as it defends itself, the installation of puppet leaderships by foreign invaders ultimately created a lasting distrust in and amongst Afghan people. These puppet leaderships occurred on a regular basis during the invasions into Afghanistan, yet when there was reprieve in the first half of the 20th century, we saw a country begin to prosper, invent and modernise.

Perhaps the greatest damage to modern Afghanistan did not come from the most recent conflict but from the Russian invasion in 1979. That period saw a multitude of divisive acts that disassembled the population into fighting civil factions, once again at the hands of foreign invaders. The US was providing arms to the mujahideen to fight the Russians. The mujahideen would, by and large, later become the first Taliban. The Taliban would then become the enemy of the US.

The greatest travesty of the Soviet invasion was the communist influence on Afghanistan. It was slowly perpetuated by subtle Russian infiltration at all levels of government. It was this betrayal that led to perhaps the greatest domestic division of the Afghan people in their known history. It turned Afghan people against Afghan people and played into the hands of the Soviet invaders, who had by then placed large numbers of military personnel in strategic locations in Afghanistan. This level of deceit in Afghanistan was unprecedented and has not occurred since. The key question is whether the passage of time has eroded memories of these divisive factions. It is likely that remnants of those memories have generationally dissolved but there would still be an element of deep-seated resentment of westerners in the psyche of the more influential families. Then there is the ongoing persecution of the Shia Muslims at the hands of the Sunnis by way of terror attacks by ISIS-K or affiliates of the Taliban.

There just seems to be layer upon layer of complexity at all levels of the Afghanistan community. Barriers of religion, culture and corruption stonewall progress. Time and time again progress is stymied by terror attacks, corruption of officials or redirected foreign aid. The criminal justice system needs to be enforced. Pardons should not be paid for nor witnesses silenced. An uncorrupted police force and a witness protection program could help Afghanistan rid itself of the multilevel corruption that seemingly stands in the way of justice and help open the country to tourism and trade to help it prosper.

The delayed focus of the rule of law by ISAF along with a weak rule of law mandate from the UNSC created an infertile environment for the proper application of the rule of law in Afghanistan and a lost opportunity to apply parallel security measures, which meant that ISAF was forced to play catch up in

circumstances where they never really made any ground. Efforts of promoting the rule of law were uncoordinated and centralised which meant that the provinces suffered, and little input was sought from tribal elders on what would be best practice in those provinces.

Despite these failures, it appears that, prior to the Taliban takeover of the administration of Afghanistan, the legal architecture of Afghanistan was largely intact and capable of supporting a cohesive policing force with capacity to provide policing across the provinces and not primarily to a centralised system. The Constitution has been drafted in such a manner that it can support the broader views of tribal and customary law. This is important in terms of supporting the rule of law blueprint proposed in this thesis that will include seat at the table for tribal and customary law in order to truly represent the requirements and needs of all Afghans and align with step 4 of the rule of law proposal of 'engagement'.

It is quite possible that a returning police intervention will be met with a country in complete disarray, noting that there are unconfirmed reports that the Taliban are filling the roles of police and the judiciary and have disavowed the Constitution. The intervention may also be faced with a country that has significant logistical issues to fulfill rule of law objectives. This assessment will need to be made on the ground and the valuable previous footprint of UNAMA will be best placed to advise a new mission on the state of play on the ground and to assist and advocate for funding from international donors, placing greater importance on the need to have an enforceable and realistic rule of law mandate to convince the international community to once again support a move back into Afghanistan.

The criminal laws that were extant prior to the Taliban take over, will be sufficient to support a rule of law process. There may need to be some amendments in order to ensure that tribal and customary laws are included in some criminal laws to meet the requirements of the Constitution, but there exist solid legal foundations to support a strong rule of law mandate in Afghanistan that will need the extra-legal measures oversight of the UNSC. This will mean that the 4-step approach to the rule of law in this thesis will have at least a solid legal basis to succeed.

The state of criminality in Afghanistan is, to an extent, an unknown, but what we do know from the assessment of the Taliban in this thesis, is that they are ruthless leaders that enforce an interpretation of Sharia law that is draconian and inhumane. It is clear the Taliban lead by fear which, in the long term, is unsustainable noting the reports of breaches of humanitarian law and human rights laws, particularly against women and children. The international community will, at some point, need to act and the UN intervene with a strong series of mandates. There will need to be ongoing assessments of what a policing intervention will encounter on the ground prior to deployment given the reports of Al

Qaeda at large throughout Afghanistan along with ISIS-K and other insurgent networks and criminal gangs as mentioned and examined in this thesis and in accordance with step 1 of the 4-step rule of law proposal.

The state of prisons in Afghanistan is unknown at this time but, as assessed in this thesis prior to Taliban rule, the real concern will be the treatment of women in custody and the treatment of all prisoners given the Taliban's poor record and complete disregard for international standards and law. The case studies of Guantanamo Bay and Abu Ghraib demonstrate the lessons that a future policing intervention will need to learn from in terms of the Mandella Rules and the International law standards of caring for prisoners. It could be that temporary prison facilities are built to house ousted Taliban operatives, Al Qaeda networks and other criminal gangs, in order to segregate them from the general prison population to prevent radicalisation of others in the system and to ensure that those that may be charged with crimes against humanity and genocide are readily identified but also treated humanely by an intervention.

In order to facilitate the arrest and subsequent prosecution of crime in Afghanistan, a judiciary will need to be mentored and set up which will be consistent with the blueprint on the rule of law that this thesis proposes. The Hughes approach to Timor-Leste is dominant to this purpose as only those that possess the appropriate qualifications and skills base must deploy with an intervention to lead and mentor a new judiciary across Afghanistan. The process is likely to be long and arduous but will be made more realistic with a strong witness protection program in order to ensure that witnesses are safe to given evidence against perpetrators.

Finally, there will need to be some laws around the prohibition of weapons for those who do not have the requirement to carry weapons, to better enable a policing intervention to identify those that pose a risk as against those that have a legitimate reason to carry weapons. There may need to be an amnesty in that regard for those that do not have a lawful excuse, to hand back prohibited weapons. This will be a longer-term project which may see the need to enact new legislation to enable a new Afghan Police Force to enforce and prosecute those that carry weapons without cause.

The next chapter will propose some assessment and design factor-based recommendations on a police-led intervention into Afghanistan that is military backed and mandated by a strong rule of law resolution that is achievable and realistic. Those recommendations align with the principles and factors as identified for this thesis in Chapter 2, with a view to guiding the design of a future rule of law blueprint that will assist the UNSC and an intervention to co-manage the progress in a new mission.

Following Chapter 8 will be an appendix that will list 13 recommendations that are based on the findings of this thesis and align with the four-element approach to the rule of law as designed in this thesis.

Chapter 8
Conclusion and recommendations

This thesis has examined the post-conflict policing efforts of the ISAF coalition and its subsidiaries, in order to understand why they failed and how to better design any future policing intervention. The analysis has revealed how uncoordinated the efforts were to train the former ANP across the provinces by the ISAF contributing forces and the waste of resources in the process. The fact that US Marines were the lead in the ANP training program in Tarin Kowt, when policing was not their speciality, is indicative of this misdirected focus and solution engineering. Sadly, this was a common theme across Afghanistan at the time. The former ANP were leaving training facilities at the completion of their training and facing 25% mortality rates, yet the show went on. This thesis is, amongst other things, an analysis against a defined and tested set of factors of what went wrong and why. This set of four rule of law factors and associated components as employed in this assessment was the result of a literature analysis which was then case tested against both external parallel situations (Timor Leste and Iraq) and Afghanistan's own policing history, in order to assesses its validity. With this validity then confirmed, this four-factor rule of law assessment scheme was then employed to critique the ISAF policing intervention so as to identify key specific failures and gaps. This final chapter closes the loop by now applying these four factors to the identified key issues in order to develop a set of recommendations to guide the four-factor aware design of a prospective future policing project for Afghanistan.

To this end, the analysis has identified a series of systematic failures in the approach to post-conflict policing by the ISAF and its subsidiaries. From the military leading training efforts without expertise, to the complete lack of a blueprint for a training policy, it seemed that post-conflict policing was doomed from the start for ISAF forces. It also seemed that the efforts to confine training efforts to the main provinces, such as Kabul, Tarin Kowt and Kandahar meant that the other provinces were either disregarded or placed lower on the priority list, with the consequence that insurgent forces could exploit these provinces to channel the movement of drugs, weapons and attacks on ISAF and ANSF forces. The failure to incorporate, and design intervention in the light of, the factors of transparency, consistency, accountability, and engagement is clear.

Additionally, a number of significant events occurred during the course of researching and writing this thesis: a withdrawal of the majority of coalition forces in 2014 from Afghanistan, a supposed peace pact between the US and the Taliban in 2020, a final withdrawal by all coalition forces in 2021 and the resulting unchallenged rise to power of the Taliban. The initial withdrawal of the ISAF in 2014 sparked a reinvigorated approach by the Taliban to retake Afghanistan province by province. By

the time of the total withdrawal of coalition forces in August 2021, the Taliban were able to walk into Kabul and seize power from the GiROA. The main concern here was the ease with which this was achieved and the lack of resistance from the ANSF.[709] This was perhaps the most illuminating moment in Afghanistan's recent history, showing not only how desperate the situation was but how inept and inadequate the ANSF had become to simply allow the Taliban to take over the capital, with very little resistance. It was also, in fairness to international forces, a time of a new global pandemic in COVID-19, which seemed to place counter terrorism efforts at a lower priority.

The new Taliban government, the IEoA, has provided a health check of where the former ANP are at as a federal enforcement agency. The former ANP seem to be missing in action or not required by the Taliban forces, despite the IEoA in theory throwing its support behind the ANP. It therefore must be assumed that, if a UN police-led force were to return to Afghanistan, it would be faced with a police force or remnants thereof, which would need complete retraining, overhauling and reshaping. The same can be said for the judiciary and the prosecution, as the Taliban has taken full responsibility for the enforcement of criminal law by way of Sharia law. Therefore, top-to-bottom reform of the criminal justice system would once again be at the forefront of any multinational peacebuilding in Afghanistan. One of a number of eventualities would need to be realised prior to any international intervention:

1. The current Taliban administration steps aside to allow the UN and an interim administration to take over the governance of Afghanistan.
2. The people of Afghanistan rebel and topple the Taliban government.
3. The UNSC deems the threat from the Taliban to the population too grave to idly stand by to allow it to continue.

There have been various signs of resistance against the Taliban government including, in Panjshir, Ghazni, Herat,[710] and other provinces.[711] UN efforts to assist Afghanistan should therefore be planned now and mobilised as soon as required, especially if an interim government is needed. The following

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[709] Timor Sharan, 'What Went Wrong: The 2021 Collapse of Afghan National Security Forces', *Afghanistan Analysts Network* (Web Page, 15 December 2022) <https://www.afghanistan-analysts.org/en/themed-reports/war-and-peace-themed-reports/what-went-wrong-the-2021-collapse-of-afghan-national-security forces/>.

[710] Lynne O'Donnell, 'The Afghan Resistance Is Still Fighting But Without Unity, Arms, or a Safe Haven, It's an Uphill Fight Against the Islamists in Kabul', *Foreign Policy* (online, 12 May 2022) <https://foreignpolicy.com/2022/05/12/afghanistan-resistance-taliban-clashes/>.

[711] Peter Bergen, 'Leader of Afghanistan's Resistance Movement Says He Will Defeat the Taliban "No Matter the Odds"', *CNN Politics* (online, 1 September 2024) <https://edition.cnn.com/2024/09/01/politics/ahmad-massoud-afghanistan-resistance-interview>.

paragraphs and recommendations provide a basic rule of law blueprint to guide a future Policing intervention into Afghanistan to assist Afghanistan to regain law and order across the provinces.

8.1 A new UNAMA

One problem with the attempt to rebuild the rule of law in Afghanistan, as identified in Chapter 6 of this thesis, was the lack of coordinated effort across Afghanistan between contributing organisations including ISAF and UNAMA. Many of these organisations were operating both independently of each other and often not in accordance with the UNSC mandate. UNAMA – through its good offices model (which is a useful guide to what a factor-aware implementation mechanism might look like) was making inroads in corruption, prison health and other key areas of the rule of law, but those efforts seemed to be in isolation. This meant that the rule of law effort was not only delayed but demonstrably uncoordinated and predominantly unsuited to Afghanistan. UNAMA is not an armed force but its experience and its knowledge across Afghanistan of many of the key aspects of the rule of law is invaluable and this must be harnessed for future interventions to strengthen policing and the rule of law utilised in new and improved ways as well as the tried and tested roles they fulfilled previously.

A new policing mission in Afghanistan should be supported by UNAMA as it already has an established footprint across Afghanistan. Nevertheless, a complete overhaul of how UNAMA operates must also be undertaken if an international mission is redeployed to Afghanistan to ensure its approach is consistent with the new rule of law mandate and that some new innovative tasks be assigned in the early stages of an intervention. Additional or reduced tasks for UNAMA can be explored post-intervention, as for now the in-country presence of this mission is what needs to be exploited. UNAMA has been in place since 2002 and had over 20 offices in Afghanistan, which will assist the navigation of a new intervention.[712] The presence of UNAMA is essential to the rule of law blueprint identified in Chapter 2 as its personnel will have an understanding of the culture and the geography of Afghanistan and will be a reliable asset for a future policing intervention to assist with advice on border control and enforcement. UNAMA would also be well placed to introduce a policing intervention to tribal elders in the provinces to ensure that the appropriate representatives have input into the rule of law approach. UNAMA would also be able to provide a policing intervention with information on the prison systems which will be essential to take stock of both who are in those prisons and the types of conditions within.

[712] 'More Offices for UNAMA in Afghanistan' (n 539).

UNAMA's main mandate is to promote peace and stability across Afghanistan and the experience of this mission and the key contacts it has made over nearly two decades will assist a police-led UN mission greatly as many of the key relationships have already been established. Pairing up with the UNAMA will also provide a new mission with the capacity to spread beyond the comforts of Kabul into some of the outlying provinces, which would not only ensure that there is a consistent approach to training but will also mean that security can be established in an outer cordon. This should enable military supporting forces to 'round up' the insurgency such as the Taliban and ensure that the mission is not compromised. A fundamental mistake that ISAF made was running the mission from Kabul. This cannot occur again, and the added advantage of a multi-location mission is that there would be more opportunity to include customary law and tribal voices in the governance of Afghanistan, which should foster unity as opposed to the current centralised system of government which alienates outlying provinces. A focus on ensuring that an intervention is decentralised and that the diverse views of culturally diverse and complex communities are taken into account will be critical to success.

8.2 Mutual assistance agreements between Afghanistan, Pakistan, Iran, Russia and the US

One of the more prevailing and pervasive challenges in Afghanistan for many decades has been the porous borders, which have enabled criminal networks and insurgencies to come and go from Afghanistan as they please. Those networks and insurgency groups, as identified in Chapter 5, made the task of implementing the rule of law mandate in Afghanistan all the more difficult given the already delayed and uncoordinated efforts of ISAF and others. ISIS-K and Al Qaeda simply strolled across the border from Pakistan and set up in Afghanistan. The Taliban themselves were also said to have had significant backing, prior to taking over Afghanistan in 2021, from the Pakistan and the US Governments during several of the iterations they had formed both prior to the 2001 invasion and gaining power as the IEoA.[713]

To assist a future police intervention, there must be mutual assistance agreements between Afghanistan and those countries that border it including Pakistan and Iran. An enforceable agreement must be reached with Pakistan, Iran, the US and Russia, to stop the flow of terrorist and organised criminal groups into Afghanistan and to repair the damage they have caused as a collective not only over the last two decades but well before the turn of century. A sensible approach must be taken to ensure borders are not breached and traditional terrorist/extremist 'nests' are flushed out and occupants dealt with accordingly. This approach is consistent with the rule of law blueprint of this

[713] Byman, *Deadly Connections* (n 325) 194–7.

thesis as mentioned above. ensuring that an international intervention is effective in assisting in border controls, to curtail illicit trade and to promote legitimate commerce and government customs revenues. The success of an intervention will hinge on ensuring there are no obstructions to the implementation of the rule of law mandate, and that the factor of accountability – in particular in relation to early coordinated action against corruption and organised crime – is accommodated and implemented.

History has told us that considerable culpability for the rise of the Taliban lies with the US and Pakistan through the US funding of Pakistan, and then the Pakistan (ISI) and US funding of the early Taliban and other extremist groups following the Soviet withdrawal in 1989. Russia also must assist (if it can be trusted) following the systematic Soviet disintegration of Afghanistan in the decade from 1979 to 1989, in which they forced over 4 million Afghans into exile and killed many thousands of civilians, committing war crimes in the process.[714] Even if the contribution from Russia was to simply clean up the landscape and make it devoid of the millions of landmines it laid, that would be a worthy contribution.

International support for the Taliban must be disrupted when they are ultimately removed from power. A new policing intervention and Afghan administration must express concerns with bordering neighbours, especially Pakistan and Iran, that any harbouring, recruitment and financing of the Taliban and any other terrorist group for the purpose of interfering with the good governance of Afghanistan must cease immediately. This is consistent with the first three Durch factors of the rule of law that this thesis has adopted in terms early provision of public security, effective border controls and curtailment of regional smuggling rings and spoiler networks that traffic in arms and commodities to finance war. More global community pressure needs to be applied to countries that are condoning and orchestrating the insertion of Taliban groups against Afghanistan. The motivation of supply countries could be offset by offering favourable future trade deals with Afghanistan once stability has been achieved and the great wealth of the country explored along with the great potential for future tourism. There must be, through redeployment of international forces, a concerted effort at building ANSF security and capacity in order to fully support a counterinsurgency so that the criminal justice system can be rebuilt, bolstered and made self-sufficient. War crimes must be prosecuted, and law and order re-established across the entire country with the full cooperation and interoperability of local and tribal security forces. Authors such as Collins stated as far back as 2013 that allied forces should

[714] 'More Offices for UNAMA in Afghanistan' (n 539).

refocus their efforts to security assistance and capacity rebuilding with an emphasis on the quality training of both military and police.[715]

8.3 Agreements between Afghanistan and Australia

Australia would be in a good position to provide the lead in a policing mission, having been a deploying force for many years, including a previous policing (and military) commitment to Afghanistan along with the UN Interventions in Timor Leste, as identified in Chapter 3 of this thesis. Australia must separate from the US in this mission as lead and join forces with other participating states to assist with the enforcement of this multi-layered mission. The Timor-Leste and Afghanistan experiences gained by the Australian Federal Police would be invaluable to a new policing intervention that must be supplied with specialist trained professionals capable of deploying to outer provinces to broaden the rule of law mandate, as noted by Hughes in Chapter 3.

Fortuitously, there already exists an agreement between the two countries in the form of the *Comprehensive Long-term Partnership between Australia and Afghanistan* signed on 20 May 2012.[716] This agreement is broken up into a number of subheadings including political, security, development, trade and investment, migration and humanitarian affairs, cultural, implementation, and institutional arrangements. Of interest to the scope of this thesis is the section on security. Paragraph 10 states that the two countries will work together with other members of the international community to assist the ANSF in countering the threat of international terrorist groups in order to promote the national security of Afghanistan both before and after the transitional arrangements in 2014 and as mutually determined. More specifically the agreement also states that the countries will develop long-term cooperation on the development and capacity of the ANSF, with a view to also promoting international support to assist. The agreement further states that specific defence cooperation arrangements could include such areas as counterterrorism support and providing trainers and advisors to assist with building the capacity of ANSF institutions. Beyond the 2014 transition, the range of support options was anticipated to expand to include a program of defence cooperation with opportunities for professional training in Australia. The agreement further provides that the countries will continue with their commitment to ongoing cooperation in conducting capacity development activities and other traditional areas of law enforcement cooperation, which could include countering narcotics, terrorism, people smuggling and transnational organised crime.

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[715] Joseph J Collins, *Understanding the War in Afghanistan: A Guide to the Land, the People and the Conflict* (Skyhorse Publishing, 2013) 100.

[716] *Comprehensive Long-term Partnership Between Australia and the Islamic Republic of Afghanistan,* Australia–Afghanistan, signed 20 May 2012 <https://www.dfat.gov.au/geo/afghanistan/pages/comprehensive-long-term-partnership-between-australia-and-the-islamic-republic-of-afghanistan>.

Therefore, the framework for an Australian-led mission already exists, noting that such a mission would require the support of the Australian military and our international partners and the lead mandate of the UNSC. The agreement itself already leans towards the requirements of the ANSF, noting that this mission would have a strong emphasis on witness protection and investigations of corruption and terrorism offences. The agreement is also consistent with the 4-step rule of law proposal of this thesis.

8.4 Compulsory police competency requirements of police assistance mission

The ISAF approach, particularly that of the US, was unworkable as there were significant problems associated with the use of private contractors as identified in Chapter 6 of this thesis. This was a consequence of the failure to account for the critical factor of consistency in respect of the identification and training of, and early consideration around local perceptions of, police trainers. Those contractors, along with the German and EUPOL approach, failed to provide the type of police and rule of law training required to propel Afghanistan into the future. While the approach to a new UN police-led mission to Afghanistan would be westernised, that is not to say that it cannot be adapted to cater for the marginalised and isolated population of Afghanistan. Nolan, in his work on criminal justice in marginalised communities, states that those who do not share the benefit of the dominant group will often see police as dangerous, threatening and perilous.[717] Nolan argues that for police to maintain legitimacy in the community there must be a reform to 'democratic policing'. That is, the people (Afghans) should take responsibility for policing and policing agencies should be responsive to the people's will.

There will need to be an adaptation of sorts of a deployed police force to ensure that a traditional westernised approach to policing is well tempered to ensure that the minority and marginalised groups do not become further disconnected from the criminal justice system. Such lessons can be drawn from Australia's treatment of the Australian Aboriginals through the Royal Commission into Aboriginal Deaths in Custody (RCADC). The recommendations in the RCADC revealed that the assaults that have been made on Aboriginal society have affected particularly young Aboriginal men in a way which tends to bring them into contact with the criminal justice system.

Applying the rule of law framework advanced in this thesis to the rule of the law mandate in Afghanistan, would ensure that specialists for the investigation of major crimes, including homicides, gender-based violence crimes, arson, trafficking and corruption were provided in an intervention to

[717] Thomas Nolan, *Perilous Policing: Criminal Justice in Marginalized Communities* (Routledge, 2019) 65.

Afghanistan. This thesis would also recommend a revolving list of approximately 100 police officers and related experts that were trained to create the civilian police component of a new peacekeeping operation, instruct incoming personnel, and give the component greater coherence at an earlier date.

Organising a police assistance mission is a tricky assignment, as police are required to perform duties in their own countries, while the military are often able to deploy at short notice to a mission as that is the nature of their work. Providing a police contingent in this context is a difficult task as such a mission requires a cross-section of policing skills. Those skills would come from the following areas:

- witness protection program
- surveillance program
- tactical response groups
- bomb squad
- search and rescue
- criminal investigations groups and
- forensics.

Regardless of the challenges, however, it is essential that mandate consistency and engagement be factored into ensuring the provision (within a policing intervention) of competent and independent judges, prosecutors, prison officers and public defenders along with experts in key penal code law, domestic violence and witness protection legislation and juvenile justice law.

Donor countries willing to contribute to a police mission in Afghanistan would need to provide police from these areas in order to fulfil the needs of top-up training and mentoring. It is not sufficient to provide numbers – this mission must be specific and focused on setting up witness protection and controlled operations to flush out corruption. The witness protection mentors would need to teach selected candidates of the ANP who have been scrutinised for suitability not only through ability but by examining any existing undesirable connections with criminal networks.

Tactical response units would need to train and mentor the ANP tactical groups in order to provide oversight of witness protection and controlled operations which would include carefully placed snipers and small teams capable of rendering assistance at short notice during operations. The surveillance program mentors would be crucial in teaching the ANP tactics on watching criminal groups and terrorist networks without detection. The ANP members who are trained in surveillance techniques would be paired with controlled operation members to sound out the threats, movements and activities of these targets. Surveillance members must be able to intercept communications from

and between these targets in order to provide the controller of these operations with the types of valuable intelligence necessary to complete the objectives of the operation.

Bomb squad mentors would provide their ANP equivalents with training on the safe deactivation of explosive devices with an emphasis on IEDs. There is also an opportunity for the bomb squad, in conjunction with a small coalition armoured unit, to work with the ANA to organise operations to sweep those parts of Afghanistan that are littered with mines in what would be an expansive but also final operation. This could span a number of years but must be systematic and well planned using all of the detection technology available including the use of autonomous weaponry systems to eradicate vast fields of mines that are far too time consuming and dangerous for human workers.

Forensic professionals could help establish a forensic capability that would be called to crime scenes to collect evidence and data capable of supporting the prosecution of offenders who are normally protected by an inefficient and under-resourced ANP. Forensic mentors would cover fields including ballistics, fingerprinting, buccal swabs and DNA. The mentors would teach the ANP how to protect a crime scene from contamination and how to collect evidentiary material. As an interim measure, these units could report to the ICC, who have accepted an invitation to prosecute war crimes and other serious crimes against the state in Afghanistan. There would also need to be prison reform in Afghanistan amid reports that IS are managing some prisons in the provinces. This is absolutely unsatisfactory given that IS is a terrorist group responsible for some for the worst atrocities known to humankind. There need not be the types of breaches of human rights seen in Guantanamo Bay and Abu-Ghraib. In fact, model incorruptible prisons would ensure that those who are incarcerated are treated fairly and that the principles of rehabilitation, restoration and in some instances, reintegration, were achieved.

8.5 Cohesion of laws and elimination of Taliban practices

For a rule of law mandate to be effective and targeted in Afghanistan, there needs to be an *eventual* cohesion of the criminal laws in Afghanistan. As the laws currently stand, they seem to operate independently and in isolation from each other, albeit that the laws are sufficient for an intervention and an interim administration. Revisions and amendments to laws should take place only once a proper judiciary and functioning Ministry are put in place.

It is unwise to negotiate with terrorists and, despite the Taliban publicly stating they have changed for the better,[718] there are reports that they are torturing women and enslaving them as sex slaves.[719] In neighbouring Pakistan, for example, the people are well aware of the cruelty associated with the extreme application of Sharia law with their own 'homegrown insurrectionists associated with the Taliban',[720] who turned once peaceful valleys like Swat Valley into an experimental ground for the application of extreme Sharia law, with many of the victims being female. Schools for girls were burnt to the ground and anyone who contravened Islamic law was flogged, beheaded or shot dead.[721] If there was ever a time for unity and a sense of understanding from neighbouring Pakistan it is now, and Pakistan must be active in shutting down the Haqqani network between the borders due primarily to its logistical supply to the Taliban and its ability to unite and coordinate both Afghanistan and Pakistan Taliban fighters.[722]

Therefore, a mission to Afghanistan, must be multi-layered and involve political and state cooperation in order to bring definitive peace to Afghanistan. Building trust between New Delhi and Islamabad and fostering long-term post-conflict relationships must be a priority in order to bring stability to the region.[723] I agree with Collins that the Taliban must be eliminated, and any Taliban alliances fractured.[724] The Taliban and its sympathisers have not shown any mercy to the Afghanistan population following its takeover of the Afghanistan government in August 2021.

The Taliban apply punishments in accordance with *Hadd* or *Kitab Al-Hudud* (the book pertaining to punishments prescribed by Islam) which include death by stoning, amputation of a limb or limbs, and flogging by one hundred or eighty strokes, and are prescribed for offences such as adultery committed by married persons, theft, highway robbery, drunkenness and slander imputing unchastity to women.[725] These draconian and extreme interpretations of Islamic law should be replaced with the

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[718] Ezzatullah Mehrdad and Griff Witte, 'The Taliban Insists it has Changed: Afghanistan's Future Hinges on Whether that's True', *Washington Post* (online, 17 August 2021) <https://www.washingtonpost.com/world/asia_pacific/afghanistan-taliban-kabul-views/2021/08/17/8c8a663c-ff6d-11eb-87e0-7e07bd9ce270_story.html>.

[719] Ipsita Bhattacharya, 'Taliban Using Women as Sex Slaves, Set a Woman Afire For "Bad Cooking", Report Claims', *Zee News* (online, 21 August 2021) <https://zeenews.india.com/world/taliban-using-women-as-sex-slaves-set-a-woman-afire-for-bad-cooking-report-claims-2387105.html>.

[720] Sadakat Kadri, *Heaven on Earth*: *A Journey Through Sharia Law* (Random House, 2011) 193.

[721] Ibid.

[722] Vahid Brown and Don Rassler, *Fountainhead of Jihad: The Haqqani Nexus 1973–2012* (Columbia University Press, 2013) 131.

[723] Collins (n 715) 113.

[724] Ibid 111.

[725] 'Kitab Al-Hudud', *International Islamic University Malaysia*, tr Abdul Hamid Siddiqui (Web Page) <https://www.iium.edu.my/deed/hadith/muslim/017_smt.html>.

humane penalties found under the existing formal set of criminal laws in Afghanistan of which, as stated above, can be amended as a component of the mandate for a policing intervention. Those amendments would be consistent with the Constitution which ensures, by way of article 7, that tribal and customary law are afforded equal rights to all others. Therefore, and consistent with the engagement factor in the rule of law model advanced in this thesis, tribal and customary law must be afforded a voice in any amendments to extant laws and indeed the constitution of judiciaries as they effect tribal areas.

The Afghanistan government peace talks (encouraged by the US in 2011) with the Taliban and later the US-driven peace talks in 2020 were akin to taking bread with 'Judge Dredd', an option fully endorsed by Hillary Clinton and Alexander Downer in what could only be labelled misguided. Professor Maley rightfully states that negotiating with the Taliban is the wrong approach as it will lead to civil war not peace.[726] The people of Afghanistan certainly do not want to be led by the Taliban, and Maley rightly predicted in 2019 that 'the moment the US departs, the Taliban with ISI backing could seek to take over the Afghan capital and seek to exclude other political and social groups from power or influence'.[727] Sadly no one was listening to Maley.

8.6 What next?

The history of disruption and invasion in Afghanistan has meant that the usual progression of the national police force has been stifled and without continuity. The ANP were last trained by the international coalition in 2013 so there is little data on how they have progressed since the main withdrawal of coalition forces in 2014. Interestingly, the release of the ANDS report coincided with the announcement by the US that it would be withdrawing from Afghanistan in 2014. I have already detailed the far-fetched achievements in Chapter 7, written in the ANDS and the fanciful future outcomes.[728] These were clearly written into the ANDS by the US to support an early exit strategy. It is therefore not surprising that the UNAMA has reported a dramatic increase in corruption against a backdrop of incompetent or inadequate investigations. Had the coalition remained in strength post-2014, then perhaps the mentoring could have continued to upskill the ANP.

Media article after media article about attacks by insurgent forces in Afghanistan resulting in civilian deaths, and a complete lack of prosecution for these offences, demonstrate that the ANP and the

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[726] Ibid 318.
[727] William Maley, 'A Negotiated Peace for Afghanistan?', *Australian Institute of International Affairs* (Web Page, 7 February 2019) <https://www.internationalaffairs.org.au/australianoutlook/afghanistan-negotiations-us-taliban/>.
[728] Islamic Republic of Afghanistan (n 593) 64.

broader judiciary are largely ineffective in policing and prosecuting crime in Afghanistan. While the law provides a good blueprint for policing forces in Afghanistan, the critical professionalisation of the ANP has on the whole been a failure by the coalition.

The blueprint for the criminal justice sector, like the extant legislation, remains largely intact in Afghanistan, but it requires enforcement. All of the law, all of the ideas and all of the facilities are nought without enforcement and without a rule of law blueprint. The UN desperately needs to return to Afghanistan as a police-led mission to help professionalise the criminal justice sector and enforce the existing laws. A thorough assessment of the infrastructure should be made in order to determine the requirements of state building and reconstruction. The widespread retaking of Afghanistan by the Taliban has meant that a coalition military force will be forced to redeploy in order to defeat the Taliban, prior to the deployment of the UN police-led mission. There must be political and diplomatic cooperation with neighbouring countries, especially Pakistan and Iran, in order to gain the assistance required to provide border control and intelligence on the movement of insurgent groups. The proper training of border police can occur once security is established, noting the superb reputation of the previous Afghanistan administration's gendarmerie. All such training should take place in consultation with the tribal leaders of provinces and should include an offer to have local militia members and security join a new Afghan Police Force but return to their province once their training has finished.

The main lesson that Afghanistan could learn from its history is the need for proper inclusion of customary law, an equal seat at the table for tribal leaders and a decentralisation of its government to multiple strategic provinces. This will require significant investment of government facilities, including police stations and an initial UN mission on the ground, to assist with the training of the ANP to arrest and prosecute insurgent forces. It will also require a change of mindset akin to the counterinsurgency philosophy. It is curious to see the significant investment in Iraq during the second Gulf War, in circumstances where Iraq and Afghanistan seemed to face the same level of post-conflict complexity, particularly in relation to the exclusion of the different ethnic and religious groups along with the deteriorating security issues. Yet there was so much more investment in Iraq than Afghanistan. Iraq appears to have recovered from the post-conflict stage and is well on the way to state building and reformation. Any further commitment to a mission in Afghanistan must learn from successful missions in other Islamic post-conflict states.

8.7 A universal approach of a future UN policing intervention

It is a basic truism of fractured and unstable post-conflict states that they are often riddled with violence, factional loyalties and social dysfunction. Conflict suspends, destroys and fragments

institutions and interpersonal relationships.[729] Afghanistan is no stranger to these consequences. There has been a huge disruption to the population with many thousands of Afghans fleeing across borders or going into hiding. A competent, corrupt-free police force would have given the population, at the very least, a glimmer of hope that remaining in Afghanistan or in their provinces would be sustainable, albeit that the current Taliban regime is now responsible for law enforcement. The criminal justice system, whilst complicated by the Constitution and tribal law, is largely intact and can support a collaborative four step rule of law approach to the enforcement of justice throughout Afghanistan.

Provided that there is a universal approach to the use of powers by police and the enforcement of the law, such an approach may satisfy the current disconnect between the centralised government and the provinces and restore the balance in terms of command and control. There must also be a greater coordinated effort to eradicate corruption within the ANSF and an urgent assessment of pay and conditions to ensure that police are adequately compensated in order to avoid bribes to supplement income. The strongmen and militias must be replaced by reputable and independent police force capable of making arrests and taking offenders before a stable judiciary. This force should be trained by the Carabinieri or Gendarmerie as part of a new police-led UN mission to Afghanistan.

Afghanistan is a very poor country that is reliant on global support and donor countries to survive. This equally makes it vulnerable to invasion and exploitation, as described in Chapter 4 and 5. It was the lack of a unified national security force that led to vulnerability to invasion, including by Russia. The Soviets used that lack of a national system against the Afghans at various levels with communist propaganda that was readily accepted by much of the population. Money was floating into Afghan coffers from the Soviet Union and life was improving for a minority of Afghans. However, the true cost of the Soviet exploitation was the population's enduring distrust of foreigners. This embedded psychological harm seems to have been passed on to generations of Afghans, particularly with the advent of the US and coalition invasion in 2001.

This sadly seems to be a pattern across Afghanistan's history. Invasion after invasion, the insertion of a puppet regime by invading forces, followed by a financial reliance on the invading force. This is most akin to a domestic violence situation where the victim has no option but to stay in a violent relationship as the alternative is destitution. It is therefore very reasonable to suggest that a strengthening of financial capability through industry would assist in the overall resourcing of the rule of law system in Afghanistan and the curbing of corruption. Better paid police and military forces are

[729] Alice Hills, *Policing Post-conflict Cities* (Zed Books, 2009) 28.

more likely to avoid corruption and collaboration with criminal individuals and groups than those who are underpaid.

The training and mentoring of the former ANP post-conflict were rushed and, despite the best efforts of some trainers, inadequate. Much of the effort was focused on putting numbers on the ground rather than addressing the inadequacy of the middle and upper echelons. The former ANP were not allocated sufficient funding and, in an environment where corruption and nepotism were already well alive, this ensured that ANP members did not possess loyalty to the civil powers, as Maley observes.[730]

This represents a unique opportunity for a redeployed UN police-led mission to strip back the current structure and encourage a new administration to reassess its policies and financial priorities around a new Afghan Police Force through the four-step rule of law approach designed in this thesis. While more money for lower-paid police officers is not a cure all, it certainly has the ability to curb corruption. Very clear objectives must be given to Afghan Police, in particular on the future vision and security of Afghanistan. Afghan Police and the general judiciary and prison systems must be given the tools to achieve those objectives through sustained and long-term mentoring and training by a police-led coalition force. The rule of law mandate proposed by this thesis in Chapter 2 can help realise very real and positive steps towards recovery for all Afghans.

Afghanistan is a hugely resource-rich country, and Chinese interests have already bought some mining rights there.[731] The country's financial security requires allowing exploration of the vast array of possibility lying beneath the soil. This then presents a conundrum because, in order to prosper, the new Afghan Police Force, must secure the country from criminal elements such as IS and more than likely the Taliban. Therefore, Afghanistan needs not only a redeployment of coalition forces but the securing of all natural resources and the provision of international support to assist Afghanistan to access those raw materials in order to build wealth which will enable longer term sustainability.

The profit from these resources should be used to modernise Afghanistan, which has sadly regressed in the period from 1901 to 1978 with the largely conservative rural population that was more determined to hold onto autonomy than development.[732] The only stable periods occurred between 1901 and 1919 and then again between 1933 and 1973, which demonstrates that good governance in

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[730] Maley, 'The Rule of Law and the Weight of Politics' (n 27).
[731] 'Navigating the Crossroads: China's Mineral Pursuit in Afghanistan and the US Concerns', *Australian Institute of International Affairs* (Web Page, 11 July 2024) <https://www.internationalaffairs.org.au/australianoutlook/navigating-the-crossroads-chinas-mineral-pursuit-in-afghanistan-and-the-us-concerns/>.
[732] Collins (n 715).

Afghanistan is possible. There is therefore hope and it must start with state building, which can only be done with the provision of proper security. The former ANA does not have the capacity to achieve this, particularly in the wake of a resurgent Taliban. The invasions and the constant conflict have been obstacles to development and modernisation. Past atrocities, many at the hands of the Russians, have created distrust and displacement among a people who are normally renowned for their hospitality.

This is an opportunity for the international community to redeploy to Afghanistan with a clear rule of law mandate to drive out the insurgency and to promote stability and state building in order to allow Afghanistan to move in the direction of development and peace. It is also an opportunity to demonstrate to Afghanis that they can trust an international deployment that is on the ground to complete the hard work needed to propel them forward and improve their lives. To do that, there will need to be an intact and capable legal system to support a post-conflict Afghanistan. It is clear that the criminal and civil law in Afghanistan is sufficient and has appropriate amendments and revisions, particularly over the last two decades with various adjustments to the Constitution having the effect of protecting the human rights of Afghans. The Constitution, sadly, has reinforced the exclusion of tribal law through its centralisation of governance in Afghanistan. We know that the centralisation of governance has failed, as it cannot unite the many different ethic and culturally diverse groups throughout Afghanistan.

The Constitution and indeed the criminal and civil law must change to ensure the inclusion of the extant customary legal systems that were in place prior to formal institutions and to ensure that the voice of the entire population is heard. This suggested change is consistent with the geography as essentially the layout of Afghanistan favours local and tribal power structures.[733] From a historical perspective, the best rulers in Afghanistan have been those who found a way to work with tribal and local rulers. The new Afghan Police Force will need to be better paid and given greater education on the law, their own powers and their ability to enforce it. Much of the former ANP training was very poor and was treated as less important than the counterinsurgency.[734] This attitude has to change, as a well-trained and capable Afghan Police Force will greatly assist in the post-conflict policing of Afghanistan. The new Afghan Police Force must not continue be the target of the Taliban due to being the weakest link in the chain. They must be capable of repelling the insurgents and this may mean that the new ANA provides the outer cordon along with an international protection force (‘clear, hold and build’) required to defend the very important work of the police and the broader criminal

[733] Ibid.
[734] Ibid 76.

justice sector: 'the key to success here is and will remain the Afghan police who will be vital to defeating the insurgency'.[735]

To enable that success, other institutions such as prisons and courts must be fully functional and free of corruption.[736] The effort here must come from a police-led UN mission into Afghanistan with the support of military forces. There may indeed be a need for tedious patrols of urban areas by military forces to ensure that they are free of crime and insurgent activity. While initially this must be undertaken by a new ANA, it should be done in concert with the Afghan Police and UN police with the provision of competent interpreters. This will ensure that the Afghan Police receive on-the-job mentoring. The new administration can then afford to be more selective about those who join the Afghan Police, particularly at officer level, to ensure that there are no connections to criminal organisations.

An immediate international police-led UN mission must be established with a military force of significance to once again redeploy into Afghanistan to drive the Taliban and its affiliates out and to pave the way for a police-led UN mission. The international community needs to fund this mission, and clear objectives and outcomes must be agreed on and achieved at staged intervals which will be assisted by the strong rule of law blueprint suggested in this thesis. These outcomes will include the achievement of a secure Afghanistan, the post-conflict re-establishment of the judicial and policing institutions and then the massive task of state building which will require a significant contribution from the international community. Real and tangible results must be achieved and sustained in this mission. The new UN mission to Afghanistan must 'teach Afghans how to fish not give them fish', in order to help sustain and fuel the country beyond its rebuilding.

8.8 The achievements of this thesis – A new approach to the rule of law

This thesis has examined the rule of law process and how it was applied by ISAF in the two decades of occupation in Afghanistan from 2001 – 2021. It found that the ISAF policing endeavours had a negative impact on the rule of law as there was a significant five-year delay to even implement a rule of law system, which was ultimately flawed, leading to an uncoordinated and inconsistent approach to policing Afghanistan. The lessons from the ISAF policing endeavour are profound but can be narrowed down to one key area – a properly enforced rule of law mandate. The rule of law model, set out in Chapter 2, will ensure that the early provision of public security will allow an international

[735] Ibid 101.
[736] Hills (n 729).

policing intervention to assist ANSF to provide effective border control and the early prevention of crime rings to reestablish law and order.

The thesis has advanced pragmatic changes and adaptations to the current Afghan criminal justice system, to empower law enforcement and judiciary officials to provide security across Afghanistan with the assistance of an international peacekeeping and mentoring force. The framework has been built around Afghanistan's current system of law through extensive examination of Afghan criminal laws, a close analysis of the ISAF policing endeavour and a deliberate inclusion of customary law in order to unite provincial Afghanistan and decentralise the current system.

The thesis has filled the gap in the literature by providing suggested improvements and amendments to Afghan criminal laws by using a comparative analysis against Australian Laws that have similar features and application. Consequently, the thesis has supplemented some of the Afghan criminal laws and provided a number of sweeping changes to others. The thesis has made an original contribution to knowledge and practice through the development of a police-focused four-step rule of law approach designed to assist a future international police intervention in its efforts to help restore law and order. The new rule of law approach developed in this thesis is also designed to hold both the UNSC and any future Afghan administration accountable for the duration of that intervention, which will serve to improve post conflict policing in the future, leading to more sustainable peace.

This new rule of law achieves this by helping an intervention and the UNSC to focus on the following four steps when implementing a new rule of law approach specific to policing:

1. **Transparency,** with a focus in policing project implementation on (a) an in-built, well signposted, ringfenced, and continuously explained extra-legal measures model subject to external review, and (b) early action against corruption and organised crime, so as to facilitate transparency within the policing project and the rule of law endeavour specifically.
2. **Consistency**, with a focus in policing project implementation on (a) a meticulous and detailed, step-by-step mandate, and (b) accompanying prior planning and resource integration before deployment and implementation.
3. **Accountability**, with a focus in policing project implantation on (a) recruitment of trainers and local police, and (b) early priority on action against corruption and organised crime so as to model a broad rule of law endeavour across the population and the country's institutions generally.
4. **Engagement**, with a focus in policing project implementation on (a) intensive central management of implementation and also of the extra-legal measures option), and (b) incorporation of customary processes and mechanisms within the project scheme.

8.8.1 Future practical directions

This four step approach to the rule of law has been designed in this thesis from the lessons learned from the two case studies of Timor Leste and Iraq as well as the ISAF policing endeavour and from a history of Afghanistan that has been characterised by violence, coups, killing, invasion and suffering. This four-step approach will ensure that a future international policing intervention, the UNSC and a future Afghan administration will all be on the same page in the post conflict efforts in Afghanistan in relation to policing. The appendix set out below presents a series of 13 practical recommendations drawn from the research in this thesis, with the aim of increasing the capacity of a future, policing focused intervention to promote the rule of law in Afghanistan.

8.8.2 Future research directions

The rule of law model developed in this thesis provides a pragmatic and wholistic framework which could be adapted and applied approach to other post conflict situations in the future, given the flexibility of the 4-step plan. The thesis could therefore contribute to improved UN design, strategy and implementation of post conflict policing in the future, reinforcing the rule of law and promoting more sustainable peace. It will do this by ensuring that the response to post conflict policing is coordinated, fit for purpose and properly overseen and directed by the UNSC. Further post-doctoral work could therefore expand upon the approach to the rule of law in post conflict situations to cover other areas that were beyond the topic of this thesis.

Appendix
Recommendations

Recommendation 1: Critical post-conflict steps

The key focus of to this thesis is the approach to long-term sustainability in Afghanistan. There are a number of important processes that need to be followed prior to reaching this point in a post-conflict situation. There are a number of state-building prototypes that have emerged in more recent times such as Timor Leste and Kosovo, where the United Nations led a number of interventions and provided interim administration while those two countries regained some stability. Interestingly, Afghanistan was not afforded the same assistance in circumstances where the original invasion of Afghanistan was NATO-led not UN, and the rule of law mandate was not prioritised. This is a pivotal point as I argue that a mission returning to Afghanistan must be UN led. Compliance with the four factors for assessment and design, as proposed in this thesis, would assist a new policing intervention to take the critical post conflict steps of public security, border control and curtailment of criminal networks in order to then implement the safe placement of a judicial system.

The UN-led missions to Timor Leste and Kosovo provided a blueprint for state building as they enabled both populations to govern their own affairs and ultimately led to self-determination.[737] This could be problematic in Afghanistan as it may prove somewhat difficult to find common ground amongst a population so diverse and so spread throughout Afghanistan. This could, however, be overcome by way of legitimate surveys and proper *jirgas* with tribal leaders, elders, governors, and representatives of the former Afghan government once the Taliban are no longer in government.

The modern post-conflict examples of the Solomon Islands, Timor Leste and Kosovo have, however, had limited success in stabilising and re-establishing a sustainable rule of law system. It is essential for Afghanistan that any failures in other post-conflict countries are identified, and future strategies re-evaluated in order to provide meaningful assistance rather than giving authors an excuse to dabble in the negatives. It is essential to analyse transitional justice in Afghanistan. As discussed previously, there are sufficient laws to prosecute offenders, but no logistical capability to do so. It is very difficult at times to see past the rhetoric of the former government and its false deliverables in the ANDS in circumstances where Afghanistan quite clearly does not have the capability to prosecute war crimes and international crimes.

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[737] Brett Bowden et al, 'Introduction' in Brett Bowden et al (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, 2009) 1.

Afghanistan has had 'their fabric – social, political, legal, cultural and religious institutions and infrastructure, as well as individual and collective psyches – torn apart by conflict'.[738] Managing a post-conflict situation and mending the emotional and physical damage inflicted on Afghanistan is a momentous task that was so unsatisfactorily left undone by coalition forces from 2001 to 2014. The next intervention should be consistent – systematic, planned, integrated and resourced – and involve a coalition re-entry under the UN banner that has the type of expertise to deal with the enormous harm that has been visited upon Afghan people for far too long. This is, ultimately, a key recommendation arising from the analysis in this thesis in that a rule of law mandate that must consider the inclusion in an intervention of suitably qualified professionals across the criminal justice spectrum (which is also a specifically identified component of the consistency factor).

Afghanistan arguably does not need a constitutional referendum or further debates about who is at fault for the current circumstances. It needs an immediate action plan to raise Afghanistan from its knees and provide a trajectory that involves real solutions on the ground. This must be supported by political agreements from Pakistan, Iran and Russia to drive the insurgent Taliban out of Afghanistan and to support a new mission that will help Afghanistan to prosper.

As discussed earlier in this thesis, the effectiveness of previous Afghan leaders to quell an uprising through bloodshed, but this type of leadership is obviously unpalatable and unsustainable. What is required is a regime or a government that survives on the basis of legitimacy and the popular support of the people. Legitimacy of a government is an essential ingredient in state building.[739] The type of government structure that Afghanistan develops moving forward will be essential in terms of the progress of state building. There seemed to be no thought of a new order when an interim government was established following the Bonn Agreement; rather there was a return to the old ways and the sharing of ministries within the favoured networks of different political groups which led to corruption. As Maley opined, this led to a catastrophic failure where nepotism and rivalry ruled over clear responsibilities, visions and objectives. The ISAF expansion never went ahead in 2002, and it remained in Kabul alongside a centralised system of governance.

As indicated by the consistency and engagement factors, any future deployment to Afghanistan must therefore be strategically posted to the main provinces to enable the maximum amount of consistency of training and mentoring. There also needs to be a far greater international financial commitment to a

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[738] Ibid 3.

[739] William Maley, 'Democracy and Legitimation: Challenges in the Reconstitution of Political Processes in Afghanistan' in Brett Bowden et al (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, 2009) 111.

new deployment. The previous commitment was inadequate compared to other post-conflict missions such as those in East Timor, Iraq and Kosovo.[740] This meant that Afghanistan could not gather any sustainable momentum in its recovery from many decades of conflict. An immediate meeting for agreement must be staged between the key parties and led by the UN to pledge a two-decade commitment to the generational change that is required in Afghanistan along with a financial commitment to fund it. Afghanistan must be rebuilt, and the trust of the population regained prior to then assessing the legitimacy of international law and democracy within its borders.

That legitimacy will come along with the trust of the people when real tangible state building is realised, and some hope is injected back into the people. Other states must not meddle in the precious resources of the Afghan people or take advantage of those resources for a short-term fix. A UN-led mission must be multifaceted in its approach and, as stated earlier, have many tools in its kit to effectively rebuild Afghanistan. Some, such as Farrall, argue that the UN is simply too bold in its vision on the rule of law in post-conflict states.[741] It is extremely difficult to fit what is essentially a westernised concept into a fledgling state like Afghanistan. As Maley states, the real tangible state rebuilding will ultimately gather hearts and minds above the difficult task of making the concept of the rule of law fit Afghanistan.[742]

Maley and others such as Farrall also rightly point out that the tribal leaders of Afghanistan have become disenfranchised and disconnected from the Constitution by the limited application of customary or local law to formal systems. The UN approach to the rule of law is in some ways flawed as it fails to take into account that some systems of law in post-conflict countries are complex and multilayered. In fairness to the UN, the initial invasion of Afghanistan was US/NATO led and did not at any stage approach a post-conflict Afghanistan with a customised rule of law that took into account the complexities of Afghanistan. The rule of law in Afghanistan became an afterthought premised by a desire to withdraw from Afghanistan rather than accompanied by the work required to install a system that represented Afghanistan and therefore would heal Afghanistan.

The post-conflict attempts to install the rule of law failed in the previous ISAF mission. Therefore, a rule of law mandate must be implemented in line with the four-factor blueprint proposed by this thesis in Chapter 2 and assessed against test cases and Afghanistan's own history, so as to ensure the maximum success of a policing led intervention.

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[740] Maley, 'The Rule of Law and the Weight of Politics' (n 27).
[741] Farrall, Charlesworth and Ryan (n 27) 212.
[742] Maley, 'The Rule of Law and the Weight of Politics' (n 27).

Recommendation 2: Rule of law proposal

One of the main missing pieces in the jigsaw in Afghanistan and international efforts to date was a strong, integrated, and policing-aware rule of law mandate. It is clear that the UN Security Council has faced a number of challenges in promoting the rule of law through peace operations, sanctions and force. The Security Council needs a rule of law model that will increase its capacity to strengthen the rule of law.[743] Afghanistan needs a strong rule of law that enables and supports the complex system of laws that govern it and those that work within that system to enforce it.

An appropriate rule of law model must be focused on peace operations and be usable by an administration that is committed to the enforcement of laws that protect and enforce the rights of its citizens. This model must support a UN mission that is deployed on a peace operation to assist Afghanistan to re-establish law and order. The ability of the Security Council to enforce that model should also be strengthened. This model must increase, as Farrall states, the UN Security Council's capacity to 'respect and promote transparency, consistency, accountability and engagement when it creates, deploys and modifies peace operations'.[744]

The rule of law model proposed by this thesis – the four key factors and their specifically targeted policing components – involves a multitargeted approach. It will not only need these key factors to be implemented in terms of public security and border control, but it will require the extra-legal measures approach encapsulated in the transparency and engagement factors to ensure that neither the UNSC nor an interim administration has unfettered control of the rule of law mandate. This rule of law model for this thesis will also need to include tribal and customary law (as a component of engagement), the provision of suitably qualified professionals to the intervention (as a component of consistency), and preparedness of appropriate, locally acceptable, UN police (as the other key component of the consistency factor).

A suitable rule of law model for future peace operations in Afghanistan should therefore be a ground-up approach that gathers the respect of those areas of Afghanistan that embrace customary law, Sharia law and statute law equally. A suitable representative from each area of law must be given a voice at the table for Afghanistan to recover and prosper. Any new peace operation, whether deployed under the auspice of the UN or another banner, should be appropriately supported by the Security Council. Further, the UNAMA good offices model offers a potentially useful mechanism for implementing these factors.

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[743] Farrall, Charlesworth and Ryan (n 27).
[744] Ibid 21.

The preferred rule of law mandate for a UN policing mission to Afghanistan would also be one that holds the UNSC, an intervention and an interim administration accountable and must be transparent and consistent (as identified by Farrall and incorporated into the transparency and accountability factors). The mandate would also need to ensure that the UNSC conforms with Extra-Legal measures to allow the UNSC to step in and out as required in order to ensure that proper values are protected once the Taliban have been ousted and that the interim government upholds the higher order values of Afghanistan in what will likely be an emergency situation.

In summary, in order for the UNSC to provide a realistic, consistent and accountable rule of law mandate for Afghanistan, it must therefore employ the four factors and their policing-specific components to first take full account of existing legal systems including statute, Sharia and customary law, and to then design a UN police-led mission that has the expertise to compliment and develop existing systems with a view to expanding on them as and where required.

Recommendation 3: Protecting a new mission

If a UN-led mission was to re-enter Afghanistan, what would it look like? The obvious question is how can a policing mission to Afghanistan be adequately protected in a land filled with so many ambush and choke points? There is not only the ongoing legacy of unexploded ordinances from previous invasions, but the current and real threat of IEDs buried beneath dusty roads, hidden amongst rocks and detonated either remotely by mobile phone or by pressure plates. Previously, the threat of IEDs could only be defeated with the eradication of the Taliban and other actors that used them. Some research shows that the Taliban claimed responsibility for 232 out of 600 suicide attacks in Afghanistan over the last 10 years.[745] The frequency and number of these attacks have risen alarmingly since the withdrawal of NATO forces in 2014. It is not clear if the Taliban Government currently presents a threat via suicide bombing, but it is not beyond question that they may return to these methods should they be forced from government. Any proposed new mission into Afghanistan must be coupled with a comprehensive program, perhaps embedded in the rule of law plan, to eradicate the threat of IEDs in order to provide for the security and safety of deployed coalition partners and the population. There are numerous methods that can be deployed to counter IED attacks but one that encompasses artificial intelligence should be considered given the threat to human life that more traditional IED detection methods pose.

[745] Giulia Scalabrino, 'Afghanistan: A Case Study in IED Harm', *Action on Armed Violence* (Web Page, 15 October 2020) <https://aoav.org.uk/2020/afghanistan-a-case-study-in-ied-harm/>.

The same technology could be utilised in the context of a return to Afghanistan, either remotely or on the ground, to support Afghan forces against insurgent groups but it is critical to ensure that the use of autonomous weaponry systems (AWS) is governed by law.[746] Such technology will need to be closely scrutinised, particularly since the reignition of tensions between Israel and Palestine, where autonomous weapons have been used as a defensive and offensive option in densely populated urban areas, killing innocent civilians.[747] That said, AWS have created new opportunities for states to target individual or groups of enemies remotely. These new opportunities have also given rise to further debates about the efficacy and applicability of the current laws of armed conflict around AWS and other technologies. The use of AWS by military forces in armed conflict situations and the law that governs both their use and misuse will need to be closely scrutinised in Afghanistan following the move to monitor the conflict from afar. This type of technology has the benefit of not only accurately eliminating enemy threats but also saving many lives in the pursuit of gaining the upper hand in a conflict situation, and in securing a new peace operation to enforce a new rule of law model.

Recommendation 4: Political consensus/agreements with neighbouring countries

The international community and the UN should make a considerable effort to achieve political consensus and agreement with neighbouring countries to Afghanistan prior to deployment to ensure that any insurgent forces that flee the provinces are contained, held and not resupplied. The control of Afghanistan borders was poor during the ISAF and coalition intervention and in order to achieve rule of law outcomes via the factors identified in this thesis as being critical, it is essential to gain border control immediately. This will mean that bordering countries such as Pakistan, Russia and Iran will need to hold and contain fleeing insurgent groups, criminal networks and Taliban in order for them to be brought to justice in Afghanistan.

Recommendation 5: International stability force

A new international security force should re-enter Afghanistan with the initial goal of providing security and stability in the inner and outer cordons of all major provinces, utilising the methodologies and principles adapted in COIN. This force may need to be a UN military force who are able to protect a police-led intervention to enable them to enforce public security. The stability force will need to push out to the outer provinces as security is established with a view to eventually becoming a receiving force of those insurgent groups, criminal networks and Taliban that are held by bordering

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[746] 'Hillary Clinton Warns of "Huge Consequences" in Afghan US Troop Withdrawal', *BBC News* (online, 3 May 2021) <https://www.bbc.com/news/world-us-canada-56966473>.
[747] Paul Adams, 'Gaza-Israel Conflict: Israel Defends Strategy as Death Toll Mounts', *BBC News* (online, 18 May 2021) <https://www.bbc.com/news/world-middle-east-57152419>.

States as per an agreement recommended earlier, so that they can be held in Afghan custody while they await identification and processing and in some instances prosecution.

Recommendation 6: Insertion of a UN-led police mission, a UN-led transitional administration and ongoing use of the UNAMA

Once security is established, a UN-led police mission equipped with trusted interpreters, medical teams and humanitarian aid specialists should enter the inner cordon of all major provinces with the objective to assess the immediate welfare needs of the civilian population. This would be in consistent with the rule of law factor identified in Chapter 2 in the report of Brahimi where he recommends a doctrinal shift in the use of civilian police, other rule of law elements, and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments. All efforts must also be made to liaise with elders in the provinces in order to establish what is required from a customary perspective, particularly in outlying provinces. UNAMA should be utilised to attend to the needs of outlying provinces and coordinate these efforts with the teams attending the major provinces.

A UN-led police mission must have multiple levels of expertise across policing, the judiciary and correctional facility experts, consistent with the findings of the special UN envoy to Timor-Leste as led by Andrew Hughes.

In parallel to the insertion of a UN-led police mission, an initial UN Transitional Administration should be set up in a similar manner in which it was raised in Timor-Leste which will ensure that the enforcement of the rule of law is overseen in accordance with a UNSC mandate and the rule of law 4-step approach as identified in Chapter 2 of this thesis. This transitional administration should coordinate initial efforts of establishing a presence in Afghanistan with UNAMA who have a wide presence throughout Afghanistan through the Good Offices project. This will also ensure that the rule of law approach is spread across the provinces and not centralised, noting the failure of that approach by ISAF, NATO and the coalition forces. The length of such a deployment must not be short or rushed as identified by Andrew Hughes from his special envoy to Timor-Leste. Therefore, any mandate from the UNSC must be realistic in terms of the timeframes in order to achieve sustainable key objectives of rule of law reform once security is established. This presupposes cognizance of the key factor of consistency in the form of a planned, integrated, and resourced intervention.

Recommendation 7: Assessments of police, prisons and resources

As identified in the course of this thesis, the four factors are useful not only for intervention design, but also for assessment of evolving issues once the intervention has commenced. In this regard it will be essential that once welfare needs are attended to, four factor-aware assessments of police, prisons and equipment should be conducted to ascertain the logistical needs of police and prison staff. The legitimacy of the appointment of all police and prison staff should be assessed (an issue within the accountability factor). Hughes' observation in respect of Timor Leste regarding police stations that had a critical shortage of expert personnel to assist in major crimes, prosecution and other speciality areas is of particular relevance. A thorough inspection and appraisal must be made to ensure that mentoring and training is conducted by trained police and judicial professionals.

An assessment of the policing arrangements should then be made in order to conduct law and order duties on an initial basis in partnership with the ANP. This will also enable UN policing teams to assess the skill base of the ANP. Health checks should then be made by teams specialising in the judicial duties of the court system so that if arrests are made there is a competent legal system in place to deal with offenders. These specialised UN teams must then communicate their findings to the UN policing teams to assess the training requirements and the need for witness protection and protection of magistrates and judges. This will enable the establishment, if necessary, of specialised teams led by UN policing teams trained in this area, and who meet the requirements of consistency in terms of integration and local perceptions.

All those who were incarcerated prior to an international intervention must be identified and the reasons for their incarceration justified by existing authorities. Those who have been incarcerated by the Taliban by way of Sharia law should be assessed first. Temporary prison facilities should be constructed to house PoWs, and all insurgent networks captured by the new international security force, overseen by the appropriate bodies to ensure that those who are captured are afforded proper treatment according to the Geneva Conventions and are appropriately identified and held if necessary for prosecution or for other lawful purposes. These prisoners must not be mixed with those who are already incarcerated. The stability force will then have purpose-built facilities to transport those groups that are returned by neighbouring countries or captured at the borders, for processing.

Recommendation 8: Financial support

Proper international financial support must be provided to the criminal justice sector to ensure that their collective jobs can be done without reprisal or fear – a key consideration in the consistency issue of a meticulously planned, integrated and resourced mandate. For Afghanistan to achieve this there

must be sustained donor assistance for at least two decades. Importantly, donor countries must extend beyond the usual donor countries as a volatile Afghanistan not only affects Afghans but those countries that become the destination of heroin, people trafficking and in the worst-case scenario terrorists or radicalised individuals and groups.

Recommendation 9: Controlled operations

Once the ANP has been professionalised and sufficiently trained it should implement controlled operations. A very good definition of controlled operations is found in the Australian Commonwealth *Crimes Act 1914* at s 15GD. In summary, this section states that a controlled operation involves the participation of law enforcement officers in an operation that may normally involve the commission of an offence for the purposes of obtaining evidence that may lead to a prosecution for a serious Commonwealth offence.

In the case of Afghanistan, this means undercover ANP officers would infiltrate these organised criminal groups to detect criminal activity and/or criminal acts that threaten human lives. In essence police break the law in order to orchestrate or attempt to orchestrate a sting or a bust. In breaking the law, they are not permitted to assault or kill a person unless in self-defence, although similar Australian operations have an overwatch component in the form of tactical response units that intervene when the risk to undercover operatives becomes compromised. Operations of this nature may assist Afghanistan in breaking down terror networks and the deeply embedded corruption that plagues the country. This approach would be consistent with the rule of law ideology of Durch in Chapter 2 and step 2 in the 4-step rule of law proposal, that criminal networks need to be curtailed and new and emerging approaches that would be suitable in Afghanistan should be entertained.

In implementing post-conflict security measures in Afghanistan, it is not possible to have a standalone witness protection program without having controlled operations conducted parallel to witness protections programs. The two operations must communicate in order to keep witnesses and victims out of harm's way and clear of dangerous controlled operations activities. Controlled operations would be a great way to counter the corrupt activities of former and current officials and those within the criminal justice system. Afghanistan has some of the legislative framework to enforce this, but the ANP also requires logistical capability and protection when conducting controlled operations.

Recommendation 10: Legal reform recommendations

The Criminal Procedures Code (CPC) is an excellent piece of legislation, and a section on controlled operations could be injected into its framework. The suggested amendment to the Criminal

Procedures Code 2014 would be a new chapter, namely chapter 7a, which could simply be titled 'Controlled Operations'. Like part IAB of the Australian *Crimes Act*, it would define a controlled operation and the circumstances in which it should be orchestrated. This chapter should list the types of serious crimes that would warrant a controlled operation to combat. The Australian example includes the following crimes:

- theft
- fraud
- tax evasion
- currency violations
- controlled substances
- illegal gambling
- obtaining financial benefit by vice engaged in by others
- extortion
- money laundering
- perverting the course of justice
- bribery or corruption of, or by, an officer
- bankruptcy and company violations
- harbouring of criminals
- forgery (including forging of passports)
- armament dealings
- illegal importation or exportation of fauna
- espionage, sabotage or threats to national security
- misuse of a computer or electronic communications
- people smuggling
- slavery
- piracy
- the organisation, financing or perpetration of sexual servitude or a sexual offence against a person who is under 18 outside of the country
- dealings in child abuse material
- importation of prohibited imports
- exportation of prohibited exports
- violence
- firearms.

It would be important to add to this list any act of terrorism or preparation for an act of terrorism. Although Australian legislation adopts a more overt approach to terrorism, attacks of this nature are far too frequent in Afghanistan to take such an obvious and candid approach. Infiltration by the ANP into extremist groups such as the Taliban, Al Qaeda and IS, while extremely dangerous, would likely uncover strategies, tactics, habits and holding points. There is also likely to be a strong intelligence collection component in terms of ammunition points, bomb-making locations and routes taken through and into Afghanistan from bordering countries. This aligns with steps 2 and 3 in the rule of law mandate proposed by this thesis in terms of both curtailing criminal networks and controlling the border which will need appropriate legislation reform to enable an Afghan Police Force to enforce it.

We can see how comfortably these crime types fit within the legislative framework of Afghanistan through the country's domestic legislation and international agreements. The penalty regime is consistent with most countries, noting the difficulty with the death penalty. The modern Afghanistan Criminal Procedure Code is again the perfect vehicle to pilot change in relation to foreign fighters who join enemy forces in Afghanistan to usurp the lawful authority of the government. Once again article 117 of chapter 7 seems the logical place to provide further powers to protect Afghanistan from foreign fighters. The Australian Commonwealth Criminal Code (CCC)[748] provides some useful examples of terminology. Section 119.1 of the CCC applies to circumstances where persons enter a foreign country with the intention of engaging in hostile activity.

While this legislation applies to Australians operating unlawfully in a foreign country, a reverse onus approach could be formulated. For example, Afghanistan could create an offence in circumstances where a foreign fighter entering Afghanistan with the intention to engage in hostile activity is detained by Afghan National Security Forces (ANSF). This would normally be seen, by developed country standards, as highly unusual as it would be most difficult for foreign fighters to pierce the borders in the first place of a country that is well organised militarily. But Afghanistan is unique and is landlocked. There are any number of countries on its borders that would either willingly or unwittingly provide safe passage for those intent on engaging in hostilities in Afghanistan.

The former Afghanistan administration incorporated terrorism laws into its 2017 Penal Code to prosecute for matters such as this but to date there have been very few public prosecutions. The criminal justice system in Afghanistan is capable of holding such public prosecutions, as mentioned previously in this thesis, and does not need to conduct private trials where there is alleged torture for confessions. The involvement of the public in the hearing of criminal trials of national importance is critical not only so that justice is seen to be done but to regain the public trust in the judiciary and the

[748] *Criminal Code Act 1995* (Cth).

police. This should be one of the foremost goals of the next Afghanistan government. The next Afghanistan government also has the option of setting up an international criminal court backed by the international community to try war crimes and crimes against humanity once security, the judiciary and policing have been established.

Recommendation 11: Banning the practice of abusing young boys (dancing boys)

Cultural norms such as the sexual abuse of young boys, or 'dancing boys' as they are known, post-Taliban rule must be completely banned and prosecuted, noting that there are extant laws that criminalise this heinous practice. Generally speaking, dancing boys are aged between 10 and 18 and are either kidnapped, orphaned or sold to wealthy Afghans by families trying to make money. They are dressed up as girls and perform dances in front of wealthy Afghans. They are handed from one man to the next and are sexually assaulted.[749]

The Taliban banned this practice when they came into power prior to the 2001 invasion, but this did not stop men from practising 'bacha bazi' (boy play in Dari) in private.[750] More recent reports would indicate that the practice is on the rise under the current Taliban rule.[751]

The law has been clear in relation to sexual assaults against boys since an amendment to article 427 of the Penal Code 1976 in 1978, well before Taliban rule. Chapter 8 of the Penal Code states that any act of pederasty with a male boy by an adult male shall be subjected to long imprisonment. Following the removal of the Taliban from rule in 2001, the practice of dancing boys once again emerged with the increase of warlord power, noting that some of these warlord commanders allegedly hold positions as governors, police chiefs and military commanders.[752] This begs the question of why the law banning this practice is not enforced. It is clear that the power of those who sexually assault boys provides them with immunity and privileges, despite the criminality of the act and the outright abuse of human rights.

This also raises the question of the universality of crime and whether beliefs act as a vehicle to label such acts as offences or simply cultural norms. It is difficult to label the act of sexually assaulting young boys as a cultural norm when it is clearly a crime under Afghanistan law. Therefore, the issue

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[749] Michelle Schut and Eva van Baarle, 'Dancing Boys and the Moral Dilemmas of Military Missions: The Practice of Bacha Bazi in Afghanistan' in Abu Bakarr Bah (ed), *International Security and Peacebuilding: Africa, the Middle East, and Europe* (Indiana University Press, 2017) 77.
[750] Ibid.
[751] Anoussa Salim, '"Bacha Bazi" is Seeing a Revival Under the Taliban', *International Policy Digest*, (online, 24 February 2025) <https://intpolicydigest.org/bacha-bazi-is-seeing-a-revival-under-the-taliban/>.
[752] Ibid.

comes down to corruption at the highest levels. In order for Afghanistan to prosper it must punish crimes in a public setting so that all Afghans can see justice being done. It seems that this is just another example of the application of two sets of standards in Afghanistan. Those without a voice seem to be bound by the criminal laws, yet those with money, position and power seem to be immune. Prosecutions for criminal acts must be consistent and equal irrespective of wealth or position.

Therefore, this offence could be tackled at a political level and again through global community pressure. For those that still insist on this practice in private, controlled operations might be just the right tool to detect and prosecute perpetrators. Once others of power and position see that they can no longer get away with sexual abuse of boys the practice may fall away. If a new Afghan Police Force are supported by the judiciary in the prosecution of such offences and are not subject to retaliation, then it would be reasonable to say that further prosecutions would follow.

Like the other listed offences for controlled operations, the sexual assault of boys could be the subject of a covert operation. The main issue would be cost and logistics, although there would be no need to establish another branch of the Afghan Police, as controlled operations just need operatives who can pass as criminals. The operatives themselves need to have those qualities or be able to find them. It is the controller of the operation that needs to be aware of dangers and risks to operatives. Time will tell If a new Afghan Police Force has the capacity to set such operations up but in the meantime it is necessary to insert a chapter 7b into the CPC that would indemnify operatives from prosecution provided those operatives conduct themselves in a manner that does not involve inducement to commit a crime or, as stated earlier, result in serious injury, death or a sexual assault.[753]

Recommendation 12: New anti-foreign fighter laws

In order to stem the flow of unlawful foreign combatants into Afghanistan, new laws need to be introduced into not only the Afghan system but neighbouring countries as well. Given the strong evidence that many Taliban members in Afghanistan were recruited in Pakistan then it would be appropriate for Afghanistan and Pakistan to enter into a bilateral agreement in relation to foreign fighters which would include mutual assistance arrangements to counter this insurgency.

The conflict in Syria had a direct relationship with the current situation in Afghanistan as many of the IS fighters spread into Afghanistan for protection following coalition efforts in Syria. This has culminated in attacks on the ethnic (religious) minority in Afghanistan, which, if nothing else, supports the ongoing objectives of the Taliban.

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[753] See, eg, *Crimes Act 1914* (Cth) s 15HA.

Recommendation 13: Insertion of a new International Criminal Tribunal for Afghanistan (ICTA) or a hybrid tribunal

This thesis has already raised concerns over the wanton destruction of religious institutions in Kabul and the wilful killing of worshippers. There are also examples of ISIS-K targeting, persecuting and killing Shia Muslims and other minority religious groups in Afghanistan. Therefore, if the current criminal justice system in Afghanistan is incapable of punishing such wanton murder and destruction, then an International Criminal Tribunal for Afghanistan (ICTA) might be a solution.[754] It may just be the perfect interim solution while an inquiry and/or assessment is established into the criminal justice system in Afghanistan. It would also act as a very good deterrent to those groups who continue to pose a threat to the security of Afghanistan. Unfortunately, an ICTA will have to wait for the Taliban regime to be ousted, as the Taliban do not recognise international law.[755]

A new administration in Afghanistan would need to ensure membership of the United Nations in order to enjoy the benefits available to it. Fortunately, Afghanistan officially joined the UN on 19 November 1946. Through its membership of the UN, Afghanistan (like all other member states) accepts the obligations contained in the UN Charter. Article 1 of the UN Charter obligates member states to maintain international peace and security and remove threats by way of 'powerful means'. Aside from the use of force under article 42, the UN member states, by way of a UNSC resolution, can establish a tribunal in Afghanistan. In establishing a tribunal for Afghanistan, the UN will need to engage with Afghan officials to lay the foundation of a temporary tribunal, as was seen in the former Yugoslavia through a United Nations Security Council resolution. A tribunal like the International Criminal Tribunal for the Former Yugoslavia (ICTY) would provide Afghanistan with an additional criminal justice capability to prosecute offences that have taken place on its soil with a view to punishing those responsible and deterring further or ongoing atrocities. The ICTY has provided much needed precedent through its many decisions on war crimes and crimes against humanity. The key objective of the ICTY was to try those individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal's Statute.[756] It also laid the groundwork for post-conflict resolution and post-conflict development, which is exactly what Afghanistan needs, putting aside the dismal security issues.

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[754] As mentioned in Chapter 4, in 2019 the GiROA formally reached out to the ICC to request an investigation into war crimes committed in Afghanistan.

[755] Office of the High Commissioner for Human Rights, 'International Community Must Not Normalise Taliban Rule in Afghanistan' (Media Release, 14 August 2024) <https://www.ohchr.org/en/press-releases/2024/08/international-community-must-not-normalise-taliban-rule-afghanistan>.

[756] 'About the ICTY', *United Nations International Criminal Tribunal for the Former Yugoslavia* (Web Page) <https://www.icty.org/en/about>.

The ICTA could be established in Kabul in Afghanistan and would send a clear message to those groups who continue to threaten security and undermine the efforts of the ANSF. It would also provide a public display of justice being done and restore some of the faith of the people in the next Afghanistan government following years of eroding trust. This would be consistent with the approach that this thesis has taken on the rule of law mandate in terms of ensuring that crimes against humanity are appropriately prosecuted.

Lastly, a hybrid court or tribunal could step in and prosecute crimes once the Taliban are removed. This will only be effective to the extent that it is part of a police-led military-supported re-entry into Afghanistan to eradicate insurgency, restore security, and properly train and mentor those in the justice sector including judges, prosecutors and police once the Taliban regime again falls. A hybrid court may be just the solution in not only prosecuting crimes but winning back the trust of the population.

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