



**Leitner Center**  
for International Law  
and Justice

**FORDHAM LAW  
NEW YORK CITY**



**KONRAD  
ADENAUER  
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## **“THE WORLD SIMPLY GAVE UP” : INTERNATIONAL LAW AND THE ROLE OF NON-STATE ENTITIES IN HUMANITARIAN EVACUATIONS IN AFGHANISTAN**





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## FOREWORD

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While kept as a buffer state during the Great Game, Afghanistan has been under the international spotlight since the Afghan-Soviet War. More recently it received much attention due to the US-led ‘war on terror’ and proxy dynamics involving regional actors. It was the longest war Washington had engaged in and it prevented the US from reorienting its focus and resources to Southeast Asia and China. The Joe Biden administration inherited a problematic peace process and faced the risk of getting embroiled in another war with the Taliban if did not uphold the Doha Accords. Hence withdrawal was the only option but it was also a moment of defeat and embarrassment.

In July-August 2021, the Taliban’s swift return to power and the retreat of the Afghan National Defense and Security Forces (ANDSF) without even fighting shocked many. Why did the Afghan army collapse so easily despite billions of dollars spent by international forces to equip, train and developed the armed forces? Despite being trained for years and receiving strong armoury, why did the ANDSF did not develop into a strong, robust and independent force to pose any resistance to the Taliban? Why was the ANDSF unable to fight the Taliban alone when the US and NATO withdrew their forces?

The country’s two decades long experiment with democracy, civil liberties and human rights also came to an end with the revival of the Islamic Emirate of Afghanistan. The group’s victory was seen as a victory for supportive groups like the Pakistani strategic and military circles given that they had finally regained strategic depth in the country given its historical and cultural ties with the group. On the other hand, India suffered a strategic and diplomatic loss in Kabul after spending billions worth of Indian investments to build roads, dams and infrastructure building.

However, the support and sanctuary that Pakistan provided to the Taliban to return to power has resulted in domestic and regional implications that Islamabad is not fully prepared for. Although Pakistan remains a key player in Afghanistan today, its level of influence and control over the group has decreased significantly compared to a quarter century ago. Its weak economic situation and little diplomatic clout in international affairs has dissuaded it from giving full diplomatic recognition to the group as it did in the 1990s.

The US-led invasion of Afghanistan in 2001 was intended to oust the Taliban, undercut Al Qaeda’s brand of jihadism, democratise the country and build a stable and functioning government. It provided an opportunity to set up strong institutions and cultivate a rule of law and democratic culture. The military campaign was quick because the US allied with local commanders and warlords on the ground along with US air power. After being defeated, many Taliban leaders took refuge in Pakistan.



Post 2001, Afghanistan was governed by both brutal warlords, corrupt and urbanised elites whose record was marginally better than that of the Taliban's. The US and its allies legitimised these corrupt local elites by allowing them to provide a false narrative that democracy, nation-building and human rights were flourishing but in reality, they were filling up their own pockets and cracking down on opponents. The two former Afghan presidents and their cronies created a self-serving constitutional philosophy to allow the executive to have overreaching power over the other two organs of government. Many of the Afghan elites also supported the war on terror including false imprisonment, night raids, death squads, illegal detentions, human rights violations and drone strikes. The development projects initiated by Washington mostly benefited US military contractors and a small group of corrupt Afghan elites who did not care about the welfare of the Afghan population. Collateral damage was a key reason that changed societal attitudes from the initial hopeful and welcoming sentiments during the initial years of the US occupation to those of resentment and hatred.

The fall of Afghanistan to the Taliban has brought a plethora of challenges not just for the country but also for the wider geopolitical dynamics by upsetting the fragile balance between nation states in the region. Terrorist groups, such as the Al-Qaeda, are not only emboldened by the Taliban's lightning speed of territorial gains but also have a playbook to follow to mount lethal attacks. There are also legitimate concerns on Afghanistan turning into a launchpad for global jihadism. The harbouring and assassination of former Al-Qaeda leader Ayman al-Zawahiri in Kabul in August 2022 demonstrated that the Taliban has not honoured the security and counterterrorism commitments laid out in the Doha agreement.

On the ideological front, the Taliban harbours the same views, policies and practices despite efforts to project itself as more moderate version from its previous avatar. When the group formed a caretaker government in September 2021, it took inspiration from the Iranian model of governance and set up a theocratic state. Instead of starting a meaningful and inclusive dialogue with other stakeholders, the group's hardliners have a bigger say on how to run the country and have steered the government towards micromanaging the lives of their citizens, particularly of girls and women. The group's puritan diktats that vary from strict enforcement of the Islamic dress code to banning female secondary education has been widely condemned.

Although the terminology 'rule of law' is used commonly in various circles, there is a lack of consensus on the definition. While its wider meaning could include strong institutions, good governance and equality for everyone, in a more practical sense it entails having clear and accessible laws, judicial independence and due process. The Taliban has refused to govern through checks and balances, rule of law and institutions. The group has a narrow understanding of security, and what it means to protect a country and its people. The public is unlikely to feel safe if only the crime levels and security situation improve. Abuses and repressive measures by the state need to stop, and this can only be achieved when the

rule of law is protected. The Taliban’s actions have indeed worsened the group’s engagement with an already distrustful international community.

Nonetheless the overall security situation has now improved, including a decrease in civilian casualties and greater humanitarian access to regions that were out of bounds for decades. However, the long spells of drought coupled with blocking of central Afghan assets and collapse of the economy has worsened the economic, humanitarian and public health crises in the country. The International Organization for Migration (IOM) stated in September 2022 that approximately 59% of Afghans are dependent on emergency assistance and international relief on a daily basis. Afghans across the country are still in dire need of emergency support. There are hundreds of thousands who remain in internally displaced camps and subjected to abject poverty.

The international community remains in a dilemma on whether it should engage, isolate or oppose the Taliban. The country is once again caught in the middle of great power rivalry over natural resources, geopolitical and geostrategic issues. The new proxy politics has more regional players who are seeking to protect their interests. In retrospect, Kabul had a loose alliance between the West and other democracies like India, but under the Taliban’s rule, Pakistan, Russia, China and Iran are likely to play a bigger role. Beijing has made concerted efforts to maintain regular contact with the Taliban’s top officials, and explore new areas of cooperation. While contradictory in nature, most countries are both engaging and isolating the Taliban. They are engaging the group by hosting meetings, providing humanitarian and economic aid and pressurising the group to uphold human and women rights. Along with engagement, they are isolating the group by not giving them formal recognition and access to the international system.

Regional states have been urged to work closer together to address mutual security concerns and prevent Afghanistan from turning into a breeding ground for extremism that could result in spill over effects. The India-Central Asia Summit — that sought to examine the evolving situation in Kabul and its implications on regional stability — saw a consensus in setting up a joint working group. After all, Afghanistan’s security challenges are regional challenges that necessitate a regional solution.

At this juncture, the Taliban can either carry on with its decades long unsuccessful security-centric policy or learn from its past mistakes and reach out to non-state actors both within Afghanistan and in the region for State-building, democratic and capacity building processes. It will be difficult for the Taliban to rule to Kabul without giving assurances to Afghans, particularly those who want to leave, to stay back and give the group a chance on its development of the rule of law and due process. To ensure that Afghans feel that their dignity, security and lives are protected, the state would need to go beyond holding criminals accountable; it will also need to ensure that the law is equal even for those in power. However, there is no one-size-fit-all formula to building inclusive peace, dealing with the



violent past and creating a new political order in the country. On the US's side, it has fallen short in initiating such a robust counter-terrorism cooperation among regional states due to several factors including its preoccupation with the Ukraine war, general disinterest and geopolitical limitations. It risks repeating the same mistakes by disengaging the Taliban and ignoring international terrorism, and relegating Afghanistan to the back of the world's conscience.

The Kabul airlift led by the US and its allies was one of the biggest, most challenging and dangerous evacuation exercise in history. By 24 August 2021, the massive airlift led by the US military, allies and partners reached a point that one aircraft was flying from the Kabul airport approximately every 39 minutes. The presence of hundreds of military personnel, aircraft, doctors and nurses demonstrated that large efforts were undertaken for evacuation.

The Kabul airport turned into a symbol of desperation among locals terrified of the Taliban's return to power. Thousands of Afghans were scrambling to get to the airport and some even hung from the aircraft leading to their deaths and injuries. The hasty withdrawal of foreign troops from Afghanistan has adversely affected the lives of Afghans and dented the US's reputation particularly among political opponents including Russia and China. Thousands who managed to flee Afghanistan and were hopeful of being resettled in the US are in a limbo in a third country or an international no man's land. Although thousands of Afghans were eligible for a refugee visa in the US, either because they worked for the US government during its operation in Kabul or they were related to someone who helped out, a backlog of visa applications remain.

Smaller countries stepped into the void to serve as 'transit points' and accommodate Afghans refugees even though they have played a limited role in the US-led war. Mike Breen, the president and CEO of Human Rights First said that no one really knows where Afghan refugees have ended up given the lack of comprehensive data. It is evident that no proper mechanism was taken to ensure that they have been resettled somewhere safe and sustainable.

The distressing stories of Afghans allies left behind in Kabul and stranded in third countries prompted many non-State entities (NSEs)—particularly private groups, including non-profit and veteran groups—to coordinate their own evacuation efforts that continue to take place even today. Joint efforts between veteran groups and other private organisations also took place and some of these groups entered into unconventional and informal deals to evacuate Afghans post Kabul Airlift.

In light of these developments, the Rule of Law Programme Asia, Konrad-Adenauer-Stiftung (KAS) has partnered with the Leitner Center for International Law and Justice, Fordham University School of Law to produce a compelling and timely report to examine the efforts, experiences and risks that private groups undertook to evacuate people from Afghanistan. While state-led

evacuation operations following the Taliban’s power grab in August 2021 have been widely discussed, critiqued and covered in various circles, little attention has been given to the efforts initiated by civil society organisations, veteran groups and private individuals to relocate and resettle as many people as possible. This report comprises of both primary and secondary research. The main authors of this report, Junli Lim and Elisabeth Wickeri, have diligently carried out 44 in-depth interviews with non-state actors living in various countries including Afghanistan, Australia, Canada, the UK, US, Switzerland, the Netherlands, Norway, Kyrgyzstan, Spain, and Singapore.

The Rule of Law Programme Asia at KAS carries out several projects to examine the intersections of the rule of law with human rights, democratic governance and constitutionalism in South Asia. In November 2022, we partnered with the Institute of South Asian Studies, National University of Singapore and hosted a closed-door hybrid workshop on the constitutional, legal and political dimensions of the ongoing economic crisis in Sri Lanka. The main takeaways of the workshop have been published in a Special Report titled, ‘Sri Lanka’s Evolving Crisis: Implications on Rule of Law and Constitutional Democracy’. We are also partnering with National Law University Delhi (NLUD), Brac University and LIRNEAsia for a joint report on platform regulation, cybersecurity, data protection, trends of securitisation and the rule of law in the jurisdictions of India, Bangladesh and Sri Lanka. The report will be completed and launched in the coming months.

For us at KAS, the project with Leitner Centre is a significant one. We are confident that this report, with unique and unprecedented findings from interviews carried out with a wide range of NSEs not only sheds greater light and awareness on the enormous risks and difficulties they faced but the wider complexities on the discourse on evacuations in highly volatile countries. Furthermore, the enriching literature captured in this report will make it a valuable contribution to the fields of international humanitarian law, international human rights law and international refugee law.

Roshni Kapur and Stefan Samse

**KAS Rule of Law Programme Asia**

## ABBREVIATIONS

ANDSF	Afghan National Defense and Security Forces
CIA	US Central Intelligence Agency
CSOs	Community Service Organisations
DoD	United States Department of Defense
DoS	United States Department of State
HCI	Humanitarian Corridors Initiative
HKIA	Hamid Karzai International Airport
HP	Humanitarian Parole
IAC	International armed conflict
ICRC	International Committee for the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IOM	International Organization for Migration
IRL	International Refugee Law
NATO	North Atlantic Treaty Organization
NDS	Afghanistan National Directorate of Security
NEO	Non-combatant Evacuation Operation
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
NRC	Norwegian Refugee Council
NSE	Non-State entity
NSU	Afghan National Strike Units
RSM	Resolute Support Mission
SIV	Special Immigrant Visa
UNHCR	United Nations High Commissioner for Refugees
USRAP	United States Refugee Admission Program

## EXECUTIVE SUMMARY

In the wake of foreign military withdrawal from Afghanistan and the Taliban’s capture of Kabul on 15 August 2021, thousands of Afghan citizens gathered at Hamid Karzai International Airport (HKIA) seeking evacuation. The unexpectedly swift resumption of Taliban control meant widespread fear and panic among groups including former government officials, human rights defenders, journalists, the legal community, people from religious and ethnic minorities, the LGBTQI community, those who had worked for foreign governments and their organisations, and many others. The ensuing chaos at HKIA only served to underscore the lack of preparation on the part of foreign States that were not only striving to meet their withdrawal deadline of 31 August 2021, but to contemporaneously evacuate vulnerable Afghan allies. Amidst the confusion compounded by an ISIS-K attack at HKIA on 26 August 2021, scores of volunteers from across the world rallied in response to requests for assistance to evacuate Afghan civilians.

This report engages International Human Rights Law (IHRL), International Refugee Law (IRL) and International Humanitarian Law (IHL) to document the experiences and examine the role of these non-State entities (NSEs) in the humanitarian evacuations from Afghanistan, as well as post-conflict obligations on the part of withdrawing States. It seeks to shed light on the lived realities of evacuation processes; and the gaps that have been exposed by these experiences in terms of applicable laws, policies, and practices. Finally, it attempts to identify a series of guidelines to implement in advance of future instances where evacuations of civilians in the context of conflict may be necessary.

Through desk research and 43 interviews with NSEs who directly supported the evacuation of Afghan civilians, this report addresses critical gaps that NSEs filled including the ability to coordinate and communicate pertinent information and logistics, emergency funding, actual evacuation of thousands of individuals and families, and resettlement options for vulnerable Afghan citizens. While much evacuation success hinged on traditional structures of access and influence, luck and happenstance also played a larger-than-ideal role. Digitisation of new communications technology and open-source information further provided NSEs with the opportunity to offer support in real time, but exposed potential security and privacy concerns. Challenges for NSEs also included financial and personnel capacity and the ability to access resources typically available to States. For instance, on-the-ground assessment and investigation, verification of identity and ensuring pathways to resettlement, managing flight manifests, and landing rights. These challenges point to an absence of preparation and leadership on the part of withdrawing States. Moreover, given the deep involvement and influence of foreign States over 20 years of armed conflict in Afghanistan, the applicability of IHL, extraterritorial obligations under IHRL and IRL, as well as normative understandings of the Responsibility to Protect, foreign States may

also have had certain protection obligations to groups, for which evacuation could have been utilised.

The disaster that unfolded in Afghanistan demands critical assessment and an accounting for the failures on the part of State actors in Afghanistan—even while global attention shifted to the humanitarian crisis in Ukraine—and also presents an opportunity to improve on policies and processes to prevent a similar catastrophe in the future. Findings from NSEs who responded to the crisis present some clear points of departure for future learning.

## Recommendations

Based on findings of this report, the following recommendations are aimed at policy and decision-makers at the State and organisational level, humanitarian and human rights practitioners, and the broader international community:

- Sound planning and preparation;
- Transparency and clear communication;
- Clear identification of coordinators and decision-makers in the event of an evacuation;
- Adaptive funding and compensation;
- Responsible outsourcing;
- Tapping into community networks;
- Creating accessible resettlement programmes;
- Recognising and adapting to issues of identity and travel documents for refugees; and
- Clarify obligations of States withdrawing from armed conflict.

This report is a response to the incredible work undertaken by volunteers from across borders, disciplines, backgrounds, and experiences, to support Afghans facing another crisis exacerbated by foreign State involvement. While there is scope to further understand responses to such crises and provide for better frameworks for humanitarian evacuations, this report aims to act as a starting point for such critical examinations and deepening these discussions.

## INTRODUCTION

*Who are we evacuating? And why are we evacuating them?...  
We evacuated Afghanistan's future. Afghanistan's brightest.  
The people who have the potential to be the next leaders, to  
make Afghanistan a better place. Kabul is empty right now.  
The world simply gave up and evil prevailed again.<sup>1</sup>*

On 11 September 2001, when four hijacked planes resulted in the deaths of thousands of civilians on United States (US) soil, the world responded with a solidarity unlikely seen since the Second World War and the creation of the United Nations (UN). Volunteers emerged in the thousands on site; alliances were forged between States; and a war that would become the longest in American history was waged against Afghanistan.<sup>2</sup> ‘Nous Sommes Tous Américains’ (‘We are all Americans’) accurately captured international resolve at the time.<sup>3</sup> The same would be seen at the end of this war, where volunteers have attempted to fill the same ‘vacuum of authority’ that followed both the immediate aftermath of the September 2001 attacks and the withdrawal of foreign military forces from Afghanistan. The events simultaneously ‘transcended age, gender, geographic and even political differences.’<sup>4</sup>

While individuals and groups scrambled to the aid of Afghan citizens in the midst of evacuation attempts in August 2021, news articles and headlines increasingly drew attention to both the chaos as well as Afghans ‘at risk’ and ‘at risk of being left behind’.<sup>5</sup> Few, however, have had the capacity to bring into question *who* were being evacuated; *why* they were being evacuated; *how* they were evacuated; *when* evacuations should occur; and *what* laws and legal obligations are applicable in this space. These wide-ranging questions bring to fore equally lofty subjects on both the war in Afghanistan as well as international law. The complexity of the war and applicable laws are further compounded by the paucity in legal literature on humanitarian evacuations.

1 Author interview with Azadah Raz Mohammad, 4 November 2022.

2 Joseph R. Biden Jr., “Remarks by President Biden on the End of the War in Afghanistan” (speech, Washington DC, 31 August, 2021), The White House, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/>; Seana Lowe Steffen and Alice Fothergill, “9/11 Volunteerism: A pathway to personal healing and community engagement” *The Social Science Journal* 46, no. 1 (2009): 29–46.

3 Jean-Marie Colombani, ‘Nous Sommes Tous Américains’, *Le Monde*, 13 September 2001, [https://www.lemonde.fr/idees/article/2011/09/09/nous-sommes-tous-americains\\_1569503\\_3232.html](https://www.lemonde.fr/idees/article/2011/09/09/nous-sommes-tous-americains_1569503_3232.html).

4 Hannah Hartig and Carroll Doherty, “Two Decades Later, the Enduring Legacy of 9/11” *Pew Research Center*, 2 September 2021, <https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/>.

5 See Dan Sabbagh, Peter Walker, Aubrey Allegretti and Daniel Boffey, “UK evacuation from Kabul to end within ‘24 to 36 hours’, defence sources say”, *The Guardian*, 24 August 2021, <https://www.theguardian.com/world/2021/aug/24/us-has-no-plans-to-delay-afghanistan-exit-beyond-31-august-pentagon-says>; Jon Allsop, “The journalists leaving Afghanistan, and those who haven’t made it out”, *Columbia Journalism Review*, 20 August 2021, [https://www.cjr.org/the\\_media\\_today/journalists\\_evacuated\\_afghanistan.php](https://www.cjr.org/the_media_today/journalists_evacuated_afghanistan.php); Debra L. Fischer, “Keeping Promises in Afghanistan”, 30 August 2021, <https://www.fischer.senate.gov/public/index.cfm/weekly-column?ID=E94D0BFA-F04E-4289-AA9C-745A0AFD10B6>.



The issues under discussion in this report present a point of convergence for multiple disciplines that simultaneously reveal an absence of clarity in definitions and concepts, as well as their applicability. The implications on both law and policy are far-ranging, as is the practical implementation by various actors. For instance, were the evacuations ‘humanitarian evacuations’ as understood in normative legal and non-legal frameworks? How do various interpretations of these concepts impact not only the implementation of support but *who* implements such support? In a system where States frequently rely on non-State entities (NSEs) in times of crises, and where the proclivity for a State-centric international legal order persists, the contours of responsibilities and obligations surprisingly remain unclear.<sup>6</sup> Underlying this, particularly where Afghanistan is concerned, are questions surrounding post-conflict obligations on the part of withdrawing States.

This report thus takes its cue from such ambiguity and is an ambitious attempt to analyse these evacuations from Afghanistan within international law frameworks. Specifically, it applies International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Refugee Law (IRL) to elicit the possible obligations of States when withdrawing from a conflict, as well as ongoing obligations beyond the theatre of combat. It pays special attention to the role of NSEs—particularly those with neither experience nor mandate to perform humanitarian evacuations—and their experiences in order to shed light on the lived realities of evacuation processes; and the gaps that have been exposed by these experiences on the applicable laws, policies, and practices. In doing so, it does not claim to offer a comprehensive account of events or applicable laws, nor does it attempt to include the perspectives of all stakeholders involved. Many of the issues under discussion fall beyond the ambit of this report and deserve further examination in their own right. This report instead offers broad recommendations and acts as a starting point for deeper and further discussions and research in the near future.

The broader questions that this report addresses are therefore twofold—what are the obligations of States when withdrawing from an armed conflict; and what role have NSEs played in the evacuations from Afghanistan? Part I of this report outlines the methodology employed here. The qualitative design of this report incorporates semi-structured in-depth interviews with 43 participants who have been directly involved in evacuating Afghan citizens since August 2021. Part II provides the context for this report—from the invasion of Afghanistan in 2001 to the peace process, the ultimate capture of Kabul by the Taliban, and the concurrent foreign military withdrawal and evacuations. While the speed at which Kabul was captured, and the contemporaneous fall of Afghanistan’s *de jure* government were unanticipated, the occurrence of these events was not—it was only a matter of time. Part III weaves findings from interviews with NSEs and desk

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6 Scarlett McArdle and Christy Shucksmith-Wesley, “International Non-State Humanitarian Actors outside of the International Legal System: Can there be any Legal Consequences for Humanitarian Actors?”, *Journal of Conflict and Security Law* 26, no. 3 (2021): 529.

research to examine both the concept and implementation of humanitarian evacuations as occurred in Afghanistan within international law frameworks. It attempts to draw out the definition, conceptualisation, and applicability of humanitarian evacuations, as well as the legal and non-legal issues that surfaced as experienced by NSEs. This section also discusses IHL to assess the range of obligations and rights that may apply when withdrawing from an armed conflict. To a certain extent, the delineation of these laws is an artificial exercise; for as outlined in this report, the protection of persons forms the common thread that binds these fields of law. The concluding section of this report summarises both field research and legal analyses to offer recommendations on best practices vis-à-vis humanitarian evacuations.

It should also be noted that the motivations for drafting this report are both professional and personal in nature. The authors of this report similarly responded to calls for assistance and were part of larger efforts to coordinate and provide necessary support to Afghan citizens attempting to evacuate. The overwhelming experience led to a realisation that critical gaps in law, policies, and practices not only exist, but require an examination. To this end, the authors were likewise in awe of the organic networks that emerged and their effectiveness, as well as the resourcefulness, tenacity and ostensible courage that both NSEs and Afghan citizens demonstrated during this time.

## PART I: METHODOLOGY AND ACKNOWLEDGEMENTS

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This report examines the obligations incumbent on States withdrawing from armed conflict, including situations of occupation; and focuses on the efforts by non-governmental civil society groups, collectives, veteran groups, and private individuals who responded to the crisis that unfolded during the foreign military withdrawal from Afghanistan in August 2021. Collectively, this report refers to these groups and individuals as non-State entities (NSEs), because many were more than ‘informal volunteers’; providing extensive support to Afghan counterparts while treading the fine line between professional duties and personal commitment. That a prominent feature of these efforts during August 2021 was its organic nature, this report does not include in its study the efforts of organisations with mandates to conduct evacuations such as international organisations like the United Nations or the International Committee of the Red Cross.

The report is based on desk research and semi-structured in-depth interviews. It examines news reports of government and non-governmental evacuation efforts, academic papers, government reports, research by non-governmental organisations, and 44 completed interviews. One individual, while uninvolved in the evacuation efforts from Afghanistan, was involved in evacuation efforts from a different State under a similar crisis setting. Thus, 43 interviewees to this report were directly involved in evacuation efforts conducted between August 2021 and April 2023 at the conclusion of writing. To this end, while the term ‘evacuation’ normatively points to an emergency situation over a comparatively short period of time, given its continued use among NSEs as well as States in this area of work, this report employs the term ‘evacuation’ to capture efforts to relocate persons from Afghanistan within the framework of durable resettlement from August 2021 onwards.<sup>7</sup>

Interviewees were recruited through the authors’ existing networks as well as desk research on NSE involvement in the evacuations from Afghanistan that were derived from newspaper articles, government reports, and non-governmental organisation reports. Calls were also placed for participants through social media platforms such as Facebook and LinkedIn within relevant groups. In addition to this purposive sampling, this report also relied on snowball sampling to recruit participants. The rationale behind adopting these methods is the result

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7 Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, “Government has evacuated 3,900 Afghan collaborators over the last year including 300 who arrived at Torrejón today”, Press Release 65, 10 August 2022, [https://www.exteriores.gob.es/en/Comunicacion/NotasPreNSE/Paginas/2022\\_NOTAS\\_P/20220811\\_NOTA065.aspx](https://www.exteriores.gob.es/en/Comunicacion/NotasPreNSE/Paginas/2022_NOTAS_P/20220811_NOTA065.aspx); see Part III, Sec. A for a more detailed discussion on the terms ‘evacuation’ and ‘humanitarian evacuation’.

of both time constraints as well as the sensitivity of the subject.<sup>8</sup> While these approaches are not without shortcomings,<sup>9</sup> this report does not aim to provide a comprehensive study into the topic. Instead, it hopes to serve as an impetus for further research into significant areas of law and humanitarian work. Efforts were made, however, to obtain as wide a sample as possible, within the time constraints for publication,—in terms of geography, participants’ professional backgrounds, as well as the nature of their involvement in the evacuations from Afghanistan.

Participants to this project were based in Afghanistan, Australia, Bangladesh, Canada, Germany, India, Italy the US, Sweden, Switzerland, the Netherlands, Norway, Kyrgyzstan, Spain, and Singapore. Interviews were conducted primarily in English, with interpretation through a certified interpreter used in one interview, and translation provided by Tammy Zapata in a written interview. Except for the one conducted via written questions and answers, interviews were conducted in person as well as over video link using secure connections such as Signal and Jitsi. 16 interviews were conducted in person, and 28 via video link; between September 2022 and April 2023. Efforts were made to ensure that the information contained in the interview records were stripped of identifying information, where appropriate, to ensure the security of ongoing support and evacuation efforts. To protect the identities of some interviewees, at their request, these names are withheld.

Participants were informed of the purpose of the interview, its voluntary nature, and the ways in which the information would be used. All interviewees provided written or verbal consent to be interviewed and were informed that they could decline to answer questions or could end the interview at any time, and that no compensation would be provided for participating. Where participants are quoted, confirmation of the accuracy of information as articulated in this report was sought, as was consent to be named or to remain anonymous. Interviews were conducted by the authors, Junli Lim and Elisabeth Wickeri, jointly or separately.

We acknowledge that this report is necessarily limited in its perspective and scope based on the identity and number of individuals we spoke to. The experiences conveyed to us, however, reflect both stories that were documented in media reporting, as well as our own experiences coordinating support to Afghan civilians during and after August 2021. Because this report is limited to examining the experiences of and efforts made by NSEs supporting evacuations from Afghanistan, and likewise draws on stories of successful or frustrated Afghan civilians seeking an exit amidst the fall of Kabul in August 2021, it does not focus

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8 Many presently continue their efforts to provide support to Afghans wishing to relocate and are cautious of the security and legal implications of both their efforts as well as the impact of public acknowledgement.

9 See Charlie Parker, Sam Scott, and Alistair Geddes, “Snowball Sampling,” in *SAGE Research Methods Foundations*, ed. Paul Atkinson et al (SAGE Publications Ltd., 2019), <https://methods.sagepub.com/foundations/snowball-sampling>; Rebecca S. Robinson, “Purposive Sampling”, in *Encyclopedia of Quality of Life and Well-Being Research*, ed. Alex C. Michalos (Dordrecht: Springer, 2014): 5243–5245.

on the experiences of and tremendous risks faced by Afghan evacuees. This report also does not include the experiences of those who remain in Afghanistan and its surroundings having failed to successfully secure durable and long-term resettlement solutions. That perspective is beyond the scope of this report. Furthermore, we are cognisant of the limitations of this report for reasons of language. While countless groups emerged globally, we were only able to engage those that presented their information in English. The authors hope to build on the findings of this report and delve into unexamined areas of research in subsequent ones.

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## PART II: AFGHANISTAN: WAR AND WITHDRAWAL

*I am a country always alone, never helped.  
Always under the gun, never thinking of its lost  
sons and daughters.*<sup>10</sup>

Afghanistan has been plagued by a succession of wars and internal strife for at least the last forty years.<sup>11</sup> Not one group—foreign or domestic—has ever wielded complete and stable control over territory and peoples for a sustained period of time.<sup>12</sup> Since the withdrawal of foreign forces in August 2021, global discourse has largely focused on the involvement of the US and its allies in Afghanistan following the events of September 11, 2001 (9/11) and invasion, but the contemporary Afghan experience has also been shaped by other key States—Russia, for instance, has long played a key role in the conflict in Afghanistan both in facilitating access,<sup>13</sup> and in itself asserting greater dominance in the region particularly after the Obama administration's efforts to ‘reset’ policy in Afghanistan signalling an eventual withdrawal, including—during the ongoing conflict—closer connections to the Taliban.<sup>14</sup> China has similarly been an increasingly important player in Afghanistan, especially since increased efforts to extend their influence in Central Asia as part of Xi Jinping's Belt and Road Initiative, with Afghanistan as a key component of that strategy.<sup>15</sup>

- 10 Afghan poet, quoted in Marika Theros, *Understanding »Local Ownership« in Peacebuilding Operations in Afghanistan* (Berlin: Friedrich-Ebert-Stiftung, November 2012): 2.
- 11 Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan ¶ 15 (12 April 2019). Afghanistan's geopolitically significant location between Europe and Asia has resulted in a much longer history of domination by foreign forces, including especially what is classically known as “The Great Game,” beginning around 1830 and lasting until the end of the 19th Century, an era of confrontation and tensions between the British and Russian Empires. For background on this era of Afghan and Central Asian history, primers include Peter Hopkirk, *The Great Game: The Struggle for Empire in Central Asia*, (New York: Kodansha, 1990); Karl E. Meyer and Sharen Blair Brysac, *Tournament of Shadows: The Great Game and the Race for Empire in Central Asia*, revised edition (New York: Basic, 2006).
- 12 See M. Nazif Shahrani, ed., *Modern Afghanistan: The Impact of 40 Years of War*, (Indiana: Indiana University Press, 2018); Hameed Hakimi and Gareth Price, “Afghanistan: One Year of Taliban Rule”, Chatham House, 15 August 2022, <https://www.chathamhouse.org/2022/08/afghanistan-one-year-taliban-rule>.
- 13 In addition to Vladimir Putin being the first world leader that George W. Bush spoke to after the 9/11 attacks, in the early days of the Afghanistan invasion, the US and Russia cooperated in sharing intelligence and facilitated air rights for the US. Putin also agreed to allow the US to establish temporary military basis in Central Asia. Alexander Cooley, *Great Games, Local Rules: The New Great Power Contest in Central Asia* (New York: Oxford University Press): 54. See also Peter Baker, “Russia to Open Airspace to US for Afghan War,” *New York Times*, 3 July 2009, <https://www.nytimes.com/2009/07/04/world/europe/04russia.html>.
- 14 Pavel K. Baev, “Russia and America's Overlapping Legacies in Afghanistan,” *Brookings*, 18 August 2021, <https://www.brookings.edu/articles/russia-and-americas-overlapping-legacies-in-afghanistan/>; Marlène Laruelle, “Russia's Strategies in Afghanistan and their consequences for NATO”, *Research Division-NATO Defense College*, no. 69, November 2011, [https://www.files.ethz.ch/isn/134579/rp\\_69.pdf](https://www.files.ethz.ch/isn/134579/rp_69.pdf); Hamid Shalizi and Josh Smith, “Ties between Russia and the Taliban worry Afghan, US officials,” *Reuters*, 7 December 2016, <https://www.reuters.com/article/uk-afghanistan-russia/ties-between-russia-and-the-taliban-worry-afghan-u-s-officials-idUKKBN13W2XF>.
- 15 Meena Singh Roy, “Afghanistan and the Belt and Road Initiative,” *Asia Policy*, No. 24, July 2017; Xiangming Chen and Fakhmiddin Fazilove, “Re-centering Central Asia: China's ‘New Great Game’ in the old Eurasian Heartland,” *Palgrave Communications*, No. 4 (2018):17.



Other regional actors, including Qatar and Pakistan, deserve mention as having played a key role in establishing early and sustained relationships with the Taliban—Pakistan’s military and intelligence services—in particular the Inter-Services Intelligence (ISI), have backed the Taliban since the 1990s and operated as a safe haven for the group, and Qatar has hosted the Taliban political office since 2013.<sup>16</sup> All these influences are only likely to increase following US and Coalition forces withdrawal.<sup>17</sup> The complexities of modern Afghanistan are infused with this foreign intervention and influence, a history of ethnic and religious tensions, and corruption, much of which are beyond the scope of this report. This section thus draws attention to the period of US-led invasion of Afghanistan following the events of 9/11 up to the time of foreign military withdrawal. It elicits the most relevant themes to this report including international response to the invasion of Afghanistan and the actors involved; the Bonn Conference 2001; the peace process preceding military withdrawal; and the resulting chaos of Kabul Airlift.

## A. War in Afghanistan: International Response, NATO, and Coalition Forces

Towards the end of 2001, the US joined by allies such as the United Kingdom (UK) launched ‘Operation Enduring Freedom’—a military operation that initiated the invasion of Afghanistan. Public and international support for the war was overwhelming, with 2001 polls revealing that 90 percent of the American public supported the military invasion of Afghanistan; and slightly more supported the US-led campaign against terrorism.<sup>18</sup> The international response to the attacks of 9/11 were ‘instantaneous, intense, overwhelming, and unanimous’ in their sympathy.<sup>19</sup> The UN expressed ‘its readiness to take *all necessary 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 Charter of the United Nations’ while also reaffirming the right to self-defence.<sup>20</sup>

The invasion of Afghanistan, while led by the US, not only received the

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- 16 Bruce Riedel, “Pakistan’s problematic victory in Afghanistan,” *Brookings Institute*, 24 August 2021, <https://www.brookings.edu/articles/pakistans-problematic-victory-in-afghanistan/>; Sami Sadat, “Taliban Political Office in Qatar -- ‘Hopes and Fears’”, 23 June, 2013, [https://www.huffpost.com/entry/taliban-political-office\\_b\\_3638354](https://www.huffpost.com/entry/taliban-political-office_b_3638354).
- 17 Aya Batrawy, “Qatar Emerges as Key Player in Afghanistan after US Pullout”, 30 August 2021, <https://apnews.com/article/middle-east-afghanistan-qatar-6c1e9e4ef1a9f0c3d19eac20b9321339>.
- 18 David W. Moore, “Public Overwhelmingly Backs Bush in Attacks on Afghanistan”, *Gallup*, 8 October 2001, <https://news.gallup.com/poll/4966/public-overwhelmingly-backs-bush-attacks-afghanistan.aspx>.
- 19 V. S. Mani, “The Fifth Afghan War and International Law,” *Economic & Political Weekly* 37, no. 4 (2002): 294.
- 20 UN Security Council, Resolution 1368, Condemning the terrorist attacks of 11 September 2001 in New York, Washington, D.C. and Pennsylvania, United States of America, S/RES/1368 (12 September 2001), <https://digitallibrary.un.org/record/448051?ln=en>; UN Security Council, Resolution 1373, Threats to international peace and security caused by terrorist acts, S/RES/1373 (28 September 2001), <https://digitallibrary.un.org/record/449020?ln=en>; UN Security Council Resolution 1378, Efforts to establish a new and transitional administration leading to the formation of a government in Afghanistan, S/RES/1378 (14 November 2001), <https://digitallibrary.un.org/record/452431?ln=en>.

endorsement of the international community, but also financial and military assistance. As many as 59 States joined the Coalition, described by Fergusson and Hughes as a ‘genuinely international enterprise’.<sup>21</sup> Operation Enduring Freedom and subsequent operations, Operation Freedom’s Sentinel and Operation Enduring Sentinel,<sup>22</sup> coupled with other international efforts characterised the truly multilateral endeavours in this war. Furthermore, international forces also worked with local Afghan militias whose roles have been described as ‘key’ in securing territory.<sup>23</sup> Significant developments during this time include the North Atlantic Treaty Organization’s (NATO) involvement, the Bonn Conference that culminated with the Bonn Agreement 2001,<sup>24</sup> and the subsequent creation of the International Security Assistance Force (ISAF). The day immediately following the 9/11 attacks, NATO invoked Article 5 of the Treaty of Washington 1949, its collective defence clause. This was a first in NATO’s history, and the first of NATO’s military commitment outside of Europe.<sup>25</sup> NATO’s direct military involvement began in December 2001 with the passing of the UNSC’s Resolution 1386 (2001).<sup>26</sup>

Initial leadership of ISAF was undertaken by individual NATO allies on a six-months rotation. This changed in August 2003 when NATO was tasked to command ISAF, as well as expand its operations beyond Kabul.<sup>27</sup> ISAF’s mandate and Operation Enduring Freedom ended in December 2014, and Afghan National Defence and Security Forces assumed full responsibility for the security of Afghanistan.<sup>28</sup> NATO’s mission in Afghanistan continued, however, in the form of Resolute Support Mission (RSM), to ‘train, advise and assist Afghan security forces and institutions to fight terrorism and secure their country.’ RSM ended in September 2021 after withdrawing all forces in August 2021.<sup>29</sup>

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- 21 James Fergusson and R. Gerald Hughes, “‘Graveyard of empires’: geopolitics, war and the tragedy of Afghanistan,” *Intelligence and National Security* 34, no. 7 (2019): 1074.
  - 22 Lead Inspector General Report to the United States Congress, *Operation Freedom’s Sentinel; Operation Enduring Sentinel* (1 October 2021–31 October 2021): 2, <https://tinyurl.com/yqv9z7f5>. Operation Freedom’s Sentinel began on 1 January 2015 and ended in October 2021 with Operation Enduring Sentinel succeeding.
  - 23 Emma Graham-Harrison, “NATO-backed Afghan militia scheme seen expanded”, *Reuters*, 12 December 2011, <https://www.reuters.com/article/afghanistan-security-militia-idINDEE7BB0EQ20111212>.
  - 24 UN Security Council, Letter from the Secretary-General to the President of the Security Council, Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, S/2001/1154 (5 December 2001), [https://peacemaker.un.org/sites/peacemaker.un.org/files/AF\\_011205\\_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf) (“Bonn Agreement 2001”).
  - 25 “NATO and Afghanistan”, *North Atlantic Treaty Organization*, [https://www.nato.int/cps/en/natohq/topics\\_8189.htm](https://www.nato.int/cps/en/natohq/topics_8189.htm); “The U.S. War in Afghanistan: 1999 – 2021”, *Council on Foreign Relations*, accessed 21 April 2023, <https://www.cfr.org/timeline/us-war-afghanistan>.
  - 26 Jack. J. Porter, “North Atlantic Treaty Organization: Transformation Under Fire,” in *Coalition Challenges in Afghanistan: The Politics of Alliance*, ed., Gale A. Mattox and Stephen M. Grenier (Stanford: Stanford University Press, 2015): 184-185.
  - 27 “NATO and Afghanistan,” *North Atlantic Treaty Organization*; “The U.S. War in Afghanistan: 1999 – 2021”, *Council on Foreign Relations*; Porter, “North Atlantic Treaty Organization: Transformation Under Fire”: 186.
  - 28 “NATO and Afghanistan,” *North Atlantic Treaty Organization*.
  - 29 “NATO and Afghanistan,” *North Atlantic Treaty Organization*. Operation Freedom’s Sentinel was the US government’s name for the Operation succeeding Operation Enduring Freedom, and formed a part of Resolute Support Mission.

While ISAF was commanded by NATO, a striking 21 out of the 49 troop-contributing States were non-NATO members.<sup>30</sup> The impetuses that prompted these States to join the Coalition represent wide-ranging motivations, including ‘[r]egional security concerns, domestic politics, or the opportunity to rehabilitate international reputations.’<sup>31</sup> Former Australian Prime Minister John Howard recounts 9/11 as an ‘attack on our shared values,’ invoking Article VI of the ANZUS treaty with parliamentary support.<sup>32</sup> When viewed comprehensively, the Coalition was diverse and influenced by the broad range of actors outside of the US and NATO. This is directly reflected in the geographically widespread response to the ensuing crisis of foreign military withdrawal.<sup>33</sup>

## B. The Bonn Conference and Rebuilding Afghanistan

In December 2001, a diverse group of stakeholders met in the city of Bonn, Germany, to reach a consensus on the future of Afghanistan. The Bonn Conference resulted in the signing of the Bonn Agreement 2001 that was to provide a roadmap for ‘a broad-based, gender-sensitive, multi-ethnic and fully representative government.’<sup>34</sup> Hamid Karzai, an ethnic Pashtun, was appointed Chairman of the Interim Administration before a transitional government could be formed. As well as laying a framework for disarmament, demobilisation, and the drafting of a new constitution, the Bonn Agreement 2001 stipulated that a transitional authority would govern Afghanistan for the two years following the interim period, then convene a *loya jirga* to draft the constitution, and the country would subsequently hold free and fair elections.<sup>35</sup> Karzai was elected president in 2002, and held the position until 2014, when Afghanistan had its first successful transfer of democratically elected leaders with Ashraf Ghani succeeding.<sup>36</sup> While Karzai’s appointment to govern Afghanistan in the six months interim period was rooted in a consensus among stakeholders that he would be able to overcome obstacles and unite the country during this time, the role of the US in his

30 “International Security Assistance Force (ISAF): Key Facts and Figures,” *North Atlantic Treaty Organization*, 15 January 2014 [https://www.nato.int/isaf/placemats\\_archive/2014-01-15-ISAF-Placemat.pdf](https://www.nato.int/isaf/placemats_archive/2014-01-15-ISAF-Placemat.pdf).

31 Stephen M. Grenier, “Introduction: Framing the War in Afghanistan,” *Coalition Challenges in Afghanistan: The Politics of Alliance*, ed., Gale A. Mattox and Stephen M. Grenier (Stanford: Stanford University Press, 2015): 1.

32 Robert Hill, “A minister’s perspective,” *Niche Wars: Australia in Afghanistan and Iraq, 2001–2014*, ed., John Blaxland, Marcus Fielding and Thea Gellerfy (Canberra: Australian National University Press, 2020): 22-23; David Watt, “Australian Defence Force in Afghanistan,” *Parliament of Australia*, 12 October 2010, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook43p/adfafghanistan](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/adfafghanistan).

33 Author interview with Fárnoosh Hashemian, 27 February 2023.

34 Ibrahim, *The Hazaras and the Afghan State Rebellion, Exclusion and the Struggle for Recognition*: 216; Bonn Agreement; Mark Fields and Ramsha Ahmed, “A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan,” *Institute for National Strategic Studies, Strategic Perspectives*, no. 8, series eds., C. Nicholas Rostow and Phillip C. Saunders (Washington, D.C.: National Defense University Press, November 2011): 5, <https://ndupress.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-8.pdf>.

35 Fields and Ahmed, “A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan”: 5.

36 Ibrahim, *The Hazaras and the Afghan State Rebellion, Exclusion and the Struggle for Recognition*: 216.

appointment should not be downplayed.<sup>37</sup>

The Bonn Agreement 2001 paved the way for the rebuilding of an Afghanistan that, in normative terms, was frequently labelled a ‘fragile’ or ‘failed’ State. It opened up the door to what Leader and Atmar have broadly described as a ‘triple transition from war to peace, from repressive to more open government, and from a controlled to a market economy.’<sup>38</sup> The task before Afghanistan’s transitional and first democratically elected government was no small feat, as was the ability to persist with political, social, and economic progress under the subsequent leadership of Ghani. The unfolding realities—and results—of nation- and State-building in Afghanistan, however, proved far removed from initial aspirations and hopes particularly on the part of its citizenry.

Rebuilding Afghanistan was marred by a complex confluence of foreign influence and dependencies, geopolitics, culture, religious and ethnic divisions, and internal battles of power and presence both domestically as well as between agencies of foreign States. Patronage, nepotism and corruption, much to the resentment of the Afghan people, persisted between the years 2001 and 2021, with Afghanistan consistently ranking as one of the most corrupt States in the world.<sup>39</sup> ‘[T]oxic corruption’ pervaded the Afghan State and contributed to instability rather than quell or deter—‘politics was dominated by individuals who were willing to rent themselves out to the highest bidder.’<sup>40</sup> Furthermore, the centralisation of government in Kabul nurtured a conducive environment for corrupt practices through its neglect of the regional and local that in turn served to cement power already in the hands of tribal elders and warlords that on occasion was further legitimised by representation in government—General Dostum’s appointment as Deputy Defense Minister in the Interim Administration, and later as Vice-President under President Ghani is case in point.<sup>41</sup>

Additionally, while the Bonn Agreement 2001 has been lauded for its ‘dimension of inclusiveness never before seen in Afghan politics’, it in fact resulted in greater

37 Author interview with Kevin Haidary, 23 September 2022; Fields and Ahmed, “A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan”: 15; James Kirchick, “The Man Who Would Be King”, *The New Republic*, 27 February 2008, <https://newrepublic.com/article/60876/the-man-who-would-be-king>; Rod Nordland, Alissa J. Rubin and Matthew Rosenberg, “Gulf Widens Between U.S. and a More Volatile Karzai”, *The New York Times*, 17 March 2012, <https://www.nytimes.com/2012/03/18/world/asia/gulf-widens-between-us-and-an-increasingly-hostile-karzai.html>. See also Bette Dam, *Expeditie Uruzgan: De weg van Hamid Karzai naar het paleis* (De Arbeiderspers: Amsterdam, 2009).

38 Nicholas Leader and Mohammed Haneef Atmar, “Political Projects: Reform, Aid, and the State in Afghanistan,” *Nation-Building Unraveled?: Aid, Peace and Justice in Afghanistan*, ed., Antonio Donini, Norah Niland, and Karin Wermester (London: Kumarian Press, 2004): 166.

39 Noah Coburn, *Losing Afghanistan: An Obituary for the Intervention* (Stanford: Stanford University Press, 2016): 201; see, generally, “Afghanistan,” *Transparency International*, <https://www.transparency.org/en/countries/afghanistan>.

40 Conor Keane, *US Nation-Building in Afghanistan* (New York: Routledge, 2016): 7.

41 Keane, *US Nation-Building in Afghanistan* (New York: Routledge, 2016): 7; Norah Niland, “Justice Postponed: The Marginalization of Human Rights in Afghanistan,” *Nation-Building Unraveled?: Aid, Peace and Justice in Afghanistan*, ed., Antonio Donini, Norah Niland, and Karin Wermester (London: Kumarian Press, 2004): 62; “Dostum Appointed Deputy Defense Minister,” *Cable News Network*, 24 December 2001, <http://edition.cnn.com/TRANSCRIPTS/0112/24/lt.17.html>; Romain Malejacq; *Warlord Survival: The Delusion of State Building in Afghanistan* (Ithaca: Cornell University Press, 2019): 8.

ethnic divisions in the country.<sup>42</sup> The ethnic hierarchy stemming from this agreement paved the way for a ‘veneer of national unity,’<sup>43</sup> behind which laid a government whose ministers lacked basic skills for managing a bureaucracy given that they were appointed to represent a clan, ethnic group or region.<sup>44</sup> Karzai’s government that was a result of this agreement established an ethno-factional distribution of power whose subsequent fragmentation within factions left ethnicity as the main point of contention and division, allowing for ‘potential relapse of the country into civil war.’<sup>45</sup> Furthermore, Ghani’s appointment of military leaders on the basis of ethnicity further compounded ethnic politicisation of Afghanistan’s security forces<sup>46</sup>—‘choices made by international donor organizations and [S]tates, as well as military forces, have helped to feed an ongoing politicization of ethnicity.’<sup>47</sup>

Since 2001, Coalition-building among political and military networks became a major feature of politics, in which political actors existed in symbiosis with the media and incentivised political polarisation along ethnic lines.<sup>48</sup> Like many conflict-affected States, ethnic politics is both a key characteristic of and sensitive issue within Afghan society. As a result, from 2016, the US Central Intelligence Agency (CIA) has refrained from providing statistics on ‘the sensitive subject of ethnicity in Afghanistan’ although it published population estimates between 1996 and 2014.<sup>49</sup> Ibrahimy argues that in Afghanistan, figures of ethnic population form the ‘basis for distribution of political power and national resources and underpin an ethnic hierarchy that is reinforced by inadvertent or conscious approval, or outright manipulation of such figures by foreign actors.’<sup>50</sup> In other words, claims to political power tend to be framed in terms of the size of ethnic groups that stakeholders represent.

Others argue that the increased importance of ethnic identity in Afghanistan since 2001 are due to injustices in reconstruction, education, and power allotment in the national government.<sup>51</sup> Schetter emphasises that international policy-makers are not the sole source of blame for politicisation of ethnicity in Afghanistan, but

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42 Sahar and Sahar, “Press and ethnic polarization in post-2001 Afghanistan: the 2014 presidential election experience”: 107.

43 Ibrahimy, *The Hazaras and the Afghan State Rebellion, Exclusion and the Struggle for Recognition*: 218-220.

44 Sven Gunnar Simonsen, “Ethnicising Afghanistan?: Inclusion and exclusion in post-Bonn institution building,” *Third World Quarterly* 25, no. 4 (2004): 713.

45 Ibrahimy, *The Hazaras and the Afghan State Rebellion, Exclusion and the Struggle for Recognition*: 220. See also Bryce G. Pool, “Counterinsurgency and the rule of law in Afghanistan,” *Small Wars and Insurgencies* 33, no. 7 (2022): 1093-1129.

46 Special Inspector General for Afghanistan Reconstruction, *Why the Afghan Security Forces Collapsed* (SIGAR: Arlington, February 2023): 27, <https://www.sigar.mil/pdf/evaluations/SIGAR-23-16-IP.pdf>.

47 Daniel Karell, “Fifteenth Anniversary of September 11, 2001: Ethnicity and Nationalism in Afghanistan in the Post-2001 Era” *Studies in Ethnicity and Nationalism* 16, no. 3 (2016): 458.

48 Arif Sahar and Aqila Sahar, “Press and ethnic polarization in post-2001 Afghanistan: the 2014 presidential election experience,” *Central Asian Survey* 35, no. 1 (2016): 107-108

49 *The World Factbook 2016-17: The Indispensable Source for Basic Intelligence* (Washington, D.C., Central Intelligence Agency, 2015): 7.

50 Niamatullah Ibrahimy, *The Hazaras and the Afghan State: Rebellion, Exclusion and the Struggle for Recognition* (London: Hurst & Company, 2017): 6.

51 Daniel Karell, “Ethnic Political Mobilization in Contemporary Afghanistan,” *Studies in Ethnicity and Nationalism* 16, no. 3 (2016): 511.

that Afghan elites engrained ethnicity in political processes, as it painted them as ‘ethnic entrepreneurs’ that provided them political legitimacy.<sup>52</sup> Understanding the context of the politicisation of ethnicity in Afghanistan is particularly relevant where reports of ethnic-based discrimination surfaced during the period of foreign military withdrawal. Specifically, that members of ethnic minority groups were denied entry into the Hamid Karzai International Airport (HKIA) by local Afghan forces that were deployed to assist with the security of the compound; an issue that is explored further in Part III of this report.

That Afghanistan’s economy was almost entirely dependent on external resources by the time of the war also proved problematical to its nation- and State-building project. Its reliance on foreign aid meant that there were implications to its democratic decision-making processes as well as political ones particularly when accountability was to donor States rather than its citizens.<sup>53</sup> Furthermore, Bizhan argues that the overwhelming flow of aid beyond the Afghan government’s budget created a parallel public sector that compounded problems of corruption as well as credibility in as far as State-building was concerned.<sup>54</sup> The Coalition’s programme of implementing Provincial Reconstruction Teams (PRTs), while in theory appeared to be an ‘innovative approach to peacebuilding and security’ in fact militarised aid and undermined humanitarian neutrality.<sup>55</sup> Contradictory mission statements were issued by parts of the Coalition, leading to suspicions that the PRT indeed served to address geo-strategic agendas.<sup>56</sup> The implementation of PRT by different Coalition teams also meant the lack of uniform approaches that often comprised differing military cultures, worldviews, and perceptions of their role.<sup>57</sup>

The failures of nation- and State-building are perhaps most ostensible through Afghanistan’s human rights track record under its democratic governments. The use of human rights rhetoric—particularly the ‘fight for the rights and dignity of women’—to justify a war in Afghanistan proved little more than just that, rhetoric.<sup>58</sup> While there is no doubt that there were some measurable improvements such as greater women representation and participation in civic life, or the enactment of more progressive policies in certain areas, by and large,

52 Conrad Schetter, “Playing the Ethnic Card: On the Ethnicization of Afghan Politics,” *Studies in Ethnicity and Nationalism* 16, no. 3 (2016): 460.

53 Nematullah Bizhan, *Aid Paradoxes in Afghanistan: Building and Undermining the State* (New York: Routledge, 2018): 4-5.

54 Bizhan, *Aid Paradoxes in Afghanistan: Building and Undermining the State*: 168-169.

55 William Maley, “Provincial Reconstruction Teams in Afghanistan - how they arrived and where they are going,” *NATI Review*, 1 July 2007, <https://www.nato.int/docu/review/articles/2007/07/01/provincial-reconstruction-teams-in-afghanistan-how-they-arrived-and-where-they-are-going/index.html>.

56 Alexander Costy, “The Dilemma of Humanitarianism in the Post-Taliban Transition,” in *Nation-Building Unraveled?: Aid, Peace and Justice in Afghanistan*, ed., Antonio Donini, Norah Niland, and Karin Wermester (London: Kumarian Press, 2004): 159. See also, “ACBAR policy brief: NGOs concerns and recommendations on civil-military relations,” *Agency Coordinating Body for Afghan Relief and Development*, 7 December 2002, <https://reliefweb.int/report/afghanistan/acbar-policy-brief-ngos-concerns-and-recommendations-civil-military-relations>.

57 Maley, “Provincial Reconstruction Teams in Afghanistan - how they arrived and where they are going”.

58 Laura Bush, “Text: Laura Bush on Taliban Oppression of Women,” *The Washington Post*, 17 November 2001, [https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/laurabushtext\\_111701.html](https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/laurabushtext_111701.html).



both the Karzai and Ghani administrations had failed to ensure respect for the rule of law and to prevent and deter violations of human rights and international law.<sup>59</sup> Impunity reigned for the powerful and appropriately connected, with the ‘war on terrorism’ dominating agendas—‘justice is a luxury for now; we must not lose peace for justice’.<sup>60</sup>

Relevantly, 20 years of nation- and State-building produced a Ministry of Defence and Interior that were ‘notoriously corrupt’, with ‘widespread ineptitude, lack of leadership, and self-interest’.<sup>61</sup> Billions invested in training and equipping the Afghan military were often siphoned and embezzled; supplies stolen; and with weakened morale, desertion remained high leading to a State that could not effectively defend itself.<sup>62</sup> The pervasive and corrosive culture of corruption was also seen at HKIA grounds with allegations of demands for bribes to access the airport compound.<sup>63</sup>

## C. The Afghanistan Peace Process

The Doha Agreement that was signed in 2020—just a year before the Taliban’s capture of Kabul in August 2021—was the culmination of a series of attempts at a peace agreement.<sup>64</sup> The peace process began under the Obama administration in 2010 when it resumed the US’s first diplomatic contact with the Taliban since the 9/11 attacks, followed by a series of failed peace talks.<sup>65</sup> Under Trump’s leadership, the US had initially committed to preventing the emergence of a

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59 Amnesty International, *Too many missed opportunities: Human rights in Afghanistan under the Karzai administration*, April 2014, <https://www.refworld.org/pdfid/5343b5f54.pdf>; “Ghani Accused Of Ignoring Human Rights Concerns At UNGA,” *TOLONews*, 22 September 2017, <https://tolonews.com/afghanistan/ghani-accused-ignoring-human-rights-concerns-unga>; Amin Kawa, “Human Rights Was Not a Priority for Former Leaders”; Exclusive Interview with Sima Samar,” *Hasht-E-Subh Daily*, 12 February 2023, <https://8am.media/eng/human-rights-was-not-a-priority-for-former-leaders-exclusive-interview-with-sima-samar/>.

60 General Dostum, quoted in Niland, “Justice Postponed: The Marginalization of Human Rights in Afghanistan”: 73; see also, Niland, “Justice Postponed: The Marginalization of Human Rights in Afghanistan,”: 71-76.

61 Lynne O’Donnell, “What Went Wrong With Afghanistan’s Defense Forces?,” *Foreign Policy*, 11 August 2021, <https://foreignpolicy.com/2021/08/11/taliban-afghanistan-defense-forces-army-militias-kabul/>.

62 Abdul Basit, “Why did the Afghan army disintegrate so quickly?,” *Al Jazeera*, 17 August 2021, <https://www.aljazeera.com/opinions/2021/8/17/why-did-the-afghan-army-disintegrate-so-quickly>.

63 See Part III, Section C (v), “Discrimination and Corruption” in this report.

64 *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America*, 29 February 2020 (“Doha Agreement”), <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>; Karen DeYoung, “U.S. to launch peace talks with Taliban,” *The Washington Post*, 18 June 2013, [https://www.washingtonpost.com/world/national-security/us-to-relaunch-peace-talks-with-taliban/2013/06/18/bd8c7f38-d81e-11e2-a016-92547bf094cc\\_story.html](https://www.washingtonpost.com/world/national-security/us-to-relaunch-peace-talks-with-taliban/2013/06/18/bd8c7f38-d81e-11e2-a016-92547bf094cc_story.html); Justin Lynch, “Obama Doesn’t Need an Afghanistan-Taliban Peace Deal,” *Time*, 16 June 2014, <https://time.com/2864920/obama-afghanistan-taliban-peace-deal/>; Barnett Rubin, “A Tale of Two Skepticisms: Fighting and Talking with the Taliban During the Obama Years,” *War on the Rocks*, 26 February 2020, <https://warontherocks.com/2020/02/a-tale-of-two-skepticisms-fighting-and-talking-with-the-taliban-during-the-obama-years/>.

65 Barnett Rubin, “A Tale of Two Skepticisms: Fighting and Talking with the Taliban During the Obama Years”.

‘vacuum for terrorists’ and increased US military engagement in Afghanistan.<sup>66</sup> In December 2018, however, representatives from Afghanistan, the US, the United Arab Emirates, and Saudi Arabia culminated their year-long effort to bring the Afghan government and Taliban negotiators to Abu Dhabi, and while some progress was made, the two sides never met face-to-face.<sup>67</sup> Amidst the growing escalation between the US and the Taliban, negotiations shifted to Doha, and were eventually postponed to February 2019, centring on the withdrawal of American troops from Afghanistan and the release of up to 5,000 Taliban prisoners in exchange for a pledge from the Taliban to prohibit international terrorist groups from operating on Afghan soil.<sup>68</sup>

A governmental contact group between the Afghan government and the Taliban repeatedly met in Qatar but never developed an agenda to negotiate.<sup>69</sup> Finally, after a tense year with President Trump cancelling talks, the US and Taliban signed the Doha Agreement on 29 February 2020 that notably excluded the Afghan government and that contains secret annexes.<sup>70</sup> The exclusion of the Afghan government was a result of a multitude of reasons ranging from the Taliban’s refusal for direct negotiations in a bid to delegitimise the government’s authority, to the division within the Afghan government, and impatience of the US to finalise the terms of withdrawal.<sup>71</sup> The same day, however, the US-Afghanistan Joint Declaration was issued, stipulating that foreign military withdrawal was predicated on the ‘Taliban’s fulfilment of its commitments’ in the peace agreement.<sup>72</sup> On 12 September 2020, the long delayed Intra-Afghan Peace Talks began after the Afghan government released 5,000 Taliban prisoners; the government continued to push for a cease-fire, while the Taliban reiterated its call for the country to be governed through an Islamic system.<sup>73</sup>

Following the signing of the Doha Agreement, thousands of troops were pulled out of Afghanistan and the US government announced it would halve its forces in the country by January 2021, despite the deadlock in negotiations between the

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66 “Timeline: U.S. War in Afghanistan,” *Council on Foreign Relations*, <https://www.cfr.org/timeline/us-war-afghanistan>.

67 Aref Dostyar and Zmarai Farahi. “Why the Afghan peace process failed, and what could come next?” *Middle East Institute*, 18 August 2022, <https://www.mei.edu/publications/why-afghan-peace-process-failed-and-what-could-come-next>.

68 “Timeline: U.S. War in Afghanistan,” <https://www.cfr.org/timeline/us-war-afghanistan>, *Council on Foreign Relations*.

69 Dostyar and Farahi. “Why the Afghan peace process failed, and what could come next?”.

70 Doha Agreement; Kimberly Dozier, “Secret Annexes, Backroom Deals: Can Zalmay Khalilzad Deliver Afghan Peace for Trump?,” *Time Magazine*, 15 February 2020, <https://time.com/5784103/secret-annexes-backroom-deals-can-zalmay-khalilzad-deliver-afghan-peace-for-trump/>.

71 Anthony H. Cordesman, “Afghanistan: The Peace Negotiations Have Become an Extension of War by Other Means,” *Center for Strategic and International Studies*, 28 October 2020, <https://www.csis.org/analysis/afghanistan-peace-negotiations-have-become-extension-war-other-means>; International Crisis Group, *Taking Stock of the Taliban’s Perspectives on Peace*, Report No. 311, 11 August 2020, <https://www.crisisgroup.org/asia/south-asia/afghanistan/311-taking-stock-talibans-perspectives-peace>; Author interview with David Schwendiman, 10 April, 2023.

72 *Joint Declaration between the Islamic Republic of Afghanistan and the United States of America for Bringing Peace to Afghanistan*, Annex to the letter dated 6 March 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the Presidency of the Security Council, UNSC, S/2020/185, 9 March 2020 (“US-Afghanistan Joint Declaration”).

73 “Timeline: U.S. War in Afghanistan,” *Council on Foreign Relations*.

Afghan government and the Taliban who continued to mount deadly attacks.<sup>74</sup> On 14 April 2021, newly inaugurated President Joe Biden postponed the 1 May 2021 date for full US military withdrawal—stipulated in the Doha Agreement—and changed the withdrawal date to 11 September 2021. When the new date was announced, the US position was that US and NATO troops would fully withdraw regardless of progress in the intra-Afghan peace talks or Taliban attacks on Afghan security forces and citizens.<sup>75</sup>

## D. Kabul Airlift

Throughout the summer of 2021, the Taliban mounted offensives against government-controlled areas and border crossings, and by early August, Kabul was the only major urban area that remained under government control.<sup>76</sup> Senior Afghan leaders held a meeting with President Ghani, warning that as the government continued to lose authority and control over territories in August 2021, a transitional power-sharing agreement was ever more vital. On the morning of 15 August 2021, Taliban fighters had promised not to enter Kabul. Two hours later, however, two Taliban factions closed in on separate sides of the city, presenting the ‘possibility of a massive conflict...that would destroy the city of five million’.<sup>77</sup> President Ghani fled the country and in the ensuing chaos, Kabul fell to the Taliban in a matter of hours.<sup>78</sup> Ghani has since stated he did not know he was fleeing the country that morning, since the Taliban had agreed not to enter Kabul. The speed at which the Taliban captured Kabul was something no one had expected; neither the intelligence agencies, nor the Taliban themselves.<sup>79</sup>

Colloquially referred to as ‘Kabul Airlift’,<sup>80</sup> the term broadly points to evacuation

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74 “Timeline: U.S. War in Afghanistan,” Council on Foreign Relations.

75 “Timeline: U.S. War in Afghanistan,” Council on Foreign Relations.

76 “Instability in Afghanistan,” *Center for Preventive Action*, updated 19 October 2022, <https://www.cfr.org/global-conflict-tracker/conflict/war-afghanistan>.

77 “Ashraf Ghani: Ex-Afghan president describes moment he fled the Taliban,” *BBC News*, 30 December 2021, <https://www.bbc.com/news/world-asia-59807737>.

78 Fawzia Koofi, “Reflections on the Fall of Kabul One Year Later, Commentary,” *Center for Strategic and International Studies*, 15 August 2022 <https://www.csis.org/analysis/reflections-fall-kabul-one-year-later>.

79 Mullah Abdul Ghani Baradar, head of the Taliban political bureau said, ‘I must say that I did not expect that we would achieve such a success so quickly and so easily’. Emel Öz, “Taliban Surprised by Speed of its Takeover,” *Anadolu Agency*, 16 August 2021, <https://www.aa.com.tr/en/asia-pacific/taliban-surprised-by-speed-of-its-takeover/2336236>; George Bowden, “MI6 boss warns of China ‘debt traps and data traps’,” *BBC News*, 30 November 2021, <https://www.bbc.com/news/uk-59474365>; See also *Evakuering Fra Afghanistan*, joint evaluation by Denmark’s Ministry of Foreign Affairs, Ministry of Defense, Ministry of Justice, and Ministry of Immigration and Integration, 25 February 2022: 9-10, <https://um.dk/en/foreign-policy/evaluation-of-the-danish-evacuation-from-afghanistan> (“Danish Evacuation Report”).

80 “Operation Allies Refuge,” *U.S. Embassy in Afghanistan*, 17 July 2021, <https://af.usembassy.gov/operation-allies-refuge/>; Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, “Government has evacuated 3,900 Afghan collaborators over the last year including 300 who arrived at Torrejón today”, Press Release 65, 10 August 2022, [https://www.exteriores.gob.es/en/Comunicacion/NotasPreNSE/Paginas/2022\\_NOTAS\\_P/20220811\\_NOTA065.aspx](https://www.exteriores.gob.es/en/Comunicacion/NotasPreNSE/Paginas/2022_NOTAS_P/20220811_NOTA065.aspx); “India’s evacuation mission from Afghanistan named ‘Operation Devi Shakti’,” *The Hindu*, 24 August 2021, <https://www.thehindu.com/news/national/indias-evacuation-mission-from-afghanistan-named-operation-devi-shakti/article36075754.ece>; see also Jon Simkins, “Kabul airlift, Abbey Gate bombing the subject of new HBO documentary,” *Military Times*, 22 September 2022, <https://www.militarytimes.com/off-duty/military-culture/2022/09/22/kabul-airlift-abbey-gate-bombing-the-subject-of-new-hbo-documentary/>.

attempts that occurred between the days of the Taliban capturing Kabul on 15 August 2021 and 31 August 2021 when remaining foreign forces left Afghanistan. Non-combatant evacuation (NEO) efforts were executed by foreign States under the banners of Operation Allies Refuge, Operation Antígona, and Operation Devi Shakti among many others.<sup>81</sup> The monumental efforts to evacuate remaining personnel as well as Afghan persons deemed at risk of harm featured prominently in the news and was typically described as ‘a huge shame for... the entire Western forces’.<sup>82</sup> Chaos and violence characterised this period, as the international community bore witness to harrowing videos of crowds running alongside planes and reports of a young Afghan footballer falling to his death after attempting to cling on to a US aircraft.<sup>83</sup>

Negligence of the US to properly plan for and employ appropriate resources to evacuate tens of thousands of people from Afghanistan is evident.<sup>84</sup> A recently released US Department of State (DoS) report also lays blame on the US government for failing to anticipate the chaos that would result from the withdrawal; and calls for better planning in future evacuation settings.<sup>85</sup> NATO and Coalition forces on the ground reported dismay at the lack of consultation and coordination extended to the NEO and closure of the US Embassy in Kabul. As a result of the lack of coordination, NATO personnel and local partners were forced to form their own evacuation plans for troops and citizens—panic spread at HKIA.<sup>86</sup>

At HKIA, Coalition members struggled to land their respective evacuation planes.<sup>87</sup> Chartered planes left half empty, and families slept on the floor as food and water ran out.<sup>88</sup> The crowds became so large that US and Coalition forces were forced to choose who entered the airport depending on proximity to the gate,<sup>89</sup>

81 Charles Pope, “One year later, historic Afghan airlift inspires pride and reflection across the Air Force,” 30 August 2022, <<https://www.af.mil/News/Article-Display/Article/3144426/one-year-later-historic-afghan-airlift-inspires-pride-and-reflection-across-the/>>.

82 Lucas Wehner, quoted in “Afghanistan: Final German evacuation flight leaves Kabul airport”, *Deutsche Welle*, 26 August 2021, <https://www.dw.com/en/afghanistan-final-german-evacuation-flight-leaves-kabul-airport/a-58978041>.

83 “Zaki Anwari: Afghan footballer fell to death from US plane,” *Al Jazeera*, 19 August 2021, <https://www.aljazeera.com/news/2021/8/19/zaki-anwari-afghan-footballer-fell-to-death-from-us-plane>.

84 Though the US had reportedly accomplished 90% of its withdrawal by July, many senior leaders in Washington failed to recognise or adapt to worsening conditions on the ground. Meanwhile, those in the field who could not wait were forced to develop impromptu plans without guidance from senior leadership. The DoS should have stepped up its accounting of US citizens and improved the process for Special Immigrant Visa (SIV) applicants and others who assisted the United States. In May, there were 17,000 principal SIV-eligible applicants in Afghanistan who were in the pipeline, and when dependents were included, the number would be substantially higher. Beyond those who had applied, neither DoS nor the Department of Defense (“DoD”) could even estimate how many Afghans were eligible for the programme. “Left Behind: A Brief Assessment of the Biden Administration’s Strategic Failures during the Afghanistan Evacuation.” *The United States Senate Committee on Foreign Relations Minority Report (February 2022)* <https://www.foreign.senate.gov/imo/media/doc/Risch%20Afghanistan%20Report%202022.pdf>: 6.

85 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*, version for public release, March 2022, <https://www.state.gov/wp-content/uploads/2023/06/State-AAR-AFG.pdf>.

86 *The United States Senate Committee on Foreign Relations Minority Report*, “Left Behind”: 23.

87 *The United States Senate Committee on Foreign Relations Minority Report*, “Left Behind”: 23.

88 Mujib Mashal, “5 Desperate Days: Escaping Kabul,” *The New York Times*, 23 December 2021, <https://www.nytimes.com/interactive/2021/12/23/world/asia/kabul-evacuation-afghanistan.html>.

89 *The United States Senate Committee on Foreign Relations Minority Report*, “Left Behind”: 21.

lifting people out of a sewage canal to pass them through a hole in the fence near Abbey Gate if they appeared to have proper documents.<sup>90</sup> Families were separated and children were used in these attempts to enter HKIA resulting in many unaccompanied minors and the establishment of a ‘temporary orphanage’ within airport compounds.<sup>91</sup> Then, on 26 August, an explosion at Abbey Gate killed at least 170 Afghan civilians and 13 US service members,<sup>92</sup> perpetrated by a lone suicide bomber who was a known ISIS–K terrorist.<sup>93</sup> Several official inquiries launched by State and non-governmental processes are ongoing, signalling the seriousness of the failures perceived worldwide.<sup>94</sup>

Before the withdrawal from Afghanistan in 2021, the most well-known and largest US-led humanitarian evacuation was from Vietnam—Operation Frequent Wind evacuated 130,000 people, including Vietnamese citizens, third party nationals, and US citizens from South Vietnam in April 1975.<sup>95</sup> During and after the US withdrawal from Kabul in 2021 many comparisons were drawn between the failures of the US government to plan for the withdrawal, and the resulting chaos was also eerily familiar, as was the large number of individuals left behind.<sup>96</sup> Many States have laws and policies that guide their responses to crises which sometimes require them to evacuate nationals, including from third countries. US law directs the Secretary of State to develop practices and policies that provide for the ‘safe

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- 90 Joshua Kaplan et al, “Hell at Abbey Gate: Chaos, Confusion and Death in the Final Days of the War in Afghanistan,” *ProPublica*, 2 April 2022, <https://www.propublica.org/article/hell-at-abbey-gate-chaos-confusion-and-death-in-the-final-days-of-the-war-in-afghanistan>.
- 91 Author interview with Christoph Klawitter, 20 January 2023. See also Kristina Cooke, Mica Rosenberg and Lindsey Wasson, “When are my parents coming? - 1,300 Afghan children evacuated to U.S. in limbo” *Reuters*, 10 November 2021, <https://www.reuters.com/world/when-are-my-parents-coming-1300-afghan-children-evacuated-us-limbo-2021-11-10/>.
- 92 “Findings and Recommendations – Attack Against U.S. Forces Conducting NEO at Hamid Karzai International Airport on 26 August 2021,” *U.S. Army Central*, 22 October 2021 (“Abbey Gate Investigations”); Jim Garamone, “U.S. Central Command Releases Report on August Abbey Gate Attack”, 4 February 2022, <https://www.defense.gov/News/News-Stories/Article/Article/2924398/us-central-command-releases-report-on-august-abbey-gate-attack/>.
- 93 Maj. Gen Buck Elton and CPT. Joshua Fruth, “Evacuation Operations, Great-Power Competition, and External Operations Terror Threats in Post-Drawdown Afghanistan,” *Journal of Indo-Pacific Affairs* (January-February 2022): 26, <https://media.defense.gov/2022/Jan/06/2002918536/-1/-1/1/JIPA%20-%20ELTON,%20FRUTH%20,%20&%20NEUMANN%20-%202022.PDF>.
- 94 For example, two Dutch cabinet members resigned over criticisms of their handling of the evacuation after interpreters and others working with the Dutch government were left stranded. “Second Dutch minister resigns over Afghan evacuation crisis,” *AFP in The Hague*, 17 September 2021, <https://www.theguardian.com/world/2021/sep/17/second-dutch-minister-resigns-over-afghan-evacuation-crisis>. In March of 2022, the Dutch government launched a Commission of Inquiry into the evacuations Netherlands central government, “Commissie van onderzoek evacuatieoperatie Kaboel van start,” 25 March 2022, <https://www.rijksoverheid.nl/actueel/nieuws/2022/03/25/commissie-van-onderzoek-evacuatieoperatie-kaboel-van-start>. Germany has also launched an inquiry into the process. Julia Dahm, “German Bundestag to investigate botched Afghanistan evacuation,” *Euractiv*, 3 June 2022, <https://www.euractiv.com/section/global-europe/news/german-bundestag-to-investigate-botched-afghanistan-evacuation/>.
- 95 Thomas G. Tobin, *Last Flight from Saigon, USAF Southeast Asia Monograph Series*, Volume IV, Monograph 6, (Air Force Historical Studies Office, 2005): vii, <https://apps.dtic.mil/sti/citations/ADA439990>.
- 96 Gillian Brockell, “The Fall of Saigon: As Taliban seizes Kabul, the Vietnam War’s Final Days Remembered”, 16 August 2021, *The Washington Post*, <https://www.washingtonpost.com/history/2021/08/15/saigon-fall-kabul-taliban/>. The conclusions being drawn around why the evacuation from Afghanistan was so chaotic echo those lessons that were made after Operation Frequent Wind, in particular that a single agency should have had authority to make decisions in order to avoid inevitable confusion. See, e.g., Daniel L. Haulman, “Vietnam Evacuation: Operation Frequent Wind,” in *Short of War: Major USAF Contingency Operations, 1947-1997*, ed. A. Timothy Warnock (Montgomery: Air University Press, 2000): 92.

and efficient’ evacuation of US government personnel, dependents, and private US citizens when their lives are endangered.<sup>97</sup> Moreover, the Secretary is authorised to make emergency expenditures including for the evacuation of those groups as well as foreign nationals, when their lives are endangered by war, civil unrest, or natural disaster.<sup>98</sup> In August 2021, however, it became clear that those policies and procedures had not been mapped out for use in this complex crisis, due to lack of adequate planning, inconsistent policy directions from Washington, lack of ‘a single, principal-level crisis leader’, and poor communications.<sup>99</sup> While a DoS report estimates that the US evacuated more than 125,000 people (including international embassy staff and nearly 6,000 private US citizens)—noting that there is no comparison on this scale since the departure from Saigon<sup>100</sup>—tens of thousands of Afghans trying to benefit from the evacuation due to their risk profile were left behind.

On 30 August, HKIA closed, and the military left, leaving thousands of vulnerable civilians behind.<sup>101</sup> Those remaining in Afghanistan were forced to rely on official State and diplomatic channels,<sup>102</sup> professional contacts, and those NSEs across the world ‘armed with group chats’ to coordinate their evacuation.<sup>103</sup> Indeed, arising from this chaos were the countless self-organised efforts of private individuals and groups across the globe, organically formed to confront the tragedy that had unfolded—including many who had never before worked in the humanitarian, government, or security sector nor set foot in Afghanistan. The response to the crisis that unfolded reflected precisely the response to the events that had precipitated the invasion of Afghanistan, a truly international and multilateral effort.

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97 Omnibus Diplomatic Security and Antiterrorism Act, 22 U.S.C. § 4802(b) (1986).

98 State Department Basic Authorities Act, 22 U.S.C. § 2671 (1956).

99 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*, version for public release, March 2022, <https://www.state.gov/wp-content/uploads/2023/06/State-AAR-AFG.pdf>.

100 “After Action Review on Afghanistan (January 2020-August 2021)”.

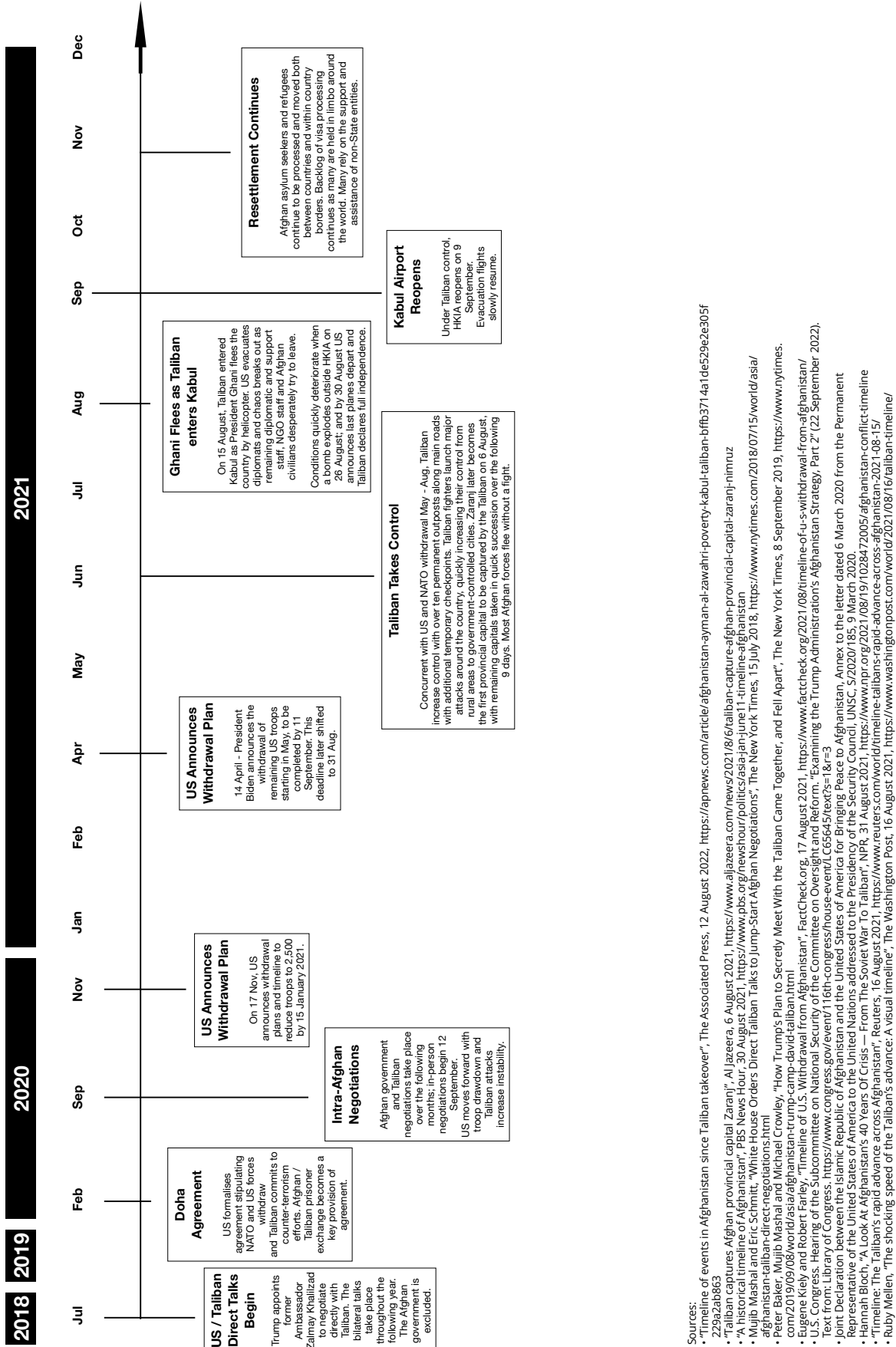
101 Eliza Griswold, “The Evacuation of Afghanistan Never Ended,” *The New Yorker*, 30 August 2022, <https://www.newyorker.com/news/daily-comment/the-evacuation-of-afghanistan-never-ended>.

102 “Instability in Afghanistan,” *Center for Preventative Action*, 19 October 2022, <https://www.cfr.org/global-conflict-tracker/conflict/war-afghanistan>.

103 Michael Venutolo-Mantovani, “Inside the Shadow Evacuation of Kabul,” *Wired* 30 August 2022, <https://www.wired.com/story/inside-shadow-evacuation-kabul-afghanistan/>.



# From Peace Talks to Withdrawal: A Brief Timeline



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## PART III: HUMANITARIAN EVACUATIONS AND INTERNATIONAL LAW IN AFGHANISTAN

Humanitarian evacuations are not a recent phenomena although as an articulated policy, White points out that it only dates to the Kosovo crisis in the 1990s.<sup>104</sup> The Kosovo crisis also signalled the first time in history that the United Nations High Commissioner for Refugees (UNHCR) implemented a Humanitarian Evacuation Programme where ‘refugees, on a voluntary basis, are flown... to third countries offering to host them temporarily.’<sup>105</sup> Since then, the UNHCR has been involved in humanitarian evacuations in situations such as Libya, the Central African Republic, and Syria, extending both within and beyond State borders, and through various means of transportation. Humanitarian evacuation efforts have also been undertaken by other organisations and agencies such as the International Committee of the Red Cross (ICRC) and the Norwegian Refugee Council (NRC). Research reveals, however, that only a handful of international guidelines directly pertaining to humanitarian evacuations are presently publicly available.<sup>106</sup> This report hopes to contribute in some measure to the lacunae in literature and policy on humanitarian evacuations, an area that continues to suffer from an ‘incomplete understanding’.<sup>107</sup> Accordingly, this section will explore its definition and conceptualisation particularly in normative legal discourse, as well as its applicability. It then turns to the work of NSEs in the evacuations from Afghanistan since August 2021.

104 Benjamin Thomas White, “A Grudging Rescue: France, the Armenians of Cilicia, and the History of Humanitarian Evacuations,” *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 10, no. 1 (Spring, 2019): 1.

105 Sadako Ogata, “Briefing by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the United Nations Security Council, New York, 5 May 1999” *UNHCR: The UN Refugee Agency*, 5 May 1999, <https://www.unhcr.org/admin/hcspeeches/3ae68fc14/briefing-mrs-sadako-ogata-united-nations-high-commissioner-refugees-united.html>.

106 See, e.g., United Nations High Commissioner for Refugees, *Internal Note: Humanitarian Evacuations in Violence and Armed Conflict* (Internal Displacement Section, Division of International Protection, June 2016); UNHCR, *Humanitarian Protection in Armed Conflict* (Toolkit, June 2021), see esp. section 6, “Humanitarian Evacuations”; Norwegian Refugee Council, *NRC Considerations for Planning Mass Evacuations of Civilians in Conflict Settings* (Geneva: Norwegian Refugee Council, 2016); Global Protection Cluster, *Humanitarian Evacuations in Armed Conflict*, Thematic Roundtable (November 2014); Global Protection Cluster, *Handbook for the Protection of Internally Displaced Persons* (June 2010); International Organization for Migration, “IOM Key Principles for Internal Humanitarian Evacuations/Relocations of Civilian Populations in Armed Conflict” (September 2018); IOM, “Guidance Note on the inclusion of protection considerations when planning and implementing international humanitarian evacuations for migrants caught in armed conflict settings” (July 2016); International Committee of the Red Cross and InterAction, “Trapped in Conflict: Evaluating Scenarios to Assist At-Risk Civilians” (Outcome Report, July 2015). Increasing research in the field of evacuations in natural hazards, however, are taking place. See, for e.g., Global Camp Coordination and Camp Management Cluster, *The MEND Guide: Comprehensive Guide for Planning Mass Evacuations in Natural Disasters* (2014); Jane McAdam, “Exploring the Legal Basis in Australia for Evacuations from Disasters: Avoiding Arbitrary Displacement,” *University of New South Wales Law Journal* 45, no. 4 (2022): 1329-1366.

107 Jane McAdam, “Displacing Evacuations: A Blind Spot in Disaster Displacement Research”, *Refugee Survey Quarterly* 39 (2020): 584.

## A. Humanitarian Evacuations and International Law

The term ‘evacuation’ is extremely broad and captures myriad situations; furthermore, the term may sometimes be used interchangeably with other terms such as ‘transfers’ or ‘relocations’.<sup>108</sup> Evacuations can be a response to armed conflict, natural hazards, and gross violations of human rights, to name a few. Persons can also be evacuated internally or across international borders; temporarily or permanently although often the former; via land, air, and/or sea. Legally, however, not all evacuations are permissible. IHL for instance prohibits the forcible transfer and/or deportation of persons except where ‘the security of the population or imperative military reasons so demand.’<sup>109</sup> Evacuations are, in effect, a form of displacement whether or not they are legal and whether or not they are framed as such.<sup>110</sup> Given the diversity of situations in which evacuations may occur as well as its conceptual expansiveness, (legal) evacuations largely converge on two points—the motivation to protect persons against imminent or certain harm; and its resort in an emergency or crisis setting.<sup>111</sup>

Evacuations, and more specifically humanitarian evacuations, are therefore situated within the framework of protection, which concept and definition are themselves contested. Scarpa points to the ICRC’s definition of protection as the most widely accepted one:

The concept of protection encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.<sup>112</sup>

That it is the ICRC’s definition that has shaped normative understandings of protection is no accident. Mamiya traces the development of the concept, and argues that modern standards and practices of protection are ‘tied fundamentally

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108 Norwegian Refugee Council, *NRC Considerations for Planning Mass Evacuations of Civilians in Conflict Settings: Guidance Document*: 2.

109 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) art. 49, 12 August 1949, 75 UNTS 287 (“GC IV”); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* art. 17, 8 June 1977, 1125 UNTS 609 (“AP II”); see also Principle 6(2)(b), “Guiding Principles on Internal Displacement,” UN OCHA (September 2004) <https://www.unhcr.org/media/guiding-principles-internal-displacement>.

110 Medecins Sans Frontieres, “Evacuations,” *The Practical Guide to Humanitarian Law*, <https://guide-humanitarian-law.org/content/article/3/evacuation-1/>.

111 Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2021: Internal Displacement in a Changing Climate*: 47, [https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021\\_idmc.pdf](https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf); McAdam, “Exploring the Legal Basis in Australia for Evacuations from Disasters”.

112 Pietro Scarpa, “International Evacuations of Refugees and Impact on Protection Spaces: Case Study of UNHCR Evacuation Programme in Libya,” *Refugee Law Initiative*, Working Paper no. 59 (June 2021): 4.

to the history of IHL’ first codified within the Geneva Conventions.<sup>113</sup> While protection finds its roots in IHL, other bodies of law—most notably IHRL and IRL—have contributed to its development and the standards that now guide the implementation of protection practices.<sup>114</sup> According to Bradly, the protection of civilians has since become increasingly legalised, owing much to the role of non-State actors.<sup>115</sup>

In normative international law discourse, then, it appears as though ‘humanitarian evacuations’ have broadly come to be understood as those legal relocations of civilians, or non-combatants, for the purpose of protecting civilians against imminent harm, usually as a result of violent conflict.<sup>116</sup> They are distinct to evacuations that result from natural hazards and other crisis settings.<sup>117</sup> The NRC suggests that the term ‘humanitarian’ refers to those driven by humanitarian factors and conducted by humanitarian actors in the face of a State’s or authority’s failure to protect its citizens.<sup>118</sup> This is in contrast to evacuations that occur as a result of natural hazards where the act of a State-organised evacuation is an exact reflection on a State’s or authority’s protection strategy. While humanitarian evacuations present a point of convergence for fields of international law and humanitarian work, its ability to touch on a broad range of activity and law, however, should not be mistaken for an equally broad application. Humanitarian evacuations are a specific response to distinct situations.

Institutions such as the UNHCR and the International Organization for Migration (IOM) highlight that humanitarian evacuations are ‘only a measure of last resort’; temporary; and triggered only ‘when other options to provide life-saving assistance and protection have failed or [are] unattainable.’<sup>119</sup> More pointedly, the Global

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113 Ralph Mamiya, “A History and Conceptual Development of Protection of Civilians,” in *Protection of Civilians*, eds. Haidi Willmot et al (Oxford: Oxford University Press, 2016): 63-65.

114 Mamiya, “A History and Conceptual Development of Protection of Civilians”: 63-65.

115 Mariam Bradly, “Human security in armed conflict: Norms, agendas and actors for protecting civilians” in *Research Handbook on International Law and Human Security*, ed. Gerd Oberleitner, Research Handbooks in International Law Series (Cheltenham: Edward Elgar Publishing Ltd., 2022): 106-124.

116 See, e.g., Global Protection Cluster, *Minimum Standards for participation, in humanitarian inter-agency evacuations, informed by international humanitarian and international human rights law*, drafted by UNHCR 23 February 2014, endorsed by UNCT 26 February 2014, [https://www.globalprotectioncluster.org/assets/files/news\\_and\\_publications/background\\_documents/UNCT%20endorsed%20minimum%20standards%20Syria.pdf](https://www.globalprotectioncluster.org/assets/files/news_and_publications/background_documents/UNCT%20endorsed%20minimum%20standards%20Syria.pdf). These minimum standards were drafted following the humanitarian evacuations from the Old City of Homs in Syria in 2014 and has been adapted for use as inter-agency guidelines. Internal Displacement Section, Division of International Protection, UNHCR, “Humanitarian Evacuations in Violence and Armed Conflict: Internal Note,” *International Journal of Refugee Law* 30, no. 2 (June 2018): footnotes 4, 8. We note, however, that at least in the Global Protection Cluster’s 2010 guide, its understanding of humanitarian evacuations encompasses those that result from natural hazards. Global Protection Cluster, *Handbook for the Protection of Internally Displaced Persons*, 2010: 137 (‘Humanitarian evacuations usually take place in situations of natural disaster. In situations of armed conflict however, humanitarian evacuations are strictly a measure of last resort.’).

117 For a detailed discussion on normative understandings of IHL and its development vis-a-vis the Laws of War, see Page Wilson, “The myth of international humanitarian law,” *International Affairs* 93, no. 3(2017): 563-579.

118 Norwegian Refugee Council, *Considerations for Planning Mass Evacuations of Civilians in Conflict Settings: Guidance Document: 2*.

119 UNHCR, “Humanitarian Evacuations in Violence and Armed Conflict: Internal Note”: 356; International Organization for Migration, “IOM Key Principles for Internal Humanitarian Evacuations/Relocations of Civilian Populations in Armed Conflict” (September 2018), <https://www.iom.int/sites/g/files/tmzbdl486/files/Int.%20humanitarian-%20Relocations-%20key%20principles%20IOMFIN.pdf>.

Protection Cluster characterises humanitarian evacuations as ‘a product of a larger “protection failure.”’<sup>120</sup> In sum, humanitarian evacuations in international law can be considered ‘exceptional measures in extreme circumstances, when there is no other way of providing urgent assistance or protection in the face of severe threats to life and security.’<sup>121</sup> Normatively, then, evacuations that are not ‘humanitarian evacuations’ take on a more positive quality in that they are almost always preventive.<sup>122</sup>

Both IHL and IHRL regulate obligations of States or parties to conflict to provide protection to civilian populations.<sup>123</sup> In the absence of such protection, at least within a conflict setting, the Geneva Conventions and their Additional Protocols as well as customary international law call for the *rapid and unimpeded passage* of humanitarian relief essential to the survival of the civilian population.<sup>124</sup> This applies to both international (IAC) and non-international armed conflicts (NIAC). Embedded in this rule is the issue of consent to allow for this relief that cannot be refused on arbitrary grounds.<sup>125</sup> While a failure to protect civilian populations obliges consent to humanitarian relief, control over such relief may be exercised. This control, however, cannot go as far as to wilfully or deliberately impede the necessary relief.<sup>126</sup> In this sense, humanitarian evacuations can be viewed as a form of humanitarian relief provided for in a time of crisis for the purpose of protecting civilian lives.

Furthermore, calls for the opening of humanitarian corridors were repeatedly invoked during the unfolding of the crisis in Afghanistan.<sup>127</sup> The concept and application of humanitarian corridors, however, are similarly unclear and appears to be used interchangeably and in conflation with other terms such as ‘safe corridor’, ‘safe zone’, and ‘protected zone’, particularly when used in non-

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120 Global Protection Cluster, “Humanitarian Evacuations in Armed Conflict,” Thematic Roundtable, November 2014: 3.

121 Protection Cluster Ukraine, “Recommendation Note on Humanitarian Evacuation of Civilians in Ukraine,” 15 April 2022: 2, <https://reliefweb.int/report/ukraine/protection-cluster-recommendation-note-humanitarian-evacuations-civilians-ukraine>.

122 McAdam, “Displacing Evacuations: A Blind Spot in Disaster Displacement Research”: 584; McAdam, “Exploring the Legal Basis in Australia for Evacuations from Disasters: Avoiding Arbitrary Displacement”: 1330-1331.

123 See Part III.

124 GC IV, arts. 23, 70(2), International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, art. 70, ¶ 2, 8 June 1977, 1125 UNTS 3 (“AP I”); AP II, art. 18, ¶ 2; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2005): 193-200 (Rule 55).

125 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*: 197.

126 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*: 197-198. See also UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), art. 8(2)(b)(xxv), 17 July 1998.

127 Eric Schwartz, “Refugees International Letter to President Biden Urges Immediate Action to Protect Afghans at Risk,” 16 August 2021, <https://www.refugeesinternational.org/reports/2021/8/16/refugees-international-letter-to-president-biden-urges-immediate-action-to-protect-afghans-at-risk>; World Refugee and Migration Council, “Confronting the Crisis in Afghanistan: Eight Priorities for the International Community,” 22 August 2021, <https://wrmcouncil.org/news/statement/confronting-the-crisis-in-afghanistan-eight-priorities-for-the-international-community/>.

legal contexts.<sup>128</sup>

The NRC appears to understand humanitarian corridors as a form of humanitarian intervention that can be ‘a pre-cursor to, or occur in conjunction with, evacuations’, and further appears to distinguish humanitarian corridors from ‘buffer zones’ and ‘safe areas’.<sup>129</sup> Chan argues that humanitarian corridors are akin to demilitarised zones described in Article 60 API, and where the prohibition to attack a demilitarised zone forms a customary international law applicable to both an IAC and NIAC.<sup>130</sup> Using various terms interchangeably, the ICRC, however, says that humanitarian corridors are not an IHL term of art and certainly not the agency’s preferred option when delivering aid to those in need—humanitarian corridors are ‘hazardous operations’ that present major risks to civilians, belligerents, and humanitarian personnel, and which operation is complex and impractical.<sup>131</sup> Regardless of varying definitions, however, humanitarian corridors share at least four common characteristics. Firstly, the protection of civilians; secondly, the restricted and narrow space in which it operates; thirdly, the temporary nature of its application; and lastly, an understanding that such operations should remain unobstructed.<sup>132</sup> Its connection to humanitarian evacuations is therefore apparent.

Applying features of humanitarian corridors to the foreign military withdrawal in August 2021, it may be argued that HKIA served as such a site for the evacuation of civilians. Civilians were moved through HKIA to safe destinations – ‘in conjunction’ with evacuations;<sup>133</sup> an agreement was reached between the US and Taliban forces such that the latter left HKIA grounds, preventing hostilities between the Taliban and Afghan National Strike Units; and security for the airport’s perimeter was coordinated between both parties.<sup>134</sup> In this instance, the intent was to facilitate the NEO led by the US. Furthermore, that a NEO was in place suggests that political and diplomatic efforts had failed.<sup>135</sup> Beyond the theatre of combat, humanitarian corridors have taken different forms including that of a resettlement programme.<sup>136</sup>

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128 Kaldor Centre for International Refugee Law, “3 things to know about getting Afghan refugees to safety,” <https://www.kaldorcentre.unsw.edu.au/3-things-know-about-getting-afghan-refugees-safety>; Kenneth Chan Yoon Onn, “The International Law of Protected Spaces and the Collapse of the Humanitarian Corridors in Ukraine,” *EJIL: Talk!*, 11 March 2022, <https://www.ejiltalk.org/the-international-law-of-protected-spaces-and-the-collapse-of-the-humanitarian-corridors-in-ukraine/>.

129 Norwegian Refugee Council, *Considerations for Planning Mass Evacuations of Civilians in Conflict Settings: Guidance Document*: 7.

130 Chan, “The International Law of Protected Spaces and the Collapse of the Humanitarian Corridors in Ukraine”; Article 60(3), API I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*: 120-121 (Rule 36).

131 “How humanitarian corridors work to help people in conflict zones,” *ICRC*, 3 June 2022, <https://www.icrc.org/en/document/how-humanitarian-corridors-work>.

132 Maelle L’Homme, “Humanitarian Corridors: Negotiated Exceptions at Risk of Manipulation,” *Journal of Humanitarian Affairs* 4, no. 1 (2022): 50.

133 Norwegian Refugee Council, *Considerations for Planning Mass Evacuations of Civilians in Conflict Settings: Guidance Document*: 7.

134 Abbey Gate Investigations: 4; Abbey Gate Investigations: 15, ¶ jj-II (Exhibit 20).

135 Abbey Gate Investigations: 5-6, ¶ o (Exhibit 20).

136 See Part III.

Following the obligation to protect is the corresponding right to receive such relief.<sup>137</sup> Where the right to life, safety and security within the IHRL framework support the right to relief within IHL, Gibney argues that the IRL regime should adopt proactive action in asserting a right to evacuate.<sup>138</sup> Humanitarian interventions, he argues, has seen little effort to remove civilians from sites of hostilities thereby doing more harm than it does protecting lives.<sup>139</sup> The right to evacuate in this instance adopts a preventive character, however, and one that touches on issues of sovereignty, the duty of States and parties to a conflict to protect civilian lives, and the ongoing duty of a State to ensure the right to life, safety and security of its populations.

Yet, at least in the case of Afghanistan, plans were already in place to offer safe haven to certain groups of people. For instance, Denmark entered into an agreement in May 2013 to offer protection solutions to interpreters and other local employees who assisted Danish efforts in Afghanistan and who could face threats to their lives because of their work with Danish authorities.<sup>140</sup> Both current and past employees are eligible for such protection, measures for which include the option to resettle in Denmark on a case-by-case basis. Furthermore, in May 2021, a few months prior to the Taliban’s takeover of Kabul in August 2021, France evacuated 623 local employees and their families.<sup>141</sup> While these efforts to evacuate and protect local staff members derive from a duty of care within the employer-employee relationship,<sup>142</sup> initiatives by some States to expand evacuation efforts to other groups of persons such as human rights

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137 For a discussion on the relationship between legal obligations and rights, see Agnes Heller, “Are There Obligations Without Rights?” in *After Thoughts: Beyond the ‘System’- Political and Cultural Lectures by Agnes Heller*, ed. John Grumley (Leiden: Brill, 2020): 52-61.

138 Mark Gibney, “Reconciling Refugee Relief and Humanitarian Intervention: The Need to Recognize a Right to Evacuation,” in *In Defense of the Alien*, ed. Lydio Tomasi (Center for Migration Studies, 1994): 146-153; see also Part III of this report on IHRL; Henckaerts and Doswald-Beck: 186-202 (Rules 53-56); and the International Bar Association’s more recent proposal for an ‘Emergency Evacuation Visa’. Violeta Moreno-Lax, *A Model Instrument for an Emergency Evacuation Visa*, (London: International Bar Association, 2019), <https://www.ibanet.org/MediaHandler?id=bd13bef4-6a29-414f-8d65-e2ddb7c695df>.

139 Gibney, “Reconciling Refugee Relief and Humanitarian Intervention”: 148.

140 Danish Evacuation Report, Faktaboks 5 “Baggrund Om Tolkeaftalen Og Taskforce 13”: 27-29; Danish Government, *Agreement on the Management of the Situation for Interpreters and Other Locally Employed in Afghanistan*, Copenhagen, 22 May 2013, <https://www.fmn.dk/globalassets/fmn/dokumenter/nyheder/2013/-2013-agreement-handling-interpreters-juli-.pdf>.

141 “Afghanistan: “France stands in solidarity with all those who defend freedom.”,” *Embassy of France in Washington, D.C.*, 16 August 2021, <https://fr.franceintheus.org/spip.php?article10414>; Author interview with Ellinor Zeino, 17 September 2022; Author interview with Mélissa Cornet, 21 October 2022.

142 See especially, Danish Evacuation Report, Faktaboks 2 “Personalegrupper ved den Danske Ambassade i Kabul” and Faktaboks 9 “Samlokaliseringaftale Mellem Danmark Og Norge i Kabul”: 24-25, 32.

defenders were later implemented.<sup>143</sup> As one interviewee notes, “[a] humanitarian emergency is about which lives [can be] saved, not contractual obligations.”<sup>144</sup> These examples indicate that humanitarian evacuation of a preventive character that includes groups of persons otherwise likely at risk of harm is not beyond the realm of possibility. Beyond the political arena, difficulties lie in *when* and *who* to evacuate.

These dilemmas are not new and have been highlighted in the handful of publicly available international guides on humanitarian evacuations. These guides, however, mostly focus on *internal* humanitarian evacuations in the midst of active hostilities. Where humanitarian evacuation across international borders may be necessary, the guides fail to address pertinent issues including protection of those who self-evacuate, and the issue of valid travel documents. As the Global Protection Cluster has pointed out, present policy and guidelines tend to be agency or sector specific; an emphasis on preparedness is lacking; decision-making processes are not clearly defined; and clear guidance on interaction with non-humanitarian actors whose roles are crucial to the operation are absent.<sup>145</sup> The following section explores how NSEs have attempted to fill these gaps.

## i. NSEs and Humanitarian Evacuations in Afghanistan

The humanitarian evacuations from Afghanistan can be divided into three temporal phases—(a) between 15 to 26 August 2021; (b) 26 to 30 August 2021; and (c) post-August 2021. NSEs came together to coordinate efforts in the first hours and days after 15 August, notably within the first 48 hours.<sup>146</sup> While the first two phases leading up to the completion of military withdrawal is described by multiple interviewees as being the most intense period of evacuation,<sup>147</sup> the bombing of Abbey Gate at HKIA on 26 August—an attack claimed by ISIS-K<sup>148</sup>—marked a shift in security screenings, impacting the efforts of NSEs. The focus of NSEs’ efforts also changed after the last evacuation flight on 30 August 2021, given that fewer options were available for those seeking permanent

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143 For example, France opened its doors to journalists and those whose lives they considered were particularly under threat; in October 2022 Germany committed to taking in vulnerable groups in a new Federal Admission Programme for Afghanistan; and Canada pledged to accept Afghan human rights defenders through a referral system. See “Afghanistan – Evacuation operation – Statement by the Ministry for Europe and Foreign Affairs Spokesperson,” *Embassy of France in Indonesia and Timor Leste*, 3 December 2021, <https://id.ambafrance.org/France-and-Qatar-conduct-humanitarian-operation-for-Afghan-people>; “Joint press release by the Federal Foreign Office and the Federal Ministry of the Interior and Community on the federal admission programme for people from Afghanistan who are at particular risk,” *German Federal Foreign Office*, Press Release, 17 October 2022, <https://www.auswaertiges-amt.de/en/newsroom/news/federal-admission-programme-afghanistan/2558756?view>; “Humanitarian program for Afghan nationals in need of resettlement: How the program works,” *Government of Canada*, last modified 1 December 2022, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/special-measures/how-humanitarian-program.html>.

144 Author interview with Scott Shadian, 2 November 2022.

145 Global Protection Cluster, “Humanitarian Evacuations in Armed Conflict”: 14-15.

146 Author interview with Anh-Thu Nguyen, 3 February 2023.

147 Author interview with Anonymous Development Worker, 14 November 2022; Author interview with Asma Faizi, 25 October 2022; Author interview with Imogen Canavan, 7 September 2022.

148 Peter Beaumont, Dan Sabbagh, and Julian Borger, “At least 60 Afghans and 13 US soldiers dead after Kabul airport blasts,” *The Guardian*, 26 August 2021, <https://www.theguardian.com/world/2021/aug/26/afghanistan-large-explosion-hits-entry-gate-kabul-airport>.



resettlement outside Afghanistan.<sup>149</sup> This section outlines *who* NSEs were, *what* work they performed, and *how*.

### a. Who Were NSEs?

A key response was that these efforts were organic, and expanded through both professional and informal networks, but also emerged through online communities on new technology messaging and social media platforms.<sup>150</sup> Anh-Thu Nguyen noted ‘we were totally random groups of people, many who had never met in person or spoken to each other before.’<sup>151</sup>

Some worked on behalf of their organisations based in the US, Canada, or European States, but who had offices or a programme in Afghanistan with staff and families eager to leave.<sup>152</sup> Many of those organisations had a human rights focus and their staff were at risk because of the intolerance of the Taliban for causes including LGBTQI rights, and gender equality among others. Most, however, had to compartmentalise this work which was not part of their ordinary workload and therefore not funded or accounted for within the organisation.<sup>153</sup> Others working on these evacuations were individuals who had previously worked in Afghanistan or had friends and/or family living in Afghanistan and had connections or knowledge that was helpful in coordinating the transfer of information or financial support such as veteran groups.<sup>154</sup> In some cases, groups and individuals had connections with government offices, which sometimes increased the propensity for successful evacuation.<sup>155</sup>

While some individuals made headlines for allegedly seeking to gain a profit out of the chaos during the withdrawal,<sup>156</sup> almost every interviewee spoke of a

149 Author interview with Anh-Thu Nguyen, 3 February 2023; Amanda Macias, “U.S. ends 20-year war in Afghanistan with final evacuation flights out of Kabul,” 31 August 2021, [www.cnn.com/2021/08/30/afghanistan-update-last-us-troops-leave-kabul-ending-evacuation.html](http://www.cnn.com/2021/08/30/afghanistan-update-last-us-troops-leave-kabul-ending-evacuation.html).

150 These sometimes overlapped. For instance, online professional networks such as ‘The Atlas Network’ which public facing name and organisation is known as ‘Atlas Women’. Atlas Women, “Women & Girls of Afghanistan,” 21 August 2021, <https://www.atlaswomen.org/profiles/2021/8/21/women-amp-girls-of-afghanistan>; PILnet, “2021 Publico Award”, 20 October 2021, <https://www.pilnet.org/2021-publico-award/>.

151 Author interview with Anh-Thu Nguyen, 3 February 2023.

152 Author interview with Ben Polk, 18 November 2022; Author interview with Ellinor Zeino, 17 September 2022; Author interview with Scott Shadian, 2 November 2022; Author interview with Tanya Henderson, 4 November 2022.

153 Author interview with Imogen Canavan, 7 September 2022, Author interview with Mike Pollock, 24 September 2022; Author interview with Martin Steindal, 27 October 2022; Author interview with Ben Polk, 18 November 2022.

154 Author interview with Kevin Haidary, 23 September 2022; Author interview with Azadah Raz Mohammad, 4 November 2022; Author interview with Kobra Moradi, 25 October 2022; Author interview with Corey Levine, 7 November 2022; Author interview with Asma Faizi, 25 October 2022; Author interview with Mélissa Cornet, 21 October 2022; Author interview with Mike Pollock, 24 September 2022; Author interview with Jeff Phaneuf, 26 October 2022.

155 Author interview with Scott Shadian, 2 November 2022; Author interview with Tanya Henderson, 4 November 2022, Author interview with Emily Foale, 22 November 2022; Author interview with Christoph Klawitter, 20 January 2023; Author interview with Frohar Poya, 13 September 2022; Author interview with Chiara Parolin, 25 November 2022.

156 For example, Erik Prince, an American military defense contractor, said he would charge US\$6,500 per seat on his chartered flights out of Kabul. Eliza Relman, “Blackwater founder Erik Prince wants to charge \$6,500 per seat on a chartered evacuation flight out of Kabul,” 25 August 2021, <https://www.businessinsider.com/erik-prince-charge-6500-for-flight-seat-out-of-kabul-2021-8>.

sense of moral or professional responsibility to be involved in the work, and this was true both for people who had professional connections to Afghanistan and had Afghan colleagues or friends,<sup>157</sup> as well as people who had more distant connections, or received information about the crisis through friends, family or professional networks.<sup>158</sup> Several drew parallels with the Second World War and the Holocaust.<sup>159</sup> Veteran groups were publicly involved both in criticising their governments, and in actively creating and deploying networks of individuals to coordinate evacuation efforts, successfully fundraising—including via crowd fundraising efforts—and managing to support dozens or hundreds of individuals out of Afghanistan.<sup>160</sup>

## b. The Work of NSEs and the Impact of Communications Technology

The use of communications technology during this emergency was pervasive and unanimously utilised by interviewees both to coordinate among themselves and to communicate with beneficiaries of support. Networks in forms of group chats organically grew exponentially on platforms such as Whatsapp and Signal.<sup>161</sup>

The work that NSEs embarked on primarily consisted of coordinating both information and logistics, as well as identifying and tapping into access points to be able to evacuate persons. In the first two phases of the evacuations, the work focussed on coordinating with individuals in Afghanistan to help them find their way to HKIA. This was done by monitoring media and sources on the ground for intelligence pertaining to where the Taliban had set up checkpoints; reading maps; and tapping into local and/or foreign networks to provide people with information on how to navigate Kabul safely.<sup>162</sup> Some also relied on satellite imagery to identify safe routes to HKIA or elsewhere.<sup>163</sup> Open-source intelligence featured prominently.

One of the most pronounced ways in which the emergency in Afghanistan differed from other instances of similar scale and nature is the quality of support NSEs were able to provide through the use of technology—both in terms of communications as well as intelligence-gathering. NSEs could simultaneously communicate guidance in real time via digital communications services such as

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157 Author interview with Anonymous Development Worker, 14 November 2022; Author interview with Imogen Canavan, 7 September 2022; Author interview with Asma Faizi, 25 October 2022; Author interview with Martin Steindal, 27 October 2022; Author interview with Ellinor Zeino, 17 September 2022.

158 Author interview with Jeff Phaneuf, 26 October 2022.

159 Author interview with Mike Pollock, 24 September 2022; Author interview with Christoph Klawitter, 20 January 2023; Author interview with Scott Shadian, 2 November 2022.

160 Groups such as No One Left Behind, Team America Relief worked to raise money to support the evacuation of Afghans who worked with the US military presence.

161 Author interview with Frohar Poya, 13 September 2022.

162 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Zachery Kallenborn, 22 September 2022.

163 Author interview with Zachery Kallenborn, 22 September 2022. See also the efforts of Digital Dunkirk. Dave Philipps, “A Digital Dunkirk: Veterans Online Scramble to Get People Out of Afghanistan,” *The New York Times*, 28 August 2021, <https://www.nytimes.com/2021/08/28/us/help-afghanistan.html>.

Google Talk, Whatsapp, and Signal, among others.<sup>164</sup> Digital security played an important consideration in deciding which platform or service to use, particularly for NSEs who had a background in security or the military.<sup>165</sup> The use of more secure platforms, however, was not always possible as these were not always readily available to or used by beneficiaries; or that the urgency of a particular situation rendered this difficult to do.<sup>166</sup>

While guidance through safe routes to HKIA was one way in which communications technology played a pivotal role, it sometimes also made the difference between being able to enter the HKIA compound or not. Interviewees describe the possibility of being able to engage in direct communications with guards at the gates; mobile phones were handed over to military personnel at the airport and ‘[i]t helped if you had an American on the line’ especially for the verification of identities and documents.<sup>167</sup>

Notably, the general availability and use of communications technology was a double-edged sword. As easily as one could communicate genuine support, so too were fraudulent claims to offer evacuation assistance; and in its extreme resulted in the deaths of persons.<sup>168</sup> The murders of four women in Mazar-i-Sharif who had responded to fraudulent calls to evacuate signalled the need for caution to NSEs. Similarly, fraudulent claims of requiring evacuation assistance could also take place. With many groups using online forms to gather requests for assistance, ‘people were putting their names into any Google Doc under the sun and we don’t know who’s on the other side of the Google Form [too].’<sup>169</sup>

NSEs’ work also included support in ascertaining eligibility for both entering HKIA and accessing evacuation flights. For instance, identifying necessary documents such as a *tazkira* (Afghan identity card), passport, birth certificates, information about past employment with or connection to foreign employers, and in particular documents related to Special Immigrant Visa (SIV) status for US-bound evacuation flights.<sup>170</sup>

After the bombing of Abbey Gate at HKIA on 26 August, security at the airport increased dramatically, and it was mandatory for civilians to enter HKIA on buses. NSEs thus shifted their work to supporting individuals get onto those buses.

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164 Author interview with Zachery Kallenborn, 22 September 2022; Author interview with Mike Pollock, 24 September 2022; Author interview with Anh-Thu Nguyen, 3 February 2023; Philipps, “A Digital Dunkirk”.

165 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Jeff Phaneuf, 26 October 2022; Author interview with Mike Pollock, 24 September 2022; Author interview with Zachery Kallenborn, 22 September 2022; Author interview with Martin Steindal, 27 October 2022.

166 Author interview with Inma Orquin, 12 October 2022.

167 Author interview with Anh-Thu Nguyen, 3 February 2023.

168 Author interview with Anh-Thu Nguyen, 3 February 2023. See also Zahra Nader and Amie Ferris-Rotman, “Women’s rights activist shot dead in northern Afghanistan,” *The Guardian*, 5 November 2021, <https://www.theguardian.com/world/2021/nov/05/womens-rights-activist-shot-dead-in-northern-afghanistan>; “Four women slain in Afghanistan after phone call ‘to join evacuation flight,’” *France24*, 6 November 2021, <https://www.france24.com/en/asia-pacific/20211106-four-women-slain-in-afghanistan-after-phone-call-to-join-evacuation-flight>.

169 Author interview with Anh-Thu Nguyen, 3 February 2023.

170 Author interview with Anh-Thu Nguyen, 3 February 2023.

Many of the interviewees we spoke to continued their support after 30 August, by persisting with ongoing evacuation efforts as well as supporting individuals’ humanitarian needs in the face of food shortages and an approaching winter.<sup>171</sup> These efforts ranged from coordinating with other groups to chartering private flights out of Kabul or Mazar-i-Sharif, seeking resettlement pathways, and placing individuals on flight manifests.<sup>172</sup> Other groups also established efforts to engage in advocacy with US and other governments, pushing them to adopt measures that would alleviate some of the frustrations for lawyers and clients in this space who faced high fees and long wait times.

### c. Stepping into the Breach

The work of NSEs not only indicate the lack of adequate preparation by States that were preparing to withdraw, but an absence of proper coordination among relevant authorities. The unclassified DoS report released to the public notes that not only had there not been adequate planning for the withdrawal, but despite efforts by those on the ground to coordinate the situation, ‘constantly changing policy guidance and public messaging from Washington regarding which populations were eligible for relocation and how the embassy should manage outreach and flow added to the confusion and often failed to take into account key facts on the ground.’<sup>173</sup> The report found that authorities on the ground received ‘multiple, direct calls and messages from current or former senior officials, members of Congress, and/or prominent private citizens asking and in some cases demanding that they provide assistance to specific at-risk Afghans.’<sup>174</sup> NSEs we spoke to took note of this confusion: for instance, information on focal or contact points to relevant authorities and organisations were unclear and scattered, as were available pathways for vulnerable persons. Groups such as PILnet and Atlas Women attempted to coordinate this information in order to relay it to potential evacuees.<sup>175</sup> NSEs were thus compelled to play a critical role in supporting persons to evacuate and continued to play an important role seeking resettlement pathways post-August 2021. That their work was vital, however, does not suggest that they were necessarily the best placed or best prepared to undertake these efforts. Indeed, some volunteers have now acknowledged that in some cases, their lack of expertise could have been harmful to the people they were working to evacuate.<sup>176</sup> NSEs pose a challenge to the international legal framework because they do not, as a whole, have legal personality within the international legal system and therefore also ‘fall outside of any international legal frameworks for responsibility,’ resulting in ‘a gap between action and

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171 Author interview with Anh-Thu Nguyen, 3 February 2023.

172 Author interview with Anh-Thu Nguyen, 3 February 2023.

173 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*: 14.

174 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*: 14.

175 Atlas Women, “Women & Girls of Afghanistan,”; PILnet, “2021 Publico Award”; “Afghanistan Legal Aid and Pathways Project,” *Asia Pacific Refugee Rights Network*, <https://aprrn-afg.org/afghanistan-legal-aid-and-pathways-information-and-support/>.

176 Haley Britzky, “Thousands of Afghans escaped the Taliban with the help of private veteran groups,” 7 May 2023, <https://www.cnn.com/2023/05/07/politics/afghan-evacuees-stuck-uae-private-evacuation>.

responsibility at the global level.<sup>177</sup> Many interviewees acknowledged that they were not the most well-suited to aid in the evacuations given that most were based outside of Afghanistan, typically in European and North American States:

First, there shouldn't have been anyone in my position. The fact that a private citizen was organising shows the clear breakdown. . . [there was] no good plan, so no good execution. I never planned to be involved in refugee or evacuation work, I was about to start [graduate school] and didn't expect to end up here.<sup>178</sup>

The Protection Coordinator for Asia-Pacific at Front Line Defenders put it this way:

This is one of the most critical things about the Afghan evacuation: it was left, in my opinion, to a motley crew of amateurs. We were learning on the job. We didn't lose anybody. . . It was a lot of coordination with a lot of different agencies talking to each other and sharing intelligence, talking to security people I'd never spoken to in my life. It is surreal, looking back, that we did this.<sup>179</sup>

Indeed, interviewees almost universally spoke of the 'gap' left by the international community and authorities that individuals, networks, and groups felt they had to step into.<sup>180</sup> For some interviewees, this gap was more appropriately described as a 'crisis,' and even 'total chaos'<sup>181</sup> and repeatedly referred to the deep frustration they felt with the inability to respond more effectively to the desperate pleas for help. It was especially frustrating for NSEs who were trying to support persons especially vulnerable to retaliatory harm because of their past work, but who had no documented connections with foreign governments, and therefore limited options to access evacuation flights. But even for Afghans who would have been a State priority, NSEs often played a significant role in their evacuation:

These were people who had been working with the Office of the Inspector General [SIGAR]. The government knew who they were. Why were they reaching out to us?<sup>182</sup>

Another interviewee pointed out that it was not only that a gap was created by governments in their failure to act, but that this gap was made more damaging by

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177 Scarlett McArdle and Christy Shucksmith-Wesley, "International Non-State Humanitarian Actors outside of the International Legal System: Can there be any Legal Consequences for Humanitarian Actors?," 18 October 2021, *Journal of Conflict & Security Law*.

178 Author interview with Jeff Phaneuf, 26 October 2022.

179 Author interview with Deanne Uyangoda, 28 November 2022.

180 Author interview with Jeff Phaneuf, 26 October 2022; Author interview with Anonymous Development Worker, 14 November 2022.

181 Author interview with Anonymous Development Worker, 14 November 2022.

182 Author interview with Anh-Thu Nguyen, 3 February 2023.

their refusal to ‘maintain the cordon’ and protect the process of evacuations they attempted.<sup>183</sup> As this interviewee notes, ‘if you create the gap, then respect the gap you created and stand in it at least until the 31st of August’<sup>184</sup> by communicating with each other effectively, with NSEs, and with third party governments willing to receive incoming flights with evacuees, to ensure that as many vulnerable people as possible are relocated—‘In a bad situation, you don’t give up on the deal.’<sup>185</sup>

#### d. Coordination Among NSEs

Despite learning on the job and coming to this work rapidly and in response to a crisis, many NSEs adapted quickly and succeeded in evacuating people themselves, or in facilitating evacuations. Each group or network did their best to keep track of the numbers of people that their efforts helped to evacuate, though statistics are difficult to verify or discern. As each person we spoke to stated, evacuations were rarely a solitary exercise.<sup>186</sup>

Groups and individuals would share information about spaces open on evacuation lists, funding opportunities, or other intelligence that could be helpful to each group’s effort often via group messaging platforms. Efforts to keep personal information confidential precluded groups from sharing their lists of names with each other so each group knew it was possible that there were overlapping efforts with names and families possibly appearing on multiple groups’ lists.

NSEs correctly noted that after 30 August, there were no more military flights, and in some cases—especially the larger, more well-funded organisations—groups coordinated to charter private flights in order to ensure that people in their networks would be able to evacuate.<sup>187</sup> For example, the International Bar Association’s Human Rights Institute (IBAHRI) ultimately collaborated to charter three planes to evacuate persons in September and October 2022.<sup>188</sup> Tremendous effort was required to charter these flights, including to fundraise US\$3 million, as well as collaborating with States and private contacts to ensure the flights could both take off from Kabul and Mazar-i-Sharif, and land in Qatar, on a US military base for the first flight, and Athens for the second flight.<sup>189</sup> Organisations such as Mina’s List and Sayara International experienced similar in their private evacuation efforts.<sup>190</sup> Afghan Women’s Organization in Canada described working with an informal coalition of organisations of other NSEs to share as much information as possible and identify open seats on flights.<sup>191</sup> All

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183 Author interview with Deanne Uyangoda, 28 November 2022.

184 Author interview with Deanne Uyangoda, 28 November 2022.

185 Author interview with Deanne Uyangoda, 28 November 2022.

186 During our interview, Deanne Uyangoda estimated that her organisation helped evacuate around 1300 people from their own lists.

187 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022; Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

188 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022.

189 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022.

190 Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

191 Author interview with Asma Faizi, 25 October 2022.

these groups wanted to secure places on State-sponsored evacuation flights, but many were unable to due both to the small number of seats available and the high demand, and due to difficulties in sharing information under these challenging circumstances that include security concerns.

IBAHRI ran into numerous challenges chartering the flights including getting permissions to land. Ultimately, they were only able to use mail carrier planes in their evacuation group. Another coalition, which called itself ‘White Scarves’ coordinated with each other and also worked to get individuals to the airport and onto flights, including by hiring private security teams to take women and their families into the airport.<sup>192</sup> While much of this work also demanded coordinating with States to get people through airport security, or secure additional places on State-sponsored flights, the credit of evacuating almost 1500 people on flights not planned for by governments, goes entirely to the NSE coalition coordinating that work.<sup>193</sup> Evacuees included 305 high profile women leaders in Afghanistan, and 717 of their family members, who were not eligible under State evacuation schemes.<sup>194</sup> NSE-chartered flights went to ‘lilypad’ destinations—places of transit—such as Greece and Uganda in order to first ensure the safety of persons deemed to be at risk, and where processing for ‘final destination’ States would take place.<sup>195</sup> All persons who were under the care of NSEs we interviewed and who had boarded privately chartered flights have been resettled in ‘final destinations’ including Canada and the US, having taken between a few months to a year for resettlement.<sup>196</sup>

Achieving this feat was hardly a smooth process and relied heavily on trust, existing networks, and sheer perseverance to accomplish. In one instance, through verbal agreement, US\$900,000 was loaned to an organisation to secure a charter plane and relied on good faith that the monies would be returned—the two groups had never before worked together and had connected online during the unfolding of the crisis.<sup>197</sup> Personal connections were used to secure visas to transit States and for permissions to land. These early efforts mostly occurred without much assistance from withdrawing States. As Scott Shadian of Sayara International put it:

The landing rights in Kabul we had to get through the US military – that took forever because we were not getting any help from the State Department, any help from DoD, any help

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192 Author interview with Tanya Henderson, 4 November 2022.

193 Author interview with Tanya Henderson, 4 November 2022. *See also* Devon Cone, ‘Now, there is Nothing Safe: A Roadmap for Investing in Afghan Women and Girls’ (Refugees International, 1 April 2022), [refugeesinternational.org/reports/2022/3/30/now-there-is-nothing-safe-a-roadmap-for-investing-in-afghan-women-and-girls](https://refugeesinternational.org/reports/2022/3/30/now-there-is-nothing-safe-a-roadmap-for-investing-in-afghan-women-and-girls).

194 Author interview with Tanya Henderson, 4 November 2022. *See also* Cone, “Now, there is Nothing Safe”.

195 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022; Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

196 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022; Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

197 Author interview with Scott Shadian, 2 November 2022.



from the White House...We had to secure the landing rights inside Kabul, at the same time we also had to secure the landing rights in a third country, to take the evacuees. State Department specifically instructed us that we had to do our own diplomatic work and that they could not support us. Essentially, we had to become diplomats overnight. We were scrambling – who do we know who knows someone in a country that would take in hundreds of refugees? There was not a single point of this that [US leadership] were helping us with. If anything, they were stopping us.<sup>198</sup>

### e. State-Non-State Coordination: Access and Influence

While providing information and facilitation of communication was a core component of the gap NSEs appear to have filled, it was significantly access to power-holders and decision-makers—often to government officials—that determined who would be evacuated or who would not in August 2021. Two points of access were crucial to evacuation during this period—(a) accessing a ‘list’; and (b) accessing the HKIA compound.

An overwhelming majority of interviewees described the number of ‘lists’ that were created and circulated during this time.<sup>199</sup> It became clear during the early days of these evacuation efforts that State actors were trying to draw up lists of individuals who would be prioritised for evacuation.<sup>200</sup> Connections to ‘list creators’ were important. These lists contained the names and other identifying information of persons to be evacuated or who wished to be evacuated and were curated by both NSEs and States.<sup>201</sup> Being able to relay this information to relevant coordinating authorities or NSEs meant an opportunity to be evacuated. States, through home-country government offices, contacted organisations that had worked with them previously, to indicate that they had space for people on their flights, and relied on those trusted organisations to provide lists of names for evacuation, and who could meet a minimum threshold set of documentation, including identification documents and travel documents.

NSEs felt encouraged when they were able to access these lists to secure evacuation, and were frustrated when access was not possible.<sup>202</sup> Many of the individuals and groups attempting to access these lists described the process as problematic and lacking any transparency and accountability, but was the only method available to them at the time.

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198 Author interview with Scott Shadian, 2 November 2022.

199 Author interview with Asma Faizi, 25 October 2022; Author interview with Deanne Uyangoda, 28 November 2022.

200 Author interview with Asma Faizi, 25 October 2022; Author interview with Deanne Uyangoda, 28 November 2022.

201 Author interview with Frohar Poya, 13 September 2022; Author interview with Chiara Parolin, 25 November 2022; Author interview with Ellinor Zeino, 17 September 2022; Author interview with Tanya Henderson, 4 November 2022; Author interview with Christoph Klawitter, 20 January 2023.

202 Author interview with Ben Polk, 18 November 2022.

The reality of evacuation, however, was still contingent on whether one could access the HKIA compound. The chaos around the airport meant that there was no orderly manner in which persons were identified for entry. Importantly, it later appeared to some that as long as one could enter the airport compound, evacuation was guaranteed.<sup>203</sup> Others noted that only foreign citizens and those with clear ‘onward pathways’ were permitted entry to airport grounds.<sup>204</sup>

To this end, some participants noted that the US DoS had at one point issued an ‘electronic visa’, a document authorising its holder to enter HKIA and evacuate to the US.<sup>205</sup> The document however, failed to include individual names and was susceptible to manipulation that, in the end, was indeed forged. NSEs noted that there was a distinct shift after the bombing at Abbey Gate on 26 August. Prior to that date, people were able to access HKIA with an Afghan *tazkira* if they had a connection to someone; after then, the rules became stricter, and people needed proof of eligibility to continue travel or resettlement approval in order to get through, though connections remained an important aspect of success.

Direct connections to personnel at HKIA was therefore crucial to being able to enter the airport. For instance, those who had contact with military personnel at HKIA, specifically personnel assigned to gates, were largely able to provide access to the airport through these networks.<sup>206</sup> State authorities also relied on such contacts—lists of identified persons to be evacuated were given to those responsible for entry to the airport. Interviewees noted that:

The situation on the ground was so chaotic and the chain of command was so broken down that knowing somebody right there at the gate pulling people in was more effective than being able to call the President of the United States.<sup>207</sup>

In other words, knowing *who* to contact, and the actual *ability* to make such contact was key to successful evacuation in August 2021.<sup>208</sup> This was particularly the case, given State authorities were not responsive to requests for assistance.<sup>209</sup>

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203 Author interview with Anh-Thu Nguyen, 3 February 2023.

204 Author interview with Jeff Phaneuf, 26 October 2022.

205 Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

206 Author interview with Jeff Phaneuf, 26 October 2022; Author interview with Christoph Klawitter, 20 January 2023; Author interview with Anh-Thu Nguyen, 3 February 2023.

207 Author interview with Jeff Phaneuf, 26 October 2022.

208 Author interview with Asma Faizi, 25 October 2022; Author interview with Barbara Wegelin, 1 November 2022.

209 See, e.g., House of Commons, Foreign Affairs Committee, *Missing in action: UK leadership and the withdrawal from Afghanistan*, First Report of Session 2022–23, 24 May 2022: ¶¶ 21–24 (‘There was chaos within the Foreign Office as thousands of emails and phone calls flooded in from people seeking help... The team was severely understaffed, and the rostering system was ineffective... A junior official with two years’ work experience was the only person monitoring the Special Cases inbox on the afternoon of 21 August, as hundreds of emails poured in. This was the height of the evacuation effort, which would end days later, and the last chance for many Afghan judges, journalists and human rights defenders seeking help from the British Government... The whistleblowers describe an arbitrary and chaotic approach to prioritising requests for help, based on “who happened to open or forward which random email”.’).

While many described deep frustrations with either the lack of response from or ineffectiveness of State coordination, some were able to successfully engage with relevant authorities on pressing matters. For instance, Team America Relief (TAR) pointed to the willingness of US authorities to engage in dialogue and adopt changes to policies where humanitarian support was concerned. The issuance of General Licences 14-20 by the US Office of Foreign Assets Control, The Department of the Treasury, was the direct result of this successful advocacy.<sup>210</sup> These changes ‘enable Afghan-Americans and Afghans in the United States and around the world to continue to support their families in Afghanistan through personal remittances.’<sup>211</sup>

It also meant that US-based groups and individuals such as TAR were now able to organise and provide much needed basic necessities without fear of violating the law. Similarly, Kabul Luftbruecke, was able to tap on its close connection with the German government to provide a channel for direct advocacy on establishing resettlement programmes for vulnerable and ‘at-risk’ Afghans. The new Federal Admission Programme for Afghanistan that was launched in October 2022 is a direct result of such advocacy.<sup>212</sup> Although further advocacy is being conducted on opening the programme to Afghans in third countries, State-Non-State cooperation has nonetheless succeeded in this area. Others not only recognised the realities of overcoming bureaucratic issues, but also noted that capacity rather than willingness on the part of States was a defining challenge.<sup>213</sup>

## B. International Human Rights Law

Crucial to the circumstances surrounding the withdrawal of international forces is International Human Rights Law (IHRL).<sup>214</sup> IHRL is grounded in customary international law and core treaties that articulate inalienable and legally enforceable rights of persons ranging from civil and political rights such as the right to freedom of expression<sup>215</sup> and the right to liberty and security of person,<sup>216</sup> to economic, social, and cultural rights, including the rights to education,<sup>217</sup>

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210 Author interview with Mike Pollock, 24 September 2022.

211 “Fact Sheet: Provision of Humanitarian Assistance to Afghanistan and Support for the Afghan People,” *The Department of the Treasury*, 13 April 2022, [https://home.treasury.gov/system/files/126/afg\\_factsheet\\_20220413.pdf](https://home.treasury.gov/system/files/126/afg_factsheet_20220413.pdf).

212 Author interview with Herta Mirea, 7 November 2022. See also “Federal admission programme for Afghanistan launched,” *Federal Foreign Office*, 17 October 2022, <https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/afghanistan-node/-/2558750>.

213 Author interview with Ellinor Zeino, 17 September 2022.

214 “Afghanistan: UN expert warns of ‘cultural disaster’, urges visas for the vulnerable,” *UN Office of the High Commissioner for Human Rights*, 17 August 2021, <https://www.ohchr.org/en/press-releases/2021/08/afghanistan-un-expert-warns-cultural-disaster-urges-visas-vulnerable>.

215 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (“ICCPR”), art. 19.

216 ICCPR, art. 9.

217 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, (“ICESCR”), art. 13.

food,<sup>218</sup> and health.<sup>219</sup> States have obligations to respect, to protect and to fulfil human rights.<sup>220</sup> These include both positive obligations to act and negative obligations to refrain from interfering with the enjoyment of rights,<sup>221</sup> and are elaborated upon in specific treaty regimes.<sup>222</sup>

## i. Application of IHRL

IHRL is applicable during times of peace and hostility, and is not displaced by the existence of armed conflict, or applicable IHL standards.<sup>223</sup> While the two bodies of law are distinct, they share a common purpose—the protection of the human person.<sup>224</sup> As Sivakumaran notes, the applicability of IHRL during armed conflict is clear from the text of the human rights treaties themselves, noting that the International Covenant on Civil and Political Rights (ICCPR) states that certain rights may be derogated from (i.e., suspended) ‘[i]n time of public emergency which threatens the life of the nation,’ including armed conflict.<sup>225</sup> The derogation clause of the ICCPR identifies non-derogable rights, including the prohibitions against torture and enslavement.<sup>226</sup> In this sense, certain rights enshrined in IHL treaties are *additional* to fundamental human rights.<sup>227</sup>

This complementary application of the two spheres of law is intended to enhance protections to civilians, who cannot be targeted in conflict without violating either legal regime, and indeed the fields have some overlapping provisions.<sup>228</sup> Relevant mechanisms and courts recognise that in some cases, the applicable

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218 ICESCR, art. 11.

219 ICESCR, art. 12.

220 “International Human Rights Law,” *UN OHCHR*, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>; David Jason Karp, “What is the responsibility to respect human rights? Reconsidering the ‘respect, protect, and fulfil’ framework,” *International Theory* 12, no. 1 (2020): 83-108.

221 “International Human Rights Law,” *UN OHCHR*.

222 Specific obligations that States undertake flow from the treaties they have ratified, in addition to customary international norms and regulations. There are 9 core international human rights instruments, each of which established an expert committee to monitor implementation by States parties. Additional optional protocols deal with specific concerns or create a committee of experts. *UN OHCHR*, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>.

223 UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, ¶ 11; HRC, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, ¶ 64; HRC, *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, ¶ 64; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 883, 136 (9 July), ¶ 106; *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 908, 168 (Judgement), ¶ 216.

224 Claude Pilloud et al., *Commentary on the additional protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), ¶ 4429.

225 ICCPR, art. 4(1); Sandesh Sivakumaran, “International Humanitarian Law,” in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2010): 530.

226 ICCPR, art. 4(2).

227 AP I, art. 72; Sivakumaran, “International Humanitarian Law,” 531. See also AP I; preamble to AP II, art. 51; Pilloud et al., *Commentary on the additional protocols*, ¶ 4430.

228 See Jelena Pejic, “Procedural Principles and Safeguards for internment/ administrative detention in armed conflict and other situations of violence,” *International Review of the Red Cross* 87, no. 585 (June 2005): 380; HRC, *General Comment no. 35*: footnote 88; Pilloud et al., *Commentary on the additional protocols*, ¶ 4509-4511.

IHL provisions may be more detailed, specialised, or suitable.<sup>229</sup> In instances where there is an absence of rules in IHL on specific matters in conflict, it will be necessary to draw on IHRL for both substantive and procedural clarity.<sup>230</sup>

## ii. Extraterritoriality

Despite numerous references to the universality of human rights in scholarship and in legal documents, the concept of extraterritorial application of human rights obligations remains contested in literature and practice.<sup>231</sup> A State certainly has jurisdiction over its own territory, and most of the IHRL treaties reference some aspect of jurisdiction. For example, Article 2 of the ICCPR refers to the obligations of States Parties to individuals ‘within its territory and subject to its jurisdiction’;<sup>232</sup> the Convention Against Torture makes numerous references to applicability to acts of torture ‘in any territory under its jurisdiction’;<sup>233</sup> and the Convention on the Rights of the Child similarly references rights being owed ‘to each child within [the State’s] jurisdiction.’<sup>234</sup> UN human rights bodies and regional human rights mechanisms have each taken different approaches to the question of extraterritorial application, but tend to be expansive in their approach to identifying the types of extraterritorial duties a state might have, in contrast to the position of States.<sup>235</sup> The Human Rights Committee articulates its position by stating that:

it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>236</sup>

The Human Rights Committee has also emphasised the principle of applying rights of the Covenant extraterritorially ‘to anyone within the power or effective control of that State Party.’<sup>237</sup> The European Court of Human Rights (ECtHR) has been more conservative, placing emphasis on applying extraterritorial obligations

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229 HRC, *General comment no. 31 [80]*, ¶ 11; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ¶ 106. For a further examination of the relationship between the two bodies of law in conflict and how application of specific principles may be assessed, see Sivakumaran: 531-535.

230 Pejic, “Procedural Principles and Safeguards”: 378.

231 See, e.g., Yuval Shany, “Taking Universality Seriously: A Functional Approach to Extra-Territoriality in International Human Rights Law” *Law and Ethics of Human Rights* 7, no. 1 (2013): 47; Ralph Wilde, “Legal ‘Black Hole’? Extraterritorial State Action and International Treaty Law on Civil and Political Rights,” *Michigan Journal of International Law* 26 (2005): 739.

232 ICCPR, art. 2(1).

233 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, arts. 2(1), 5(1)(a), 11, 16, 10 December 1984, UNTS 1465: 85.

234 UN General Assembly, *Convention on the Rights of the Child*, art. 2(1), 20 November 1989, UNTS 1577: 3.

235 See Sarah Joseph, “Scope of Application,” in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2010): 161-167.

236 HRC, *López Burgos v Uruguay*, Communication No R.12/52, UN Doc CCPR/C/13/D/52/1979 (29 July 1981), ¶ 12.2-3.

237 HRC, *General comment no. 31 [80]*, ¶ 10.

only in instances where the State has ‘effective control’ over the territory.<sup>238</sup> The former thus adopts a more liberal approach, focusing on an affected individual being in the effective control of a State, rather than examining whether the territory is under that State’s control. This has been developed in particular in relation to the right to life,<sup>239</sup> such that States have an obligation to respect and ensure the right to life for ‘all persons over whose enjoyment of the right to life it exercises power or effective control.’<sup>240</sup> Significantly, this ‘includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner.’<sup>241</sup> Case law and human rights body interpretation have also held States to their extraterritorial obligations flowing from the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>242</sup> In some cases, for example where States implement economic sanctions, States have an obligation to monitor and protect the human rights of the affected population.<sup>243</sup>

Wilde has argued that not applying rights extraterritorially leads to an arbitrary unequal treatment of a State’s nationals and foreigners, since most territorial application of a treaty will apply to nationals—an approach that has been adopted by the ECtHR.<sup>244</sup> Furthermore, he notes that failing to apply treaties extraterritorially may lead to legal vacuums where no human rights law applies.<sup>245</sup> This approach favours a rule that focuses on jurisdiction over affected individuals rather than territory.<sup>246</sup> Human rights needs greatly increase during a humanitarian crisis, particularly as they relate to protection; and during an armed conflict of an international or internationalised character, State action will have an impact on the human rights and dignity of people outside of their national borders.

The responsibility of the international community to Afghans was not lost on the many independent human rights mechanisms actively monitoring events in Kabul in 2021. On 17 August, 20 special procedures mechanisms of the UN Human Rights Council noted ‘the particular responsibilities of States who have led and engaged in a peace process with the Taliban, where the most basic of

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238 See *Bankovic et al v. Belgium et al.*, Application no. 52207/99, 2001-XII Eur. Ct. H.R. 890, ¶ 59. See further, ECtHR, *Issa v. Turkey*, Application no. 31821/96 [2004] Eur. Ct. H.R. 62, ¶ 7. 4; *Al-Skeini and Others v UK*, App No 55721/07, [2011] Eur. Ct. H. R. 1093, ¶ 139.

239 HRC, *General comment no. 36*, ¶ 63.

240 HRC, *General comment no. 36*, ¶ 63.

241 HRC, *General comment no. 36*, ¶ 63.

242 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ¶ 111-113. The Committee on Economic, Social and Cultural Rights has made explicit reference to the responsibilities of States in other countries in its General Comments. See, e.g., UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, ¶ 33. See further, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” *Netherlands Quarterly of Human Rights* 29, no. 4 (December 2011): 578–90, Principle 9.

243 CESCR, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, 12 December 1997, E/C.12/1997/8, ¶ 12–13.

244 Wilde, “Legal ‘Black Hole?’”: 791.

245 Wilde, “Legal ‘Black Hole?’”: 772-773, 799-800; ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, 2001-IV Eur. Ct. H.R., ¶ 78.

246 Wilde, “Legal ‘Black Hole?’”: 804.

commitments made in the current agreement, namely, a commitment to engage in an intra-Afghan dialogue, rather than pursue a military offensive, is being broken with impunity.<sup>247</sup> Moreover, they stated that it was ‘unacceptable for States to stand on the sidelines,’ articulating a list of reports of serious violations of human rights occurring as States withdrew, including, significantly, violent attacks on civilians.<sup>248</sup>

From a human rights protection standpoint, there is little evidence that protection and concern for civilians was centred at any time during the evacuation process, despite obligations that may exist in the context of a military withdrawal, and despite clear evidence that the fall of Kabul and the Taliban’s takeover was leading to a significant negative impact on human rights and security.<sup>249</sup> International civil society organisations called on the US and other governments to act decisively in favour of protecting civilian life, but governments maintained their focus only on meeting the departure deadline of 31 August.<sup>250</sup> In the months leading up to the withdrawal of troops, there were no concerted efforts to deploy the many tools the international community has at its disposal for assessing risk for communities and documenting concerns that may require states to act more specifically.<sup>251</sup>

### iii. Substantive Rights

Numerous substantive human rights provisions are relevant to understanding the circumstances in Afghanistan in the lead-up to evacuations, including the right to non-discrimination, right to life, the right to be free from torture and from arbitrary detention, the right to education, the right to food, due process rights, privacy rights, and rights for specific groups. After the withdrawal of international forces on 30 August 2021, the Taliban declared the Islamic Emirate of Afghanistan. In his first report to the Human Rights Council, the Special Rapporteur on the situation of human rights in Afghanistan detailed significant concerns, including roll backs on women and girls’ enjoyment of human rights, in particular in education and in high levels of violence; increasing levels of poverty and food insecurity; ongoing conflict-related violence; reprisals against people affiliated with the previous government and military; and discrimination against

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247 “Afghanistan: UN experts urge swift global action to protect human rights and prevent ‘civilian slaughter,’” *OHCHR*, 16 August 2021, <https://www.ohchr.org/en/press-releases/2021/08/afghanistan-un-experts-urge-swift-global-action-protect-human-rights-and>.

248 “Afghanistan: UN experts urge swift global action”, *OHCHR*.

249 There is emerging scholarship around the concept of developing a norm of “jus ex bello,” to complement existing rules of war and which would set guidelines and expectations around the decision to end a conflict. *See, e.g.* Ariel Colonomos, “Is there a Future for ‘Jus ex Bello?’,” *Global Policy* 6, no. 4 (November 2015).

250 “Evacuate At-Risk Afghans,” *Human Rights Watch*, 24 August 2021, [www.hrw.org/news/2021/08/24/evacuate-risk-afghans](http://www.hrw.org/news/2021/08/24/evacuate-risk-afghans).

251 *See, e.g.*, “Checklist on incorporating Protection and Accountability to Affected Populations in the Humanitarian Programme Cycle,” *Global Protection Cluster*, [https://www.globalprotectioncluster.org/old/\\_assets/files/tools\\_and\\_guidance/protection-cluster-coordination-toolbox/gpc-edg-note-checklist-on-incorporating-protection-and-accountability-in-the-hpc.en.pdf](https://www.globalprotectioncluster.org/old/_assets/files/tools_and_guidance/protection-cluster-coordination-toolbox/gpc-edg-note-checklist-on-incorporating-protection-and-accountability-in-the-hpc.en.pdf). The checklist was created in 2022 but is based on guidance from IASC in 2013 and 2015; and mirrors the three steps of the Humanitarian Programme Cycle: needs overview, response planning, and implementation and monitoring.



religious and ethnic minorities, among others.<sup>252</sup> These concerns are echoed by the UN Assistance Mission in Afghanistan, human rights organisations and others, many over the situation of human rights defenders in the country.<sup>253</sup> The situation does not suggest that the US government or international forces should have remained in the country indefinitely, but rather that the hasty and chaotic withdrawal neither provided for the humanitarian evacuations of all those who may have had reason to fear human rights abuse or reprisals, nor created the best set of circumstances for positive—or minimally the least detrimental—development for human rights.

Indeed, in August 2021, numerous groups and individuals had good reasons to fear for their safety in view of the Taliban’s resumption of control. This includes anyone who had supported foreign military and governments, was affiliated with human rights organisations, had worked for the Afghan government, was working as a human rights defender, outspoken journalists, or any critic of the Taliban. Whereas the Taliban made some vague pledges to uphold rights, they did not commit to upholding obligations under treaties and other rules that apply in Afghanistan.<sup>254</sup> Furthermore, ethnic and religious minorities, as well as women and girls, and LGBTQI individuals all had concerns relating to the Taliban’s treatment of people with those identities.

Moreover, the international community, including individual States present in Afghanistan, knew that certain groups and persons were vulnerable to attacks by the Taliban<sup>255</sup>—the March 2022 US DoS report that was partially released to the public in June of 2023 states this explicitly.<sup>256</sup> It is not clear, however, how or whether that vulnerability was assessed in the lead up to the military withdrawal. As a State Party to the ICCPR, the US and other States present in Afghanistan may have had responsibilities to individuals in Afghanistan whose right to life

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252 “Situation of Human Rights in Afghanistan, Report of the Special Rapporteur on the situation of human rights in Afghanistan, Richard Bennett,” *OHCHR*, 9 February 2023, ¶ 7, 8, 14-24, 25, 32-49, 64-65, 74-81.

253 See, e.g., “Human Rights in Afghanistan: 15 August 2021-15 June 2022,” *UN Assistance Mission in Afghanistan*, July 2022; “Afghanistan: Isis Group Targets Religious Minorities,” *Human Rights Watch*, 6 September 2022, <https://www.hrw.org/news/2022/09/06/afghanistan-isis-group-targets-religious-minorities>; Visakh Mathews and Sukanya Bali, “Taliban 2.0: The End Game for Afghan Sikhs and Hindus?,” *The Diplomat* 21 July 2022), <https://thediplomat.com/2022/07/taliban-2-0-the-end-game-for-afghan-sikhs-and-hindus/>; “UN Experts: Legal Professionals in Afghanistan Face Extreme Risks, Need Urgent International Support,” *OHCHR*, [ohchr.org/sites/default/files/documents/issues/ijudiciary/statements/2023-01-17/202301-stm-sr-ijl-sr-afghanistan-day-endangered-lawyer.pdf](https://www.ohchr.org/sites/default/files/documents/issues/ijudiciary/statements/2023-01-17/202301-stm-sr-ijl-sr-afghanistan-day-endangered-lawyer.pdf).

254 “Transcript of Taliban’s first news conference in Kabul,” *Al Jazeera*, 17 August 2021, <https://www.aljazeera.com/news/2021/8/17/transcript-of-talibans-first-press-conference-in-kabul/>; “Taliban Rights Pledges Raise Concerns,” *Human Rights Watch*, 18 August 2021, <https://www.hrw.org/news/2021/08/18/afghanistan-taliban-rights-pledges-raise-concerns>. While the Taliban has not been recognised by the international community as a State, no other actor currently bears the burden of fulfilling its human rights obligations. See Ben Saul, ““Recognition” and the Taliban’s International Legal Status,” *International Centre for Counter-Terrorism*, 15 December 2021, <https://www.icct.nl/publication/recognition-and-talibans-international-legal-status>.

255 “Afghanistan: UN experts urge swift global action,” *OHCHR*; “Joint Statement from the Department of State and Department of Defense: Update on Afghanistan,” *U.S. Department of State*, Office of the Spokesperson, 15 August 2021, <https://www.state.gov/joint-statement-from-the-department-of-state-and-department-of-defense-update-on-afghanistan/>.

256 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*: 5 (“The extensive U.S. presence in Afghanistan over two decades meant that many thousands of Afghans had worked on behalf of the United States either directly or indirectly, often at great risk to themselves and their families.”).

was threatened by the Taliban, based on the Human Rights Committee’s explicit determination that States take responsibility where the right to life may be affected by its military activities.<sup>257</sup> As the discussion above demonstrates, there is no defined right to evacuation by a particular State,<sup>258</sup> however, States engaging in evacuations and identifying groups and individuals for evacuation need to ensure they are doing so in such a way that does not negatively impact particularly vulnerable groups.

#### iv. NSEs and ‘Triage’: Assessing Vulnerability

Interviewees were asked how they prioritised cases given the overwhelming influx of requests for assistance they received. The prioritisation of cases not only meant that limited resources were channelled to these cases first, but that these individuals or groups would first be evacuated when the opportunity arose. For some, owing to the chaos in August 2021, cases were not prioritised and support was often either provided on a ‘first come first served’ basis or to whomever had reached out during this period.<sup>259</sup> Because resources were extremely stretched, and the physical, mental and emotional toll overwhelming on individual NSEs, responding to requests for support was also contingent on the level of energy and motivation at the time such requests were received.<sup>260</sup> NSEs with more staff at hand were able to distribute the workload, albeit at stretched capacity.<sup>261</sup>

Groups that work closely with authorities to identify evacuees prioritised cases according to relevant mandates. For instance, as a DoS Volunteer Liaison Group, Team America Relief (TAR) focuses on the evacuation of American citizens, permanent residents of the US, and SIV applicants in that order.<sup>262</sup> A key factor for being able to provide support also depends on whether beneficiaries have relevant documents such as identity and travel documents.<sup>263</sup> Similarly, Kabul Luftbruecke is a referring NSE to Germany’s Federal Admission Programme for Afghanistan, and filters and prioritises cases according to the programme’s focus.<sup>264</sup>

The way NSEs prioritised cases was also contingent on the expertise of the given individuals or organisations. Those with a background in humanitarian, human rights, or refugee work tended to prioritise cases based on measures of vulnerability such as gender and sexual orientation, previous experiences with

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257 “Joint Statement from the Department of State and Department of Defense: Update on Afghanistan,” *U.S. Department of State*, ¶ 63.

258 See Part III, Sec. A.

259 Author interview with Rachel Reid, 21 November 2022; Author interview with Corey Levine, 7 November 2022; Author interview with Inma Orquin, 12 October 2022.

260 Author interview with Corey Levine, 7 November 2022.

261 Author interview with Scott Shadian, 2 November 2022.

262 Author interview with Anh-Thu Nguyen, 3 February 2023.

263 Author interview with Anh-Thu Nguyen, 3 February 2023.

264 Author interview with Herta Mirea, 7 November 2022.

threats of physical harm and violence, age, and disability.<sup>265</sup> Many State and non-governmental programmes gave priority to supporting women and in particular women advocates. One interviewee whose organisation works primarily on the rights of women nonetheless expressed frustration with the fact that there were so few options for Afghan men to be included on her list—including men who had worked to promote women’s rights—thus placing them at risk of reprisals by the Taliban.<sup>266</sup>

Furthermore, interviewees with a military or security background saw ‘risks’ differently:

[Risk] is very subjective and I think that’s appropriate... the Taliban like any organisation is made up [of] different types of people, different types of skills, different types of interests—so the Taliban in one area might be very aggressive and really trying to crack down on a lot of people but in another area they might not be, and there might even be some folks who might actually be friendly, and not particularly hostile.<sup>267</sup>

Measuring priority and vulnerability are quite subjective and was a point of contention among groups.<sup>268</sup> Many interviewees expressed discomfort in having to ‘select’ persons for programme referrals—‘there’s no way to choose between people, and no way we want to do that... Governments should decide, not us.’<sup>269</sup> Another interviewee expressed that this need to ‘demonstrate vulnerability’ was yet another shortcoming of the way governments responded to the evacuation effort. The lines delineating vulnerability or risk were never clear, and there was no effort to communicate to civil society how they reached these decisions. As a result, advocates had to draft compelling cases, while in the position of doing so for, in some instances, 1,500 priority cases. One interviewee noted:

How do I tell a defender, sorry, your story isn’t good enough. And we are forced to do this... You are a defender, and you shouldn’t have to come with one arm bleeding to prove you are at risk.<sup>270</sup>

The same interviewee notes, however, that at some point, groups need to grapple with this question internally and arrive at a conclusion in order for work to be performed without further delay.<sup>271</sup> Her sentiments were shared by other

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265 Author interview with Deanne Uyangoda, 28 November 2022; Author interview with Laura Deitz, 9 September 2022; Author interview with Imogen Canavan, 7 September 2022; Author interview with Scott Shadian, 2 November 2022.

266 Author interview with Asma Faizi, 25 October 2022.

267 Author interview with Zachery Kallenborn, 22 September 2022.

268 Author interview with Herta Mirea, 7 November 2022; Author interview with Imogen Canavan, 7 September 2022.

269 Author interview with Herta Mirea, 7 November 2022.

270 Author interview with Deanne Uyangoda, 28 November 2022.

271 Author interview with Deanne Uyangoda, 28 November 2022.

interviewees.<sup>272</sup>

## v. Discrimination and Corruption

Several interviewees described racial discrimination in entry attempts to HKIA, particularly discrimination against persons belonging to the Hazara community, or persons who ‘look’ Hazara.<sup>273</sup> This appears to have occurred at the North Gate where paramilitaries such as the ‘Zero Units’ were stationed.<sup>274</sup> Furthermore, reports of violence and demands for bribes by paramilitary personnel stationed in the airport to allow entry into HKIA have also surfaced.<sup>275</sup>

These claims not only warrant further investigation, but also bring into question the pervasive culture of corruption in Afghanistan, as well as the role the international community has played in compounding or perhaps even fuelling existing ethnic tensions. The appointment of a Pashtun leader coupled with the imperfect process in which the Constitution of Afghanistan was drafted ‘consolidated ‘near total authority’ in the head of State, who was, of course, a Pashtun.’<sup>276</sup> Mike Pollock of Team America Relief explained:

We were mostly fighting Pashtuns. The Taliban were mostly Pashtuns...The irony of this is that mostly Pashtuns were hired as interpreters because the US government wanted to understand [the Pashtun community] better, and also in order to fight [against a group that is dominated by Pashtuns].<sup>277</sup>

Ethnic tensions and resulting discrimination were also apparent at bases where persons were evacuated to. ‘Building leaders’ were appointed and for the most part, nepotism occurred when accessing resources at these bases; instructions were also delivered in certain dialects that excluded other ethnic groups.<sup>278</sup>

During the period of August 2021, the opportunity for financial gain was not limited to the airport gates. Visas to neighbouring States could be secured via

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272 Author interview with Imogen Canavan, 7 September 2022; Author interview with Herta Mirea, 7 November 2022.

273 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Christoph Klawitter, 20 January 2023; Author interview with Kevin Haidary, 23 September 2022.

274 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Christoph Klawitter, 20 January 2023. Security at the north end of HKIA is also corroborated in published reports. See Shane Harris, “CIA-trained Afghan forces who helped Americans and others evacuate now await resettlement in the U.S.,” *The Washington Post*, 10 September 2021, [https://www.washingtonpost.com/national-security/cia-afghan-special-forces-kabul-evacuation/2021/09/10/7986e9e0-123a-11ec-bc8a-8d9a5b534194\\_story.html](https://www.washingtonpost.com/national-security/cia-afghan-special-forces-kabul-evacuation/2021/09/10/7986e9e0-123a-11ec-bc8a-8d9a5b534194_story.html); Andrew Quilty and Matthew Cole, “The CIA’s Afghan Proxies, Accused of War Crimes, will get a Fresh Start in the U.S.,” 6 October 2021, <https://theintercept.com/2021/10/05/zero-units-cia-afghanistan-taliban/>. Zero Units appear to be controlled by the US. See Part III, Section E(i) “International Armed Conflict, Non-International Armed Conflict and Occupation” of this report.

275 Author interview with Christoph Klawitter, 20 January 2023; see also Quilty and Cole, “The CIA’s Afghan Proxies”; C. Tatum, “CIA, Spec Ops roles in Kabul’s collapse belie official versions,” *SpyTalk*, 21 November 2022, <https://www.spytalk.co/p/cia-spec-ops-roles-in-kabuls-collapse>.

276 Bryce G. Pool, “Counterinsurgency and the rule of law in Afghanistan,” *Small Wars and Insurgencies* 33, no. 7 (2022): 1107.

277 Author interview with Mike Pollock, 24 September 2022.

278 Author interview with Mike Pollock, 24 September 2022.

an ‘agent’ with fees as high as USD 1,000.<sup>279</sup> Interviewees also describe ‘black market passports’ and demands from transport carriers such as bus drivers for exorbitant fees.<sup>280</sup> Criticism has also been levelled against flight carriers that typically operate deportation flights and were now ‘cashing in’ on evacuation flights.<sup>281</sup> One interviewee notes that Kam Air, charter airlines, and private military companies all ‘exploit[ed] human tragedy for profit.’<sup>282</sup>

## C. International Refugee Law

Protection mechanisms for refugees are few in Asia and the Pacific even though the region hosts some of the largest numbers in the world. In South Asia, generations of protection advocates have had their work defined by the situation of Afghan refugees.<sup>283</sup> As of December 2022, UNHCR estimates 2.1 million refugees and asylum seekers from Afghanistan in neighbouring States.<sup>284</sup> The phenomenon is palpable and remains a significant matter for States to address, particularly given increasing anti-refugee attitudes among destination and host populations.<sup>285</sup>

The core instrument regulating International Refugee Law (IRL) is the Convention Relating to the Status of Refugees 1951 (Refugee Convention) and its 1967 Protocol (Protocol) that boasts an overwhelming majority of State parties.<sup>286</sup> Other treaty-law frameworks such as regional ones also contribute to the protection of refugees, in addition to customary international law and other international legal

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279 Author interview with Anonymous Development Worker, 14 November 2022.

280 Author interview with Jeff Phaneuf, 26 October 2022.

281 “Deportation airlines return to Afghanistan to cash in on evacuation flights,” *Corporate Watch*, 27 September 2021, <https://corporatwatch.org/deportation-airlines-return-to-afghanistan-to-cash-in-on-evacuation-flights/>.

282 E-mail correspondence with Scott Shadian, 9 May 2023. Shadian noted that his organisation, Sayara International, found instances of Kam Air also attempting to smuggle people onto their evacuation flights.

283 Gül Inanç and Themba Lewis, “Introduction,” in *Forced Displacement and NGOs in Asia and the Pacific*, eds., Gül Inanç and Themba Lewis, Routledge Advances in Asia Pacific Studies, Series 22, (New York, NY: Routledge, 2022): xxiii.

284 UNHCR, *External Update: Afghanistan Situation #22*, 4 December 2022, <https://reporting.unhcr.org/index.php/document/3944>.

285 See, e.g., “Dutch protesters burn tyres outside military base housing Afghan refugees,” *Euronews*, 28 August 2021, <https://www.euronews.com/2021/08/25/dutch-protesters-burn-tyres-outside-military-base-housing-afghan-refugees>; Eyes on Europe, “Explaining the Main Drivers of Anti-Immigration Attitudes in Europe”, 30 November 2020, <https://www.eyes-on-europe.eu/explaining-the-main-drivers-of-anti-immigration-attitudes-in-europe/>. Author interview with Anh-Thu Nguyen, 3 February 2023.

286 *Convention Relating to the Status of Refugees*, signed 28 July 1951, 189 UNTS 137, entered into force 22 April 1954 (“Refugee Convention”); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967, (“Protocol”); “States parties, including reservations and declarations, to the 1951 Refugee Convention,” UNHCR, <https://www.unhcr.org/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html>; Maja Janmyr, “Non-signatory States and the international refugee regime,” *Forced Migration Review*, no. 67 (July 2021), <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/issue67/janmyr.pdf>.

regimes such as IHRL.<sup>287</sup> Born from the ashes of WWII, IRL has been described as ‘a desire to avoid repetition of the worst excesses of the Second World War era... [and has] added a substantial measure of humanity to the post-war period.’<sup>288</sup> In implementation, however, the IRL regime is fragmented and has been a persistent site of ‘an unholy alliance of competing interests’, including competing principles of international law.<sup>289</sup> Additionally, that the fates of many rest in the hands of diverse national courts serve little to clarify the contours of refugee protection.<sup>290</sup>

## i. The Convention’s Refugee

The Refugee Convention has consistently been criticised for its inadequacy, particularly as it relates to the definition of a refugee and the lived realities of refugees today.<sup>291</sup> It is contrasted with the OAU Convention that recognises refugees fleeing from foreign aggression or invasion,<sup>292</sup> as well as the Cartagena Declaration that goes further to include those who face generalised violence, massive violations of human rights, and internal conflicts.<sup>293</sup> The Refugee Convention defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>294</sup>

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287 See, e.g., *Organisation of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, adopted 10 September 1969, entered into force 20 January 1974 (“OAU Convention”); *Cartagena Declaration on Refugees*, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984 (“Cartagena Declaration”); *Charter of Fundamental Rights of the European Union*, art. 18, 26 October 2012, 2012/C 326/02. See also Thomas Gammeltoft-Hansen, “Growing Barriers: International Refugee Law,” in *Universal Human Rights and Extraterritorial Obligations*, eds. Mark Gibney and Sigrun Skogly (Philadelphia: Philadelphia University Press, 2010), 56; Introductory Note by the Office of the United Nations High Commissioner for Refugees: Convention and Protocol Relating to the Status of Refugees (December 2010), <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

288 Daniel J. Steinbock, “The Refugee Definition as Law: Issues of Interpretation” in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds., Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999): 14.

289 Guy S. Goodwin-Gill, “The Politics of Refugee Protection,” *Refugee Survey Quarterly* 27 (2008): 21; Rieko Karatani, “How History Separated Refugee and Migrant Regimes: In Search of their Institutional Origins” *International Journal of Refugee Law* 17, no. 3 (2005): 517.

290 Thomas Gammeltoft-Hansen, “Extraterritorial human rights obligations in regard to refugees and migrants” in *The Routledge Handbook on Extraterritorial Human Rights Obligations*, eds. Mark Gibney et al. (London: Routledge, 2021): 155.

291 Adrienne Millbank, “The Problem with the 1951 Refugee Convention,” *Parliament of Australia*, Research Paper 5 2000-01, 5 September 2000, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP05#problems](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05#problems); Eduardo Arbodela, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism,” *International Journal of Refugee Law* 3, no. 2 (1991): 186.

292 OAU Convention, art. I(2).

293 Cartagena Declaration, Part III, ¶ 3.

294 Refugee Convention, art. 1(A)(2).

For both the stateless and the citizen, a pre-requisite for seeking asylum is to be physically outside their country of birth or nationality. It is nothing short of a ‘legal Catch-22’ that refugees must have already relocated in order to apply for the right to permanently relocate.<sup>295</sup> The Refugee Convention is also silent on how a refugee might leave their country of nationality, as well as the legal status they hold in a country of transit. At least one initiative discussed below has attempted to fill this gap. Namely, the Italian Humanitarian Corridor Initiative (Italian HCI) that is grounded in Article 25 of the EU’s Visa Code allowing for the exceptional ‘Issuing of a visa with limited territorial validity’ on ‘humanitarian grounds, for reasons of national interest or because of international obligations’.<sup>296</sup> Although participants of this initiative are often already in third States, the initiative could, at least in theory, reach those who are not. This initiative sits at one end of the spectrum where States seek to externalise their border control. Cases and policies discussed in the following instead act to actively curb refugee arrivals.

## ii. Externalising Border Control and Extraterritorial Obligations

The externalisation of border control is not a new phenomenon and has grown in popularity among States that seek to limit refugee flows.<sup>297</sup> Moreno-Lax and Lemberg-Pedersen define the phenomenon as ‘the range of processes whereby [States and relevant actors] complement policies to control migration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own.’<sup>298</sup> Within IRL, then, externalised border controls are those acts or policies that seek to test the boundaries of jurisdiction and concomitantly, the principle of non-refoulement. While interdiction policies on the high seas are likely the most conspicuous of them, less visible are those that occur within defined extraterritorial jurisdictions such as embassies and consulates.

One notable example is the case of *X and X v Belgium* before the Court of Justice of the European Union (CJEU), where a Syrian family applied for a visa to Belgium at the Belgian embassy in Lebanon pursuant to Article 25 of the Visa Code in order to seek asylum.<sup>299</sup> The CJEU found that the case rested ‘solely within the scope

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295 Jaya Ramji-Nogales, “Moving Beyond the Refugee Law Paradigm,” *AJIL Unbound* 111 (2017): 9.

296 *Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*, *Official Journal of the European Union*, art. 25(1)(a), L 243/1, 15 September 2009.

297 Examples include Australia’s ‘Pacific Strategy’ of interdiction and ‘off-shore’ solutions; and the EU’s interdiction schemes implemented by Frontex. See Susan York Kneebone, “The Pacific Plan: The Provision of ‘Effective Protection?’” *International Journal of Refugee Law* 18, nos. 3-4 (September 2006): 696-721; Thomas Gammeltoft-Hansen, “Growing Barriers: International Refugee Law,” in *Universal Human Rights and Extraterritorial Obligations*, eds. Mark Gibney and Sigrun Skogly, (Philadelphia: Philadelphia University Press, 2010), 55-81.

298 Violeta Moreno-Lax and Martin Lemberg-Pedersen, “Border-induced displacement: The ethical and legal implications of distance-creation through externalization,” *Questions of International Law* 56 (2019): 5. For a slightly broader definition, see Bill Frelick, Ian M. Kysel, and Jennifer Podkul, “The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants,” *Journal on Migration and Human Security* 4, no. 4 (2016): 193.

299 Case C-638/16, *X. and X. v. Belgium*, ECLI:EU:C:2017:173.



of national law.<sup>300</sup> Because ‘the purpose of the application differs from that of a short-term visa’, it fell beyond the scope of the Visa Code and therefore beyond EU law.<sup>301</sup> Belgium had absolute discretion to issue or deny a visa. The Court’s finding is in contrast to Advocate General Mengozzi’s non-binding Opinion that ‘[t]he intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium *cannot alter the nature or purpose of their applications*. In particular, that intention cannot convert them into applications for long-stay visas or place those applications outside the scope of the Visa Code and of EU law’.<sup>302</sup> Significantly, that an application and resulting decision made within EU law:

requires the Member State to ensure that the rights guaranteed by the [European Union] Charter are respected... particularly the right enshrined in Article 4 of the Charter, [that] implies the existence of a positive obligation on the part of the Member States, which must require them to issue a visa with limited territorial validity where there are substantial grounds to believe that the *refusal to issue that document will have the direct consequence of exposing persons seeking international protection to torture or inhuman or degrading treatment which is prohibited by that article*.<sup>303</sup>

In a similar case, the ECtHR found the matter to be inadmissible and that proceedings initiated by individuals in national jurisdictions does not in itself trigger extraterritorial jurisdiction and accordingly, obligation.<sup>304</sup> Third party interveners highlighted that should the Court have accepted the applicants’ arguments, then ‘the well-established principle of international law’ that is sovereign jurisdiction would become meaningless and ‘would give way to an unlimited obligation on the States Parties to authorise entry to their territory to individuals who were at risk of treatment in breach of Article 3 anywhere in the world’.<sup>305</sup>

Efforts to externalise border control have ignited debates about States’ extraterritorial obligations. According to Gammeltoft-Hansen, ‘extraterritorial jurisdiction for the purpose of human rights responsibility is generally assumed to arise whenever a state exercises effective control over either individuals or territory’.<sup>306</sup> The notion of ‘effective control’ in this instance is nonetheless ill-defined. Scholars have applied various frameworks with which to interpret ‘effective control’ including ‘public powers jurisdiction’, ‘functional jurisdiction’ and

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300 *X. and X. v. Belgium*, ¶ 44. See also Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), art. 1, Official Journal of the European Union, L 243/1, 15 September 2009.

301 *X. and X. v. Belgium*, ¶ 47-51.

302 *X. and X. v. Belgium*, Opinion of Advocate General Mengozzi, 7 February 2017, ¶ 50 (emphasis added).

303 *X. and X. v. Belgium*, Opinion of Advocate General Mengozzi, ¶ 3.

304 *MN and Others v Belgium*, Application No. 3599/18, Eur. Ct. H. R., 5 March 2020, ¶ 121-122.

305 *MN and Others v Belgium*, ¶ 89.

306 Gammeltoft-Hansen, “Extraterritorial human rights obligations”: 158.

'effective control over situations'.<sup>307</sup> Surely, if it is within the jurisdiction of States to extend its control, it would seem logical that its obligations extend therewith.

Other sites have also been contested as to the reach of jurisdiction and control. In *Amuur v France*, four Somali siblings having arrived from Syria were denied entry to France, and were detained and removed from Paris-Orly's international airport zone despite their request for asylum.<sup>308</sup> The ECtHR held that the possibility for the applicants to leave the zone voluntarily 'cannot exclude a restriction on liberty', particularly because the applicants were seeking refuge.<sup>309</sup> The Court found that '[d]espite its name, the international zone does not have extraterritorial status'—the applicants were therefore within French jurisdiction despite contrary national legislation.<sup>310</sup> The Court emphasised States' ongoing compliance with international obligations, and efforts to manage unlawful immigration 'must *not* deprive asylum-seekers of the protection afforded by these conventions.'<sup>311</sup>

Courts have also had to navigate the interpretation of collective expulsions. In *ND and NT v Spain*, the applicants had scaled barriers to enter the Spanish territory of Melilla where they were then apprehended by the *Guardia Civil* and forcibly returned to Morocco.<sup>312</sup> While the ECtHR found that there had been an 'expulsion' within the meaning of Article 4 of Protocol No. 4 of the European Convention on Human Rights—as opposed to the Spanish government's assertion that the act was a refusal of admission to Spanish territory—Spain's provision of 'genuine and effective access to means of legal entry' meant that the applicants' resort to 'illegal entry' barred them protection under Article 4 of Protocol No. 4.<sup>313</sup> Interestingly, the Court emphasised that its ruling in this matter does not call into question States' obligation of non-refoulement.<sup>314</sup>

Beyond the EU, the US's 'wet-foot/dry-foot' policy relating to Cuban migration saw one of the more extreme examples of how far a State would go to limit refugee flows. An amendment to the Cuban Adjustment Act of 1966 meant that Cubans attempting to reach the US by sea were repatriated.<sup>315</sup> In January 2006, an 'unusual' and 'unique' case saw fifteen Cubans hanging on to the Seven Mile Bridge in Florida Keys removed back to Cuba.<sup>316</sup> Authorities argued that because

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307 See, e.g., Violeta Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v. Italy*, and the "Operational Model"', *German Law Journal* 21, no. 3 (2020): 385-416; Thomas Gammeltoft-Handen and James C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence," *Columbia Journal of Transnational Law* 53, no. 2 (2015): 235-284; Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts," *European Journal of International Law* 29, no. 2 (2018): 581-606.

308 *Amuur v. France*, Application no. 19776/92, 1996-III, ECtHR (1996).

309 *Amuur v. France*, ¶ 48.

310 *Amuur v. France*, ¶ 52.

311 *Amuur v. France*, ¶ 43 (emphasis added).

312 *ND and NT v Spain*, Application Nos. 8675/15 and 8697/15, ECtHR (2020).

313 *ND and NT v Spain*.

314 *ND and NT v Spain*.

315 See Alberto J. Perez, "Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy", 28(2) *Nova Law Review* (2004): 437-465.

316 *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343 (S.D. Fla. 2006).

the old bridge ‘is an artificial structure without its own territorial sea’, and the portion of the bridge where the persons were found was ‘unconnected to land at either end’ it cannot be considered US territory and for that matter, ‘land’.<sup>317</sup> The absurdity of this distinction was rejected by the District Court and removal of the fifteen persons found illegal.

The use of the term ‘extraterritorial’ in this context has been labelled a misnomer for it suggests rights, obligations, and responsibilities that are somehow separate and distinct from the domestic sphere. The more appropriate term as Gibney suggests is simply, ‘human rights obligations’ for they apply both domestically and internationally.<sup>318</sup> The functioning of international law, however, and the attribution of human rights obligations to States as interpreted and applied by courts still largely rests on the territorial model.<sup>319</sup>

### iii. Exceptions to and Exclusions from Refugeehood

By definition, a person only seeking economic opportunities cannot be considered a refugee within the Refugee Convention. The evolution of IRL has filtered out the ‘economic migrant’, distinguishing the terms ‘migrant’ and ‘refugee’.<sup>320</sup> The exclusion of categories of persons also exists within the Refugee Convention. The ‘undeserving’ are found in Article 1(F) of the Refugee Convention.<sup>321</sup>

The UNHCR Standing Committee has reasoned that the purpose of excluding perpetrators of serious international crimes and ‘serious common crimes’ from international protection are twofold. Firstly, the humanitarian and ‘peaceful’ nature of IRL is in direct contravention to the perpetration of such serious crimes leading to a contradiction between protection, and national and international laws; and secondly, that such perpetrators present a danger to receiving States.<sup>322</sup> More recently, however, scholars have suggested that these exclusionary clauses should be replaced with an inclusive one that calls for the prosecution of these serious crimes.<sup>323</sup> This way, both victims and perpetrators of international crimes are accounted for within IRL, leading to a more robust model of protection and international justice instead of pitting ‘genuine’ refugees against ‘others’.

As the European Union Agency for Asylum (EUAA) has emphasised, the Refugee Convention’s exclusionary Article 1(F)(b) is particularly relevant where Afghanistan is concerned, a State with ‘widespread criminality and breakdown in law and

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317 *Movimiento Democracia*: 1348-1349.

318 Mark Gibney, “The Historical Development of Extraterritorial Obligations” in *The Routledge Handbook on Extraterritorial Human Rights Obligations*, eds., Mark Gibney et al (London: Routledge, 2021): 13.

319 Gamze Erdem Türkelli, “Extraterritorial Human Rights Obligations and Responsibility Under International Law” in *The Historical Development of Extraterritorial Obligations*, ed. Mark Gibney: 43.

320 Katy Long, “When refugees stopped being migrants: Movement, labour and humanitarian protection” *Migration Studies* 1, no. 1 (2013): 4-26.

321 Refugee Convention, art. 1(F).

322 UNHCR Standing Committee, “Note on the Exclusion Clauses”, EC/47/SC/CRP.29, 30 May 1997, para. 3, <https://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html>.

323 James C. Simeon and Joseph Rikhof, “Ending Exclusion from Refugee Protection and Advancing International Justice”, *Laws* 11, no. 4 (2022): 61-78.

order’.<sup>324</sup> Included in the agency’s list of possible serious non-political crimes are trafficking, smuggling, murder, corruption and other economic crimes. Articles 1(F)(a) and (c) are likewise relevant given the multiple conflicts that have taken place over the years in Afghanistan as well as the existence of armed groups having been labelled terrorist organisations.<sup>325</sup>

Within the context of evacuations from Afghanistan, the application of exclusionary clauses become especially pertinent in the face of reports that perpetrators of crimes enumerated in Article 1(F) have not only been evacuated to, but resettled in destination States.<sup>326</sup> Not all evacuated, however, enter the asylum process. For those evacuated by the US (particularly in August 2021), for instance, an overwhelming majority entered the US via Humanitarian Parole and could later apply for the Special Immigrant Visa, Temporary Protected Status, or seek asylum.<sup>327</sup>

#### iv. Identity Documents, Verification, and Vetting

In the immediate aftermath of the Taliban’s capture of Kabul, NSEs’ support was often lent to personal and professional contacts of first degree connection. This, however, quickly expanded to referrals from second and third degree connections. The fast escalation meant NSEs were soon receiving requests for support from individuals they were unfamiliar with. As requirements from authorities to evacuate became more stringent,<sup>328</sup> the need to verify identities and claims became an important part of the work that NSEs performed. Verifying claims of imminent harm or threat to life were challenging, and at least one interviewee expressed the view that it mattered less whether these claims could be proven, but that persons genuinely feared for their lives.<sup>329</sup>

NSEs that had an existing network in Afghanistan relied on these connections to

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324 European Union Agency for Asylum, *Country Guidance: Afghanistan*, April 2022, p. 43, [https://euaa.europa.eu/sites/default/files/publications/2022-04/2022\\_04\\_Country\\_Guidance\\_Afghanistan\\_EN\\_1.pdf](https://euaa.europa.eu/sites/default/files/publications/2022-04/2022_04_Country_Guidance_Afghanistan_EN_1.pdf).

325 European Union Agency for Asylum, *Country Guidance: Afghanistan*: 42-43.

326 See, e.g., Andrew Quilty and Matthew Cole, “The CIA’s Afghan Proxies, Accused of War Crimes, Will Get A Fresh Start in the U.S.”, *The Intercept*, 6 October 2021, <https://theintercept.com/2021/10/05/zero-units-cia-afghanistan-taliban/>; David Ignatius, “Inside the CIA’s desperate effort to rescue its Afghan allies”, *The Washington Post*, 30 September 2021, <https://www.washingtonpost.com/opinions/2021/09/30/cia-afghanistan-allies/>. See further, Human Rights Watch, “They’ve Shot Many Like This”: Abusive Night Raids by CIA-Backed Afghan Strike Forces, 31 October 2019, <https://www.hrw.org/report/2019/10/31/theyve-shot-many/abusive-night-raids-cia-backed-afghan-strike-forces>.

327 Danilo Zak, “Explainer: Options for Evacuated Afghans,” *National Immigration Forum*, 8 April 2022, <https://immigrationforum.org/article/explainer-options-for-evacuated-afghans/>; U.S. Department of State, ‘Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government’, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html>

328 Stricter controls on identity and travel documents were implemented after the attacks on Abbey Gate on 26 August 2021. Author interview with Anh-Thu Nguyen, 3 February 2023.

329 Author interview with Jean Ayoub, 14 October 2022.

verify claims.<sup>330</sup> This, however, was not always possible as immediate networks were often sector or geographically limited. When this occurred, more emphasis was placed on the provision of documents such as employment contracts and letters of recommendation. While this process helped identify fraudulent claims, it was both not always possible for the refugee whose ‘lack of identity documents may be far more than a source of inconvenience’<sup>331</sup> and for NSEs to identify genuine and fraudulent documents.<sup>332</sup> Nonetheless, NSEs described instances where fraudulent or inaccurate claims were identified and support for these persons were withdrawn.<sup>333</sup> NSEs also relied on their personal interactions with persons requesting assistance to identify inconsistencies.<sup>334</sup> These difficulties were pronounced with identifying families of young children—‘Birth certificates are not the first thing you think of when fleeing danger.’<sup>335</sup>

Encountering the ‘perfect refugee’, one who not only has all necessary documents, but can also articulate the specific risks and vulnerabilities they face as relevant to applying for resettlement programmes is a significant challenge. Furthermore, the issue is entwined with the prioritisation of cases as well as capacity to perform due diligence:

People’s lives are messy...We’re not going to have the ‘perfect refugee’...Everybody comes with challenges... Maybe they have stories that are exaggerated, maybe they have stories that they don’t want to share.<sup>336</sup>

[Authorities] were generally hostile to non-profit efforts... There was a [Wall Street Journal] article – I think it was the Secretary of State – that openly critiqued... claiming the various non-profit volunteer groups didn’t have security that’s why it’s a problem. But, we’re volunteering – you have multiple billions of dollars and you’re blaming this on us right now?<sup>337</sup>

330 Author interview with Asma Faizi, 25 October, 2022; Author interview with Cecilia Pani, 25 November 2022; Author interview with Chiara Parolin, 25 November 2022; Author interview with Deanne Uyangoda, 28 November, 2022; Author interview with Imogen Canavan, 7 September 2022; Author interview with Kevin Haidary, 23 September, 2022; Author interview with Laura Deitz, 9 September, 2022; Author interview with Natasha Latiff, 16 October 2022; Author interview with Ruchi Kumar, 11 November 2022; Author interview with Scott Shadian, 2 November 2022.

331 UNHCR, “Identity Documents for Refugees,” Document No. EC/SCP/33, 20 July 1984, ¶ 2, <https://www.unhcr.org/excom/scip/3ae68cce4/identity-documents-refugees.html>.

332 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Martin Steindal, 27 October 2022.

333 Author interview with Chiara Parolin, 25 November 2022; Author interview with Ellinor Zeino, 17 September 2022.

334 Author interview with Inma Orquin, 12 October 2022.

335 Author interview with Chiara Parolin, 25 November 2022.

336 Author interview with Fārnoosh Hāshemian, 27 February 2023.

337 Author interview with Zachery Kallenborn, 22 September 2022, referencing an article in The Wall Street Journal that described ‘The State Department said it has concerns about the accuracy of volunteer groups’ passenger manifests because it lacks personnel on the ground to vet the list’. Jessica Donati, “Hundreds Seeking Evacuation From Afghanistan Forced to Leave Safehouses”, *The Wall Street Journal*, 11 November 2021, <https://www.wsj.com/articles/hundreds-seeking-evacuation-from-afghanistan-forced-to-leave-safehouses-11636670801>.

Interviewees further expressed deep frustration with the unwavering requirement—particularly after August 2021—that every member of a family, including newborns, have identity and travel documents. This was particularly so for access to some programmes,<sup>338</sup> and in some cases, was near impossible. The US government for instance destroyed sensitive documents at its embassy, including IDs, passports, and other documents that may have been in process for renewal, for example, to obtain visas.<sup>339</sup> For some individuals, that loss of documents meant the inability to leave Afghanistan.<sup>340</sup> Furthermore, the need to possess an electronic *tazkira* in order to apply for a passport was an additional hurdle to overcome since many, especially those in more rural areas, did not have this.<sup>341</sup> Interviewees also note that many applicants did not have passports because they were not planning on leaving Afghanistan.<sup>342</sup> The refusal of authorities to issue emergency travel documents, or *laissez-passer*, even for those with approved visas to final destination States proved an immense hurdle for many.<sup>343</sup> The irony that an individual at risk of retaliatory harm is required to request travel or identity documents from an authority committing such harm is not lost on many.

## v. Agency vs ‘Asylum Shopping’

The tension between individual agency and ‘asylum shopping’ was also apparent in the work that NSEs performed. With the lack of prompt responses from States regarding appeals for assistance and protection, particularly in the early weeks following the Taliban’s capture of Kabul, vulnerable Afghans and supporting NSEs were ‘trying for everything out there’.<sup>344</sup> As processing and response times increase, so too the risks and vulnerabilities of those needing protection.

In a system that discourages, and at times penalises, asylum seekers for both seeking refuge in multiple jurisdictions and for ‘secondary movement’, the implications are significant.<sup>345</sup> For instance, the European Commission defines ‘asylum shopping’ within the Dublin Regulation as applying for international protection in multiple EU jurisdictions having received or not such international protection from an EU member state, and suggests that this ‘implies an abuse of the asylum procedure...[in] choosing the EU Member State which may grant the most appealing social, humanitarian and economic standards.’<sup>346</sup> This

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338 Author interview with Barbara Wegelin, 1 November 2022.

339 Ashley Collman, “US officials destroyed Afghans’ passports as they evacuated the Kabul embassy,” 18 August 2021, *Business Insider*, <https://businessinsider.com/us-officials-destroyed-afghan-passports-which-shutting-kabul-embassy-2021-8>.

340 Author interview with Jeff Phaneuf, 26 October 2022.

341 Author interview with Ellinor Zeino, 17 September 2022.

342 Author interview with Laura Deitz, 9 September 2022.

343 Author interview with Barbara Wegelin, 1 November 2022.

344 Author interview with Fárnoosh Hāshemian, 27 February 2023.

345 See, generally, Roberto Cortinovis and Marco Stefan, “Secondary movements of asylum seekers in the EU”, *Research Social Platform on Migration and Asylum*, Discussion Policy Brief, September 2019, <https://migrationresearch.com/storage/app/uploads/public/5ef/b3c/62c/5efb3c62c7ff6376829175.pdf>.

346 European Commission, “asylum shopping”, [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/asylum-shopping\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/asylum-shopping_en).

understanding, however, severely fails to capture the nuances of the motivations for doing so.

For NSEs, respecting individual agency was an important part of their work:

Recognising that people are going to make all kinds of choices... They are living the experience of risks and terror so they can make the decision on what's best for them. All we can do is say, here are the choices that could potentially work for you or not. You choose. You can decide, and whatever you choose, I'm going to support you.<sup>347</sup>

NSEs, however, also recognised the ramifications of secondary movements and the impact that may have on other, future, applicants. Furthermore, prohibitions on secondary movement may also impact issues of family reunification. Where motivations to relocate are multi-faceted and nuanced, they often include social and communal support such as being able to reunite with family members:

Many families that arrived in Spain largely go to Germany because they have more relatives there...This is a big problem because the Dublin law can apply to them where they can be deported to the country of origin of arrival...Another problem with this flight is that the embassies do not want to help much in this evacuation and visa process because they know that most of those who are given a Spanish visa go to other countries, so this is closing the doors to their fellow Afghans themselves, this makes it a detrimental process for everyone. It's a shame.<sup>348</sup>

## vi. Resettlement/Migration Programmes for Afghans

Following the Taliban's capture of Kabul, States announced resettlement and migration programmes for Afghans. While a complete description and analysis of every programme is beyond the scope of this report, we present five that NSEs we interviewed most engaged with and are reflective of common challenges across various schemes. Understanding the structures and accessibility of these programmes is crucial to both appreciating the full extent of the work NSEs undertook, and areas of potential policy improvement. Findings reveal that NSEs frequently bore the financial and logistical costs of resettlement, and were confronted with structural barriers such as the need for identity or employment documents, or changing eligibility criteria. In most cases, these programmes were extensions of, or uses of, pre-existing immigration schemes available to asylum seekers, or Afghans generally, and which newly announced quotas include those applicants already in the pipeline prior to the crisis.<sup>349</sup>

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<sup>347</sup> Author interview with Fárnoosh Hāshemian, 27 February 2023.

<sup>348</sup> Written author interview with Queralt Puigoriol, 15 April 2023.

<sup>349</sup> Author interview with Asma Faizi, 25 October 2022.



## a. Canada

In July 2021, Canada announced a special programme to resettle Afghans who were ‘integral’ to Canada’s efforts in Afghanistan.<sup>350</sup> It later expanded its regular resettlement programme to include 20,000 Afghans in mid-August 2021; and in late September 2021, the Canadian government committed to resettling a total of at least 40,000 Afghans through a mix of government and private sponsorship pathways.<sup>351</sup> The expansion of its programmes was to include Afghan human rights defenders (HRD) and vulnerable Afghans through the ‘Special Humanitarian Program’ (SHP).<sup>352</sup> As of October 2022, at the time interviews were conducted for this report, understanding of the SHP as a whole was that potential beneficiaries could be referred to the programme via Front Line Defenders, ProtectDefenders.eu, and UNHCR.<sup>353</sup>

Two pressing issues at the time of the SHP creation, however, were: (a) accessibility to the programme; and (b) transparency of information and processes. Interviewees expressed frustration at how to access the SHP and described the process as ‘opaque’.<sup>354</sup> For instance, while the Canadian government’s website indicates that referrals to the SHP under the ‘Government-assisted refugees’ pathway ‘must be’ made through Front Line Defenders, ProtectDefenders.eu and UNHCR, one interviewee has indicated that referrals may also be made by the US government and NATO and that ‘no one knew how to get people in through those referral doors’.<sup>355</sup> Furthermore, the limit of 15,000 Afghan nationals to be resettled under the SHP, with 8,000 under the government-assisted refugees pathway is also not mentioned on the website.<sup>356</sup> Frustration was also expressed

350 City of Toronto, “Afghan Refugee Resettlement”, <https://www.toronto.ca/community-people/moving-to-toronto/refugee-resettlement-program/afghan-refugee-resettlement/>.

351 City of Toronto, “Afghan Refugee Resettlement”; Refugee Sponsorship Training Program, “Information from IRCC on Supporting Afghan Nationals”, <https://www.rstp.ca/en/refugee-sponsorship/latest-policy-program-update/information-from-ircc-on-supporting-afghan-nationals/>; Reuters, “Canada to accept 20,000 vulnerable Afghans such as women leaders, human rights workers”, 13 August 2021, <https://www.reuters.com/world/canada-accept-20000-vulnerable-afghans-such-women-leaders-human-rights-workers-2021-08-13/>; Rick Gladstone and Ian Austen, “Canada Doubles Its Afghan Refugee Resettlement Target to 40,000 People”, *The New York Times*, 27 September 2021, <https://www.nytimes.com/2021/09/27/world/americas/canada-afghanistan-refugees.html>.

352 Government of Canada, ‘Supporting Afghan nationals: About the special programs’, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/special-measures.html>.

353 Author interview with Asma Faizi, 25 October 2022. See also Rory Stewart, *The Afghan Refugee Crisis: How to Resurrect the Global Refugee Resettlement Coalition* (Atlantic Council Europe Center, February 2022): 22, <https://www.atlanticcouncil.org/wp-content/uploads/2022/02/The-Afghan-Refugee-Crisis-.pdf>.

354 Author interview with Corey Levine, 7 November 2022.

355 Government of Canada, “Humanitarian program for Afghan nationals in need of resettlement: How the program works”, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/special-measures/how-humanitarian-program.html>, accessed 22 May 2023; Written e-mail with Corey Levine, 18 and 20 May 2022. It should, however, be noted that the Canadian government’s website indicates that its ‘Government-Assisted Refugees program’ on the whole involves referrals from UNHCR and ‘another referral organization’. See Government of Canada, “Government-Assisted Refugees program”, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/government-assisted-refugee-program.html>, accessed 22 May 2023.

356 Government of Canada, “Supporting Afghan nationals: About the special programs”; Written e-mail with Corey Levine, 20 May 2023.

at the lack of response from authorities or referring organisations.<sup>357</sup> Significantly, it was unclear to interviewees as to how beneficiaries were being selected, with some expressing that the criteria may be too narrow—“The question was, how were they selecting who would come [to Canada]?”<sup>358</sup>

The question of who a ‘human rights defender’ is and how such a person is defined and identified was concerning to NSEs. The normative definition of a HRD derives from Article 1 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.<sup>359</sup> This is also the definition applied by Front Line Defenders that endeavoured to adopt an expansive approach where HRDs eligible for referral to the Canadian programme need not have been employed by a human rights organisation, but whose peaceful work and advocacy directly resulted in risk of harm.<sup>360</sup> This definition, however, was contested by many NSEs. Legal professionals, for instance, are not typically considered to fall within the definition of a HRD:

When people refer to human rights defenders in this context, what they really mean is human rights *activists*... However, a broader definition also includes someone who supports the Rule of Law is someone who advances human rights.<sup>361</sup>

If you look at Rule of Law as one of the most important features of a resilient, viable government—that resilient, viable government is only resilient and viable to the extent that it protects the dignity and rights of the people it governs. If Rule of Law is an integral part of that—if it’s not reliable, if it’s not robust, if it’s not committed to human rights goals and objectives—you’re not going to have a viable government. You have to get really granular with this...a prosecutor’s prosecuting someone for trying to assassinate the governor in the former government structure in Asadabad is defending not only the Rule of Law, but is helping to create the

357 Author interview with Corey Levine, 7 November 2022; Author interview with Asma Faizi, 25 October 2022.

358 Author interview with Asma Faizi, 25 October 2022.

359 G.A. Res 53/144, The Declaration on Human Rights Defenders (8 March 1999). This definition was also adopted by the UN Special Rapporteur on the situation of human rights defenders as well as the Council of Europe, the European Union, the African Commission on Human’s and Peoples Rights and the Organisation for the American States. UN Special Rapporteur on the situation of human rights defenders, “How Are Human Rights Defenders Defined?”, <<https://www.protecting-defenders.org/en/content/how-are-human-rights-defenders-defined>>; Council of Europe Commissioner for Human Rights, Conclusions Of Council Of Europe Commissioner For Human Rights, Mr Thomas Hammarberg: Council Of Europe Colloquy On Protecting And Supporting Human Rights Defenders, 14 November 2006 Doc. CommDH/Speech (2006) 26 and Doc. CommDH (2006)19; European Union, Ensuring Protection-EU Guidelines on Human Rights Defenders” (2004), [https://eeas.europa.eu/sites/eeas/files/eu\\_guidelines\\_hrd\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf); African Commission on Human and People’s Rights Res 69; Organisation for American States, “Human rights defenders: Support for individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas”, Res AG/RES. 2517 (XXXIX-O/09) (San Pedro Sula 4 June 2004).

360 Author interview with Deanne Uyangoda, 28 November 2022.

361 Author interview with Imogen Canavan, 7 September 2022.

environment where that government can be viable and can protect the rights of those it governs. And that guy's on the front line.<sup>362</sup>

Specifically, interviewees opined that Afghan legal professionals were a group that did not have as much access to the international community compared to, for instance, a civil society group that worked on development issues:

[These are] people who have issued judgments, including against members of the Taliban, and done what the international community supported to uphold the rule of law. I feel strongly that they should not be effectively punished for advancing justice in [the] way that they [did].<sup>363</sup>

There are parallels between these findings and those with the Italian HCI, discussed below, where lack of clarity on definitions and processes are apparent, accessibility problematic, and where the rule of law is concerned, legal recourse in case of no response or ‘rejection’ to the programme is absent.

## b. Germany

Similarly, admission to Germany beyond the scope of its new Federal Admission Programme for Afghanistan requires approved individuals to obtain their own travel visas to neighbouring States such as Pakistan or Iran from where they will travel to Germany.<sup>364</sup> The application and fees for visa extensions if required, as well as exit permits, are also incumbent on individuals. Necessary logistical and operational support for some types of travel out of Afghanistan are provided for, as are accommodation and flights to Germany.<sup>365</sup> In a post-interview follow-up with Herta Mirea of Kabul Luftbruecke in mid-July 2023, she notes that in the past few months, the German government—through funding from Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)—only supports the cost of a one-way flight out of Afghanistan to Pakistan for individuals with a medical multiple entry visa to Pakistan, and who have supporting medical documents.<sup>366</sup> Others who are unable to obtain this visa will have to rely on their own means to travel out of Afghanistan. To this end, Kabul Luftbruecke supports land crossings from Afghanistan to Pakistan for certain groups such as single women, ‘one of the most vulnerable in Afghanistan’.<sup>367</sup>

While the ongoing efforts of Germany, and their effective operational partnership with NSEs has received some praise, initial implementation of its admissions

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362 Author interview with David Schwendiman, 10 April 2023.

363 Author interview with Imogen Canavan, 7 September 2022.

364 Author interview with Herta Mirea, 7 November 2022.

365 Author interview with Herta Mirea, 7 November 2022

366 E-mail correspondence with Herta Mirea, 14 July 2023

367 E-mail correspondence with Herta Mirea, 14 July 2023.

programme prior to August 2021 was met with frustration. Lack of clarity and changing eligibility requirements impacted team spirit within organisations and bred resentment among applicants particularly on the issue of including family members in applications.<sup>368</sup> This also impacted individual organisations’ ability to prepare and plan in advance. For instance, the initial requirement of a ‘concrete threat’ viz. eligibility to relocate to Germany was problematic:

We [would have applied] for German visas long before, but only until [about] a week before the takeover of Kabul did the Ministry of Interior no longer ask for [proof of] a concrete threat. Until then, we had to prove that there’s a concrete threat. But that was a problem because the threat was not yet there. So we did not meet the criteria for an application. And only the week before they said “OK, now you get the visa if you work for a German development agency or the military, you have the right to be relocated/evacuated to Germany.” So that was a problem.<sup>369</sup>

The definition of ‘family’ further restricted inclusion of family members who did not fit the normative definition that typically points to a spouse and minor unmarried children.<sup>370</sup> Siblings, parents and other family elders, are among those who may have lived under the same roof, and whose lives were intricately connected, were often found to be ineligible.<sup>371</sup> Unmarried applicants, in particular, were unable to include any family members in their applications for evacuation. In such cases, NSEs had to actively seek alternative pathways for ineligible family members such as educational scholarships. The Germany Bundestag established a Committee of Inquiry on 8 July 2022 to examine the events in connection with their withdrawal, including the evacuation of German and locally-employed staff, and “other affected individuals.”<sup>372</sup>

### c. Italy

First launched in December 2015, the Italian ‘Corridoi Umanitari – Humanitarian Corridors Initiative’ (Italian HCI) offers a legal pathway for asylum seekers and refugees to reach safety.<sup>373</sup> It brings together civil society actors—both organisations and individuals—supported by the Italian government, to offer refuge to the most vulnerable under a model of private sponsorship that incorporates

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368 Author interview with Ellinor Zeino, 17 September 2022.

369 Author interview with Ellinor Zeino, 17 September 2022.

370 Federal Ministry of the Interior and Community Federal Foreign Office, “FAQs on the humanitarian federal admission programme for Afghanistan”, <https://www.bundesaufnahmeprogramm.afghanistan.de/bundesaufnahme-en/bundesaufnahmeprogramm-faq/-/2557920>.

371 Author interview with Jawadia Qurbany, 10 February 2023.

372 “1st Committee of Inquiry (Afghanistan)”, *Deutsche Bundestag*, <https://www.bundestag.de/en/committees/bodies/inquiry/1inquiry>.

373 Benedetta Panchetti and Ilaria Schnyder von Wartensee, “The Humanitarian Corridors Experience”, March 2020, [https://www.researchgate.net/publication/339916349\\_THE\\_HUMANITARIAN\\_CORRIDORS\\_EXPERIENCE](https://www.researchgate.net/publication/339916349_THE_HUMANITARIAN_CORRIDORS_EXPERIENCE)

resettlement and integration programmes. A Memorandum of Understanding (MoU) between specific civil society organisations, mostly faith-based ones, and the Italian government allows for these organisations to select and vet a limited number of refugees who travel to Italy on a territorially-limited visa, and to receive beneficiaries on arrival where they then lodge an application for international protection and enter integration programmes across the country.<sup>374</sup>

Italy's latest programme for Afghanistan employs this model. In this agreement, 1,200 Afghans will be transferred to Italy to seek international protection. *Protocollo Di Intesa Per La Realizzazione Del Progetto “Corridoi Umanitari/ Evacuazioni Per L’Afghanistan”* (HCI Afghanistan) supports Afghans who find themselves in Pakistan, Iran, and any other first country of asylum or transit.<sup>375</sup> In addition to faith-based organisations, the latest also includes Associazione Ricreativa e Culturale Italiana (ARCI), the UNHCR, and IOM as signatories to the MoU.

Two groups of persons are eligible for the programme—those, *prima facie*, recognised by the UNHCR as refugees requiring international protection and have registered with the UNHCR; and Afghans who do not fall within the former category but are in ‘clear need’ of international protection.<sup>376</sup> A quota is set for each party to the agreement with the faith-based organisations and ARCI accepting 800 persons in total.<sup>377</sup> The Italian government, through UNHCR, shall be responsible for the remaining 400. Like previous agreements, each party with their own resources is responsible for the identification, reception and integration of persons in the programme for a minimum of one year.<sup>378</sup> HCI Afghanistan can therefore be considered a ‘mixed model’ of the traditional resettlement programme and the private sponsorship programme.<sup>379</sup>

The Italian HCI has received widespread support with other EU members

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374 Carola Ricci, ‘The Necessity for Alternative Legal Pathways: The Best Practice of Humanitarian Corridors Opened by Private Sponsors in Italy’ 21 *German Law Journal* (2020): 268-271; Working Group of the Humanitarian Corridors Project, ‘Humanitarian Corridors: Implementation Procedures for their extension on a European Scale’ 2019: 19-33. [https://www.humanitariancorridor.org/wp-content/uploads/2019/12/REPORT\\_ENG\\_WEB.pdf](https://www.humanitariancorridor.org/wp-content/uploads/2019/12/REPORT_ENG_WEB.pdf).

375 Ministero degli Affari Esteri e della Cooperazione Internazionale, Ministero dell’Interno e Conferenza Episcopale Italiana e Comunità di Sant’Egidio, Federazione delle Chiese Evangeliche e Tavola Valdese, ARCI e INMP, OIM, e UNHCR, “Protocollo Di Intesa Per La Realizzazione Del Progetto “Corridoi Umanitari/Evacuazioni Per L’Afghanistan””, art. 5(1), 4 November 2021, [https://www.interno.gov.it/sites/default/files/2021-11/protocollo\\_corridoi.pdf](https://www.interno.gov.it/sites/default/files/2021-11/protocollo_corridoi.pdf) (‘HCI Afghanistan’); see further Logo Ministero degli Affari Esteri e della Cooperazione Internazionale, “Firma del protocollo per i corridoi umanitari dall’Afghanistan” 4 November 2021, [https://www.esteri.it/it/sala\\_stampa/archivionotizie/comunicati/2021/11/firma-del-protocollo-per-i-corridoi-umanitari-dallafghanistan/](https://www.esteri.it/it/sala_stampa/archivionotizie/comunicati/2021/11/firma-del-protocollo-per-i-corridoi-umanitari-dallafghanistan/).

376 HCI Afghanistan, arts. 2-3(2).

377 HCI Afghanistan, art. 4(c).

378 HCI Afghanistan, arts. 4(a), 4(e)-4(f).

379 Author interview with Cecilia Pani, 25 November 2022.

implementing their respective versions.<sup>380</sup> Parallels have been drawn with the Canadian private sponsorship programme with the distinction that assessment of vulnerability is performed for eligibility to the Italian HCI.<sup>381</sup> The agreements between the Italian government and relevant Community Service Organisations (CSOs), however, merely offer general guidance as to the process of identification and selection of beneficiaries. It is incumbent on the organisations to create their own assessments of risks and vulnerabilities, and ultimately identify beneficiaries to the programme.

To this end, Sant’Egidio had previously partnered with local organisations on site that have direct contact and greater familiarity with potential beneficiaries.<sup>382</sup> In the case of HCI Afghanistan, sources who identified potential beneficiaries were relatives already resettled in Italy, as well as those who had previously worked in Afghanistan such as journalists and military personnel.<sup>383</sup> These connections and ties to Italy reflect potential for integration and provision of safe shelter; and are significant considerations in Sant’Egidio’s selection of beneficiaries.<sup>384</sup> While this criterion does not exclude those without an existing network in Italy per se, its implementation forms part of practical considerations such as the potential for successful integration as well as filtering the overwhelming number of requests for assistance. As Cecilia Pani explains:

Because we could only take a very small group, let’s say a hundred people, we of course had to use an extra criteri[on] after [an assessment of risk]. And the extra criteri[on] was that [they had] families who could welcome them...We need that the people who come to Italy have a proper welcome integration path. If we didn’t have proper shelter [for them], we couldn’t let them come.<sup>385</sup>

Although the Italian HCI has been lauded, its shortcomings have impacted the rule of law. It is a programme in which ‘the risk of emphasising suffering over rights and of substituting charity for the law’ is high.<sup>386</sup> Where vulnerability is an

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380 See Maurizio Ambrosini and Ilaria Schnyder von Wartensee, “Actions Speak Louder than Claims: Humanitarian Corridors, Civil Society and Asylum Policies” 48(7) *Journal of Ethnic and Migration Studies* (2022): 3966; Francesco Rolando, “Humanitarian Corridors to Italy: An Interview with Professor Paolo Naso,” 39(2) *Harvard International Review* (Spring, 2018): 64-67; European Commission, “Communication from the Commission on a New Pact on Migration and Asylum,” Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final, 23 September 2020, Section 6.6 “Developing legal pathways to Europe”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609>.

381 Francesco Rolando, “Humanitarian Corridors to Italy: An Interview with Professor Paolo Naso”: 66-67.

382 Author interview with Cecilia Pani, 23 November 2022. See also Katia Bianchini, “Humanitarian Admission to Italy through Humanitarian Visas and Corridors” in *Humanitarian Admission to Europe: The Law between Promises and Constraints*, eds. Marie-Claire Foblets and Luc Leboeuf, Schriften zum Migrationsrecht, Vol. 30 (Baden-Baden: Nomos, 2020): 166-167.

383 Author interview with Cecilia Pani, 23 November 2022.

384 Author interview with Cecilia Pani, 25 November 2022.

385 Author interview with Cecilia Pani, 25 November 2022. See also Katia Bianchini, “Humanitarian Admission to Italy through Humanitarian Visas and Corridors”: 172

386 Katia Bianchini, “Humanitarian Admission to Italy through Humanitarian Visas and Corridors”: 181.

important criterion for admission to the programme, no legally binding process is in place. Because the process of selection is not subject to legal oversight, there is no recourse in the case of ‘rejection’ nor does there exist an obligation to provide reasons for non-admission. The programme, while allowing access to some, forgoes due process guarantees. Furthermore, this assumes that being able to contact mandated organisations in the first place is transparent and accessible.<sup>387</sup>

The programme has also been criticised for privileging those who have the means to travel, to be able to reach the focal point of CSOs.<sup>388</sup> Furthermore, the issuance of a visa to Italy is dependent on a person’s ability to obtain a travel visa to the relevant third country, underscoring the ‘legal Catch-22’ of relocation in order to apply for asylum.<sup>389</sup> This excludes groups, particularly those with disabilities and limited financial means.<sup>390</sup> Additionally, visas to Pakistan, for instance, are usually only secured through third party agents who demand a high fee.<sup>391</sup> Again, this privileges those with financial means and connections. Furthermore, the wait for admission to the programme and the time taken to process such admissions often exceed the validity of visas to third countries.

Additionally, while CSOs to the HCI Afghanistan programme have fulfilled their quotas of the agreement, at least as of the end of November 2022, the Italian government had yet to begin the process for fulfilling their part of the quota. To this end, UNHCR selects beneficiaries on behalf of the Italian government, within the traditional resettlement process. Their procedures and criteria differ to those of the CSOs and ‘that means mainly people who have been living in [a] third country for a long time [are selected]... [the process] takes 2 or 3 years, mainly.’<sup>392</sup> CSOs have advocated for the Italian government to transfer responsibility of selection to them, so that refugees may find safety and stability sooner.<sup>393</sup>

## d. Spain

In contrast to many other jurisdictions, Spain does not have a dedicated immigration or resettlement programme for Afghans. Instead, those seeking protection have to submit a request to a Spanish embassy or consulate outside Afghanistan for transfer to Spain in order to seek protection pursuant to Article

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387 Reports of persons demanding money to provide the contact e-mail addresses of Sant’Egidio also surfaced. Author interview with Cecilia Pani, 25 November 2022.

388 Author interview with Chiara Parolin, 25 November 2022. While beneficiaries of previous programmes were already in refugee camps, HCI Afghanistan applies to those already in third States.

389 Author interview with Cecilia Pani, 25 November 2022. *See above*, Part III, Section D, i. “The Convention’s Refugee”.

390 Author interview with Chiara Parolin, 25 November 2022.

391 Author interview with Anonymous Development Worker, 14 November 2022. It is also the experience of one author of this report that applications for visas to Pakistan through direct online application were frequently met with no response or were unsuccessful.

392 Author interview with Cecilia Pani, 25 November 2022.

393 Author interview with Cecilia Pani, 25 November 2022.



38 of Law 12/2009.<sup>394</sup> Applicants are then scheduled for an interview at the relevant embassy, whose claims are assessed for credibility in terms of fear of persecution, and whose requests for transfer to Spain are then approved or denied. In this sense, the process is similar to the Italian HCI where approved applicants enter the usual asylum process on arrival in the respective territories. Approved applicants do not typically benefit from State-sponsored flights to reach Spain and have to rely on their own resources to secure flights.<sup>395</sup> Challenges for both the asylum seeker and NSEs are many and include the long wait times, the ability to travel to an embassy outside of Afghanistan, and prior to the summer of 2022, procedural safeguards relating to the management of such requests as well as the way in which interviews at the Spanish embassies were conducted.<sup>396</sup>

According to one interviewee, Afghan asylum seekers to Spain in Islamabad were not offered certified or official interpreters during their interviews at the Spanish Embassy in Islamabad. This, however, changed with the appointment of the new Spanish ambassador, José Antonio de Ory, in June 2022.<sup>397</sup> Afghan asylum seekers are now provided with interpreters for their interviews at the Spanish Embassy in Islamabad; and are attended to on a first-come-first-served basis. The wait for such interviews, however, may extend to two or three years.<sup>398</sup> Significantly, the criteria for issuing a humanitarian visa hinges not only on being able to demonstrate a well-founded fear of persecution in Afghanistan, but may also depend on demonstrating fear of persecution in the third country Afghans find themselves in such as Pakistan or Iran.<sup>399</sup> This impacts the application of international refugee law where ‘[a]s a rule, a refugee claim is assessed against the country of the applicant’s nationality, or habitual residence if s/he is stateless... the primary concern in determining a refugee claim is the objective risk of being persecuted, that is, the situation prevailing in the *country of origin*.’<sup>400</sup>

## e. USA

Three programmes offer the possibility for Afghans to relocate to the US—the Special Immigrant Visa (SIV), the US Refugee Admissions Program (USRAP), and

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394 Article 38, Law 12/2009 of 30 October 2009, regulating the law of asylum and subsidiary protection, Official Gazette No 263, 31 October 2009

395 Written author interview with Queral Puigoriol, 2 April 2023.

396 Author interview with Inma Orquin, 12 October 2022.

397 Written author interview with Queral Puigoriol, 2 April 2023; “José Antonio de Ory, new Spanish Ambassador to Pakistan,” *The Diplomat in Spain*, 15 June 2022, <https://thediplomatinspain.com/en/2022/06/jose-antonio-de-ory-new-spanish-ambassador-to-pakistan/>.

398 Written author interview with Queral Puigoriol, 2 April 2023.

399 Written author interview with Queral Puigoriol, 2 April 2023.

400 *Advisory Opinion by UNHCR on the Interpretation of the Refugee Definition*, 23 December 2004, ¶ 16-17, <https://www.refworld.org/docid/4551c0374.html> (emphasis added).

Humanitarian Parole.<sup>401</sup> While the SIV and USRAP programmes are specifically catered to Afghan applicants, all three have been characterised by excessive delays in processing times.<sup>402</sup> Furthermore, existing backlogs in the SIV programme were compounded by the impact of COVID-19 and the suspension of interviews at the US embassy in Kabul.<sup>403</sup> Indeed the DoS report released in June 2023 specifically notes the existence of a backlog in processing SIV and other applications from Afghans long before the start of the withdrawal, and notes that the Trump administration made ‘no senior-level or interagency effort to address the backlog of consider options for other at-risk Afghans despite its commitment to a military withdrawal.’<sup>404</sup>

### Special Immigrant Visa (SIV)

The Afghan SIV programme was launched in 2009 and in June 2021 was expanded to include those working as contractors and subcontractors to the US government, and which process was expedited for Afghans in the lead-up to the planned withdrawal.<sup>405</sup> SIV status was the most favourable status for Afghans seeking to leave Afghanistan in August 2021.<sup>406</sup> The US prioritised people with SIV status and their families,<sup>407</sup> as did several NSEs. Veterans groups were particularly motivated because Afghan colleagues in the military typically qualified for SIV in addition to other employees and contractors.<sup>408</sup>

At the time of writing, the number of SIV applications have skyrocketed to seven

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401 See US Department of State, “Special Immigrant Visas (SIVs) for Iraqi and Afghan Translators/ Interpreters,” <https://travel.state.gov/content/travel/en/us-visas/immigrate/siv-iraqi-afghan-translators-interpreters.html>; US Department of State, “Special Immigrant Visas for Afghans - Who Were Employed by/on Behalf of the U.S. Government,” <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immig-visa-afghans-employed-us-gov.html>; US Department of State, “Afghan Arrivals under the U.S. Refugee Admissions Program,” <https://www.state.gov/afghan-arrivals-under-the-u-s-refugee-admissions-program/>.

402 Anoush Baghdassarian and Todd Carney, “Special Immigrant Visas for the United States’ Afghan Allies: Lessons Learned from Promises Kept and Broken,” *Lawfare*, 19 August 2021, <https://www.lawfareblog.com/special-immigrant-visas-united-states-afghan-allies-lessons-learned-promises-kept-and-broken>; Winston & Strawn LLP, “Winston Sheds Light on U.S. Failure to Support Afghan Refugees After Military Withdrawal,” 22 March 2023, <https://www.winston.com/en/where-we-are/north-america/los-angeles.html#/en/thought-leadership/winston-sheds-light-on-us-failure-to-support-afghan-refugees-after-military-withdrawal.html?aj=ov&parent=3015&idx=28>; National Immigration Forum, “Explainer: The Refugee Resettlement Backlog and How to Rebuild the Pipeline,” 15 November 2021, <https://immigrationforum.org/article/explainer-the-refugee-resettlement-backlog-and-how-to-rebuild-the-pipeline/>.

403 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*: 7.

404 “After Action Review on Afghanistan (January 2020-August 2021),” *US Department of State*: 13. The report does note that the Biden administration then took steps to accelerate the SIV process. Part of this backlog came from COVID-era restrictions preventing in-person interviews at the US Kabul Embassy for SIV visas—a required part of the process. While the Trump administration processed visa applications for those who had completed their interviews, the backlog at the time of the withdrawal was exacerbated by those COVID-related restrictions resulting in a significant stall of issuing visas in the lead-up to and in the midst of the withdrawal. Tara Subramaniam, “Fact checking Jake Sullivan’s claim Trump admin didn’t process Afghan visas for a year,” *CNN*, 25 August 2021, <https://www.cnn.com/2021/08/25/politics/afghan-visas-trump-admin-fact-check/index.html>.

405 H.R. 3985 Averting Loss of Life and Injury by Expediting SIVs (ALLIES) Act, passed by the House of Representatives on 22 July 2021.

406 Author interview with Anh-Thu Nguyen, 3 February 2023.

407 Eligible family members included spouses and children.

408 Author interview with Anh-Thu Nguyen, 3 February 2023; Author interview with Zachery Kallenborn, 22 September 2022.

times more in the pipeline than in the summer of 2021.<sup>409</sup> The application process is extensive and cumbersome, and requires numerous pieces of information—in particular, a favourable written recommendation from a General or Flag Officer in the US Armed Forces chain of command, or by the Chief of Mission (or designee) at the US Embassy in Kabul for employment verification. Obtaining this letter was not always straightforward. In many instances, applicants were unable to locate relevant persons for this recommendation because of the passage of time; or because employment records were not well archived if at all.<sup>410</sup> Furthermore, the SIV programme was geared towards military personnel, making it difficult for non-military personnel to qualify despite working for US authorities:

The problem with the SIV process was not just that it was a one-size-fits-all—you had to make some of these accommodations like we did with our [embassy] staff—it was that it was deliberately difficult to do. And it was made deliberately difficult to do because the US as far back as 2009...didn't want it to look like they were providing a parachute for people to get out of Afghanistan... There was still that burdensome 14-plus step process that had been instituted by the previous administration—in my view, instituted deliberately to discourage people from seeking Special Immigrant Visas...<sup>411</sup>

So cumbersome is this verification process that the Department of Defense (DoD) established ‘Project Rabbit’ in a bid to simplify the procedure.<sup>412</sup> The opaqueness of Project Rabbit and the employment verification process, however, has led to the International Refugee Assistance Project filing action against the DoD in August 2022 on the ground of violating the Freedom of Information Act.<sup>413</sup> Furthermore, an interview at a US Embassy is required for the processing of the SIV. Even before the urge to evacuate from Afghanistan intensified in mid-2021, processing an SIV application took an average of 996 days even though the Afghan Allies Protection Act stipulates 9 months of processing time upon receipt of a complete application.<sup>414</sup> The SIV process has been described as ‘intentionally

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409 Jack Detsch and Robbie Gramer, “Afghan Special Immigrant Visas Surge Amid Taliban Crackdown”, *Foreign Policy*, 8 March 2023, <https://foreignpolicy.com/2023/03/08/afghanistan-special-immigrant-visa-biden-taliban-crackdown/>.

410 Katie Weidenboerner Deppen, “Pitt people help with Afghan resettlement efforts,” *Pittwire*, 18 August 2021, <https://www.pitt.edu/pittwire/features-articles/pitt-people-help-afghan-resettlement-efforts>.

411 Author interview with David Schwendiman, 10 April 2023.

412 Under Secretary of Defense, Letter to Tammy Duckworth, 28 October 2021, [https://www.duckworth.senate.gov/imo/media/doc/21\\_09\\_28%20-%20DOD%20Response%20to%20Senator%20Duckworth%20Letter%20to%20State%20and%20DOD%20-%20Afghan%20SIV%20Program%20Employment%20Verification%20Alternatives.pdf](https://www.duckworth.senate.gov/imo/media/doc/21_09_28%20-%20DOD%20Response%20to%20Senator%20Duckworth%20Letter%20to%20State%20and%20DOD%20-%20Afghan%20SIV%20Program%20Employment%20Verification%20Alternatives.pdf).

413 International Refugee Assistance Project, Inc. vs U.S. Department of Defense, “Complaint for Declaratory and Injunctive Relief for Violation of the Freedom of Information Act, 5 U.S.C.”, Case 1:22-cv-06513, 1 August 2022, [https://refugeerights.org/wp-content/uploads/2022/08/IRAP-Complaint-agst-DOD-re-Project-Rabbit-to-FILE\\_Redacted-1.pdf](https://refugeerights.org/wp-content/uploads/2022/08/IRAP-Complaint-agst-DOD-re-Project-Rabbit-to-FILE_Redacted-1.pdf).

414 US Department of State, *Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program*, January 2021, <https://travel.state.gov/content/dam/visas/SIVs/Afghan-Public-Quarterly-Report-Q1-Jan-2021.pdf>.

made difficult, arbitrary and opaque, to discourage people from applying.<sup>415</sup>

For those who had SIV status and a letter or the visa to demonstrate that fact, passage into HKIA compound in August 2021 was easier than for those who did not have such documentation.<sup>416</sup>

### US Refugee Admissions Program (USRAP)

Applicants to the USRAP are those ineligible for SIV. Within USRAP, the P1 programme allows for individual Afghans facing persecution to be referred for refugee resettlement to the US via UNHCR, a US embassy, or ‘a certified NGO’.<sup>417</sup> The P2 programme is also accessed via referrals but is instead tailored to those who do not meet SIV requirements or were employed by a US-based NGO or media organisations. Because the P1 and P2 programmes are refugee programmes, application processing can only commence once the applicant is outside Afghanistan. P1 and P2 applicants are also not part of any evacuation scheme.<sup>418</sup>

[P1 applicants] had to be outside of Afghanistan. They had to be somewhere else... So they were operating at a disadvantage in any case because a lot of the material that was required—identification material, employment records, that sort of stuff—I mean if you’re hauling a garbage sack with everything that you own because that’s all you could get, maybe you recovered enough documents to make that...<sup>419</sup>

Like the SIV, the P2 programme requires proof of employment. This presented similar obstacles, leading to a voluntary group at the University of Pittsburgh to assist in seeking out previous employers who could provide the necessary documentation.<sup>420</sup> The extensive delays in USRAP, even for those with required documents, however, have presented a surge in risks and vulnerability as displaced Afghans in Pakistan and elsewhere have waited for more than a year and a half for their applications to be processed.<sup>421</sup> At the time of interviews, interviewees noted that processing for USRAP are ‘not moving’.<sup>422</sup>

415 David Schwendiman, “Afghanistan Haunts Me”, *The Salt Lake Tribune*, 17 August 2021, <https://www.sltrib.com/opinion/commentary/2021/08/17/david-schwendiman/>.

416 However, one interviewee noted that this was no guarantee.

417 US Department of State, “Afghan Arrivals under the U.S. Refugee Admissions Program”, <https://www.state.gov/afghan-arrivals-under-the-u-s-refugee-admissions-program/>.

418 International Refugee Assistance Project, “Am I eligible for the new Afghan refugee program?”, <https://support.iraplegalinfo.org/hc/en-us/articles/4404608797588-Am-I-eligible-for-the-new-Afghan-refugee-program-#:~:text=P%2D1%2C%20or%20Priority%201,for%20a%20P%2D1%20referral>.

419 Author interview with David Schwendiman, 10 April 2023.

420 Rashi Ranjan, “GSPIA team helps Afghans apply for resettlement visas”, *The Pitt News*, 7 September 2021, <https://pittnews.com/article/166720/news/gspia-team-helps-afghans-apply-for-resettlement-visas/>.

421 Rahim Faiez, “Afghan refugees in Pakistan protest delay in US resettlement”, *Associated Press*, 26 February 2023, <https://apnews.com/article/united-states-government-pakistan-7574d84a607ba284f362119f7863533b>.

422 Author interview with Fárnoosh Hashemian, 27 February 2023. In one of our co-author’s experience, this has since changed. Processing for USRAP programmes are taking place, albeit at a slow pace.

## Humanitarian Parole (HP)

Because of slow processing times for both SIV and USRAP, and because of their restrictive criteria, many in the post-withdrawal period saw HP as a potential route for Afghans seeking safety in the US. HP is not an immigration or refugee programme but a temporary and discretionary authorisation to enter the US that can be granted for humanitarian or significant public benefit reasons. It has been described as ‘a catchall status that lets foreigners enter the United States under exceptional circumstances.’<sup>423</sup> USCIS usually receives approximately 2,000 applications annually, with 500-700 approvals for people seeking urgent medical treatment or to visit a dying relative.<sup>424</sup> During the evacuation process, those numbers surged. The same has been used in the past for relocating larger numbers of people out of crisis or conflict settings—for example Vietnam, Iraq, Nicaragua, or Cuba.<sup>425</sup>

Each individual application, however, costs a prohibitive US\$575 in application fee and must be sponsored by a US resident. Significantly, HP denials cannot be appealed, although a new application can be lodged if ‘significant new facts’ arise.<sup>426</sup>

The HP process was a significant focus of groups working in the US. Interviewees noted both the long waiting times as well as the high application fee.<sup>427</sup> For a family of 5 to 10 members, the price was a significant barrier. While fee waivers could be requested, this extended processing times. The American Immigration Council notes that between 1 March 2021 and 21 March 2022, the US received over US\$19 million in application fees from Afghan applications, with over 42,000 of such applications pending between 1 January 2020 and 6 April 2022.<sup>428</sup>

While Afghan applications were initially expedited, this changed in September 2021 for those who remained in Afghanistan, and was implemented without notice to the public. The severe lack of preparedness to ‘adjudicate the high volume of humanitarian parole applications from Afghans who *did not make it on those early flights to the United States*’ coupled with changing protocols have contributed to these excessive delays.<sup>429</sup>

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423 Sean Sullivan, Cleve R. Wootson Jr., Nick Miroff, “Afghan resettlement raises the question: Who is coming to the U.S.?”, *The Washington Post*, 5 September 2021, [https://www.washingtonpost.com/politics/afghan-evacuees-resettle-us/2021/09/05/a78b2538-0c2f-11ec-aea1-42a8138f132a\\_story.html](https://www.washingtonpost.com/politics/afghan-evacuees-resettle-us/2021/09/05/a78b2538-0c2f-11ec-aea1-42a8138f132a_story.html).

424 Miriam Jordan, “Afghans who bet on fast path to the U.S. are facing a closed door,” *The New York Times*, 16 February 2022, <https://www.nytimes.com/2022/02/16/us/afghan-refugees-humanitarian-parole.html>.

425 Lauren DeLaunay Miller, “Climbing got her out of Afghanistan, She needs lawmakers to let her stay in the U.S.,” *NPR*, 27 August 2023, <https://www.npr.org/2023/08/23/1195479128/biden-immigration-taliban-humanitarian-parole>.

426 U.S. Citizenship and Immigration Services, “Fact Sheet: Humanitarian Parole”, 28 January 2010, available at American Immigration Lawyers Association, <https://www.aila.org/>.

427 Author interview with Fārnoosh Hāshemian, 27 February 2023.

428 American Immigration Council, “Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans”, 16 March 2023, <https://www.americanimmigrationcouncil.org/foia/uscis-failures-afghans-parole>.

429 American Immigration Council, “Agency Failures Make Obtaining Humanitarian Parole Almost Impossible for Afghans” (emphasis added).

## D. International Humanitarian Law

In the context of military withdrawal vis-à-vis the duty to protect, no discussion will be complete without examination of International Humanitarian Law (IHL). In addition to customary international law, IHL is governed by several instruments, most significantly the Geneva Conventions and their Additional Protocols. While IHL neither regulates nor reasons the morality for waging war, it does, as in the *Just War* tradition, expound on both the conduct of war and to a certain extent post-conflict obligations. International courts, for instance, have recognised that ‘each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting.’<sup>430</sup> IHL, however, offers little when it comes to the termination of war; and in particular, the ‘legal implications of withdrawals from armed conflict and the contours of the obligations relevant to States in doing so.’<sup>431</sup> This section will discuss the application of IHL as it relates to the withdrawal of foreign military forces that occurred in August 2021, and the ensuing legal obligations of participating States if any. While this report does not seek to make definitive determinations, we aim to present some of the most relevant debates that occur within this space, in order to ascertain the possible obligations that apply to the withdrawing parties. These discussions illustrate the complexity of the situation at hand that warrants further investigation.

### i. International Armed Conflict, Non-International Armed Conflict, and Occupation

Ascertaining the existence of an international armed conflict (IAC), a non-international armed conflict (NIAC), and occupation is crucial to the application of IHL. Common Articles 2 (CA 2) and 3 (CA 3) of the Geneva Conventions, and Additional Protocols I (AP I) and II (AP II) among other provisions, would apply.<sup>432</sup> Furthermore, where a NIAC is found, assessments as to whether ‘internationalisation’ of the armed conflict has occurred is critical to determining whether the rules of an IAC apply.<sup>433</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that this occurs when ‘overall control’ of an

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430 ICTY, *Prosecutor v. Duško Tadić a/k/a “DULE”*, Appeals Chamber, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, Case no. IT-94-1-AR72, 2 October 1995, ¶ 67.

431 Paul Strauch and Beatrice Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”, 102(914) *International Review of the Red Cross* (December 2021): 923.

432 CA 2 and 3. The former applies to IACs and situations of occupation, while the latter governs NIACs. For a discussion on classification of conflict, see, generally, Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict” in *Research Handbook on International Conflict and Security Law*, eds. Christian Henderson and Nigel White (Cheltenham and Northampton, MA, Edward Elgar, 203): 256-313; Rogier Bartels, “The Classification of Armed Conflicts by International Criminal Courts and Tribunals”, *International Criminal Law Review* 20 (2020): 596.

433 The term ‘internationalised conflict’, and correspondingly ‘internalised conflict’, can be employed either descriptively or in legal fashion, in the sense that either can transform a *prima facie* NIAC to IAC or vice versa. See Marko Milanovic, “The end of application of international humanitarian law”, *International Review of the Red Cross* 96 (893) (2014): 181-183; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016): 112.

armed group that is party to the *prima facie* NIAC is exercised.<sup>434</sup>

In the case of Afghanistan, the International Criminal Court (ICC) suggests that it is ‘common knowledge’ that ‘the people of Afghanistan have suffered immensely, due to a series of armed conflicts and a succession of security crises’ in the last four decades.<sup>435</sup> However, there remains no consensus among the legal community as to whether the armed conflict from October 2001 was an IAC at all, and when occupation by foreign military forces ended in Afghanistan.<sup>436</sup> Some legal scholars suggest that the armed conflict in Afghanistan went through phases such that the character of the conflict changed from NIAC prior to US-led military action; an IAC upon US-led military action and occupation; and again NIAC post-occupation.<sup>437</sup> Furthermore, the identification of isolated acts of the use of force and military operations may also receive separate and different classification; the killing of Ayman al-Zawahiri in a drone strike by the CIA on 2 August 2022 is case in point.<sup>438</sup>

The progressively decreasing numbers of foreign military troops and operations within Afghanistan over the years, and the installation and functioning of a democratically elected government in Afghanistan, however, adds credence to the characterisation of the armed conflict as a NIAC upon the establishment of

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434 ICTY, *Prosecutor v. Duško Tadić a/k/a “DULE”*, Case No. IT-94-1, Appeals Chamber, Judgment, 15 July 1999, ¶ 84, 120-131, 145 (“*Tadić* Appeal Judgment”); ICTY, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017, Vol. 1, ¶ 238. The test for ‘overall control’ is distinct to ‘effective control’. See ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986 (“*Nicaragua* Judgment”), ¶ 109–117; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007 (“*Bosnia Genocide* Judgment”), ¶ 398–415; *Tadić* Appeal Judgment, ¶ 137. It should, however, be highlighted that the development of IHL within international courts such as the ICTY serves the purpose of attributing individual criminal responsibility, and as such should be applied with care when ascertaining the laws of State responsibility. See Djemila Carron, “When is a Conflict International? Time for new control tests in IHL”, *International Review of the Red Cross* 98 (3) (2016): 1025-1026; Rogier Bartels, “The Classification of Armed Conflicts by International Criminal Courts and Tribunals”, *International Criminal Law Review* 20 (2020): 600-601.

435 ICC, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, ICC-02/17, 12 April 2019, ¶ 15.

436 Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, “International Law and armed non-state actors in Afghanistan”, *International Review of the Red Cross*, 93(881) (March 2011): 51-52. See also U.S. Department of Justice, “Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees”, 22 January 2002; The White House, “Humane Treatment of al Qaeda and Taliban Detainees”, 7 February 2002, Declassified in full 17 June 2004; c.f. W. Hays Parks, “Combatants”, in *The War in Afghanistan: A Legal Analysis*, ed. Michael N. Schmitt, International Law Studies, Vol. 85, US Naval War College International Studies, (Naval War College Press, 2009): 258; *Hamden v. Rumsfeld*, 126 S. Ct. 2749 (2006) where the Supreme Court held that the conflict with al-Qaeda was of non-international character.

437 Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, “International Law and armed non-state actors in Afghanistan”: 51-52.

438 Rule of Law in Armed Conflicts, Geneva Academy of International Humanitarian Law and Human Rights, “Non-International Armed Conflicts in Afghanistan”, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan#collapse2accord>.



an Afghan government following the US-led invasion.<sup>439</sup> Furthermore, there was a sharp decrease in the number of international troops following the signing of the Doha Agreement.<sup>440</sup> By July 2021, 4,800 NATO soldiers and most European troops had left Afghanistan with the US closing its Bagram airbase at the start of the month and President Biden announcing that at least 90% of US troops had left.<sup>441</sup> In this case, CA 3 and AP II would apply although it should be noted that Afghanistan only became party to AP II in 2009 and the US has yet to ratify.<sup>442</sup>

Reports, however, point to paramilitary groups that worked at the behest of the US Central Intelligence Agency (CIA).<sup>443</sup> These groups, known collectively as National Strike Units (NSUs) were established shortly after the US-led invasion in 2001, and its personnel recruited by the CIA in order to carry out covert ‘kill-or-capture operations’ in the fight against terrorist groups.<sup>444</sup> While these paramilitary groups existed and operated with the knowledge of the Afghan government, including an agreement in 2010 to enter into a joint programme with Afghanistan’s National Directorate of Security (NDS), reports highlight that at least some of these groups were exclusively funded by the CIA.<sup>445</sup> Specifically, ‘Zero Units’ operated under the control of the CIA at least until President Biden took office in 2021, with senior Afghan officials unaware of how they operate.<sup>446</sup> NDS oversight of the Zero Units from 2010 was ‘physical’ but not ‘technical’ – ‘[Zero Units] salary was paid by Americans, their targets were given by Americans, and until the end the Americans were with these units.’<sup>447</sup> Other groups such as

439 The ICC Appeals Chamber, for instance, did not take issue with the Prosecutor’s characterisation of the armed conflict in Afghanistan as an NIAC within the issue of the application of Common Article 3 of the Geneva Conventions. ICC, “Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan”, *Situation in the Islamic Republic of Afghanistan*, Judgment, Appeals Chamber, No. ICC-02/17 OA4, 5 March 2020, ¶ 65-76; Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, Reacted, November 2020, <https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>: 267, ¶ 10-11 (Chapter 1.10).

440 Ministerie van Buitenlandse Zaken, Algemeen Ambtsbericht Afghanistan, March 2022: 12; Doha Agreement.

441 Geir Moulson and Kathy Gannon, “Most European troops exit Afghanistan quietly after 20 years”, *Associated Press*, 30 June 2021, <https://apnews.com/article/europe-afghanistan-health-coronavirus-pandemic-9c1c4f5732c032ba85865aab0338a7a3>; Congressional Research Service, “U.S. Military Withdrawal and Taliban Takeover in Afghanistan: Frequently Asked Questions”, CRS Report, 17 September 2021, <https://crsreports.congress.gov/product/pdf/R/R46879>.

442 CA 3; AP II. For a full list of parties to AP II, see ICRC International Humanitarian Law Databases, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/state-parties?activeTab=undefined>.

443 Stefanie Glinski, “How the CIA Aims to Keep a Footprint in Afghanistan”, *Foreign Policy*, 8 August 2019, <https://foreignpolicy.com/2019/08/08/how-the-cia-aims-to-keep-a-footprint-in-afghanistan-taliban-talks/>; Human Rights Watch, “They’ve Shot Many Like This”: *Abusive Night Raids by CIA-Backed Afghan Strike Forces*, October 2019, [https://www.hrw.org/sites/default/files/report\\_pdf/afghanistan1019\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/afghanistan1019_web.pdf); Mujib Mashal, “C.I.A.’s Afghan Forces Leave a Trail of Abuse and Anger,” *New York Times*, 31 December 2018, <https://www.nytimes.com/2018/12/31/world/asia/cia-afghanistan-strike-force.html>.

444 Human Rights Watch, “They’ve Shot Many Like This”: *Abusive Night Raids by CIA-Backed Afghan Strike Forces*: 10. See further, Steve Coll, *Directorate S: The C.I.A. and America’s Secret Wars in Afghanistan and Pakistan* (New York: Penguin Press, 2018).

445 Andrew Quilty and Matthew Cole, “The CIA’s Afghan Proxies, Accused of War Crimes, Will Get a Fresh Start in the U.S.”, *The Intercept*, 6 October 2021, <https://theintercept.com/2021/10/05/zero-units-cia-afghanistan-taliban/>.

446 Quilty and Cole, “The CIA’s Afghan Proxies, Accused of War Crimes, Will Get a Fresh Start in the U.S.”.

447 Fahim Abed, “Ground Zero: The Evacuation of the CIA’s Afghan Proxies Has Opened One of the War’s Blackest Boxes”, 20 November 2022, <https://theintercept.com/2022/11/20/taliban-afghanistan-zero-unit-migrants/>.

the Khost Protection Force and the Kandahar Strike Force also operated out of CIA bases with logistical, intelligence, and surveillance support from the US.<sup>448</sup> Full control of Zero Units was transferred to the Afghan government only after President Biden announced the withdrawal of US forces in April 2021.<sup>449</sup> The foreign control of these organised armed groups party to a NIAC adds weight to the ‘internationalisation’ of the NIAC in Afghanistan until the foreign military withdrawal in August 2021 such that the rules of an IAC—and corresponding obligations—would apply.

Occupation has attained customary international law status and also triggers the application of IHL as found within CA 2 of the Geneva Conventions.<sup>450</sup> That it is found within CA 2 and not CA 3 further suggests that occupation only exists in an IAC.<sup>451</sup> Notably, an occupier is also bound by Article 47 of GC IV that stipulates the inviolability of rights of protected persons.<sup>452</sup> Occupation may occur via proxy where a State must first be found to have overall control of a particular organised group; and secondly that this group has effective control over the territory concerned.<sup>453</sup> Another issue within the laws of occupation is whether the invasion phase of a war may amount to occupation.<sup>454</sup>

At least from the period of US-led operations in 2001 to its withdrawal in August 2021 from Afghanistan, there possibly have been separate and/or overlapping periods of occupation. One may argue that foreign occupation ended upon the establishment of the Interim Authority in 2001; the appointment of Hamid Karzai as President of the Transitional Authority in June 2002; the presidential election in 2004; or the parliamentary election in 2005.<sup>455</sup> Occupation could have also ended in December 2014 when Afghan security forces assumed full responsibility for Afghanistan’s security, and NATO completed ISAF operations.<sup>456</sup>

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448 Human Rights Watch, “*They’ve Shot Many Like This: Abusive Night Raids by CIA-Backed Afghan Strike Forces*”: 13.

449 Abed, “Ground Zero: The Evacuation of the CIA’s Afghan Proxies Has Opened One of the War’s Blackest Boxes”.

450 CA 2, art. 2. Occupation is defined in Article 42, Hague Regulations 1907. See also ICTY, *Prosecutor v. Prlić et al.*, Case No., IT-04-74-A, Appeals Chamber, Judgement, 29 November 2017, ¶ 318.

451 ICTY, *Prosecutor v. Jadranko Prlić et al.*, Appeals Chamber, Judgement, ¶ 335 (‘the Appeals Chamber notes that a state of occupation and that of an international armed conflict are not necessarily mutually exclusive’); Diakonia International Humanitarian Law Centre, “When does IHL apply”, <https://www.diakonia.se/ihl/resources/international-humanitarian-law/when-does-ihl-apply/> (‘Occupation is a concept that only applies in the context of an IAC.’).

452 GC IV, art. 47.

453 *Prosecutor v. Tadić*, Case No. IT-94- 1-T, Trial Chamber, Judgment, 7 May 1997, (“*Tadić* Trial Judgment”), ¶ 584; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ¶ 177; See also Marten Zwanenburg, “The Law of Occupation Revisited: The Beginning of an Occupation”, in *Yearbook of International Humanitarian Law*, Vol. 10, ed., Jann K. Kleffner (The Hague: T.M.C. Asser Press, 2007): 99-130; Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”. *International Review of the Red Cross* 94 (885) (Spring 2012): 133-163; Yoram Dinstein, *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009).

454 ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting, Report, ed., Tristan Ferraro, March 2012: 10.

455 Bellal, Giacca, and Casey-Maslen, “International Law and armed non-state actors in Afghanistan”, footnote 24, where the authors point to at least five possible dates.

456 North Atlantic Treaty Organization, “NATO and Afghanistan”, updated 31 August 2022, [https://www.nato.int/cps/en/natohq/topics\\_8189.htm](https://www.nato.int/cps/en/natohq/topics_8189.htm).

Where overall control of an organised armed group is concerned, the CIA’s control of paramilitary forces such as the Zero Units may serve to fulfil the requirement of occupation by proxy or indirect effective control. This will, however, depend on whether these Units effectively controlled territory. Without further investigation, and with IHL’s ‘territorialised legal reasoning’,<sup>457</sup> the Units’ existence to implement covert operations is unlikely to be found as an occupation by proxy.

Some interviewees who had regularly worked with local and foreign security forces and government, however, ‘strongly believe’ that occupation lasted until ‘the last plane left’ in August 2021.<sup>458</sup> Furthermore:

If you look at the ground troops—in a lot of respects we were in fact an occupying force and...the truth of that is that when we left, everything fell apart...[We] looked like one, acted like one; we were a benign occupying force. I mean, we didn’t take over the instruments of government although we influenced the instruments of government heavily by our contributions of aid and assistance, by our advisory capacities...<sup>459</sup>

The Doha Agreement that excluded the former Afghan government, may also raise questions on the latter’s control over its jurisdiction. In this instance, the US committed to ‘work with all relevant sides on a plan to expeditiously release combat and political prisoners’—the release of up to 5,000 Taliban prisoners.<sup>460</sup> In response, President Ghani stated that prisoner release was a decision for the government of Afghanistan to make, and that ‘it can be part of the [intra-Afghan] negotiations but it cannot be a precondition’.<sup>461</sup> Significantly, the US indicated that its withdrawal would be premised on the Taliban’s ‘counter-terrorism performance, not to progress in intra-Afghan talks’.<sup>462</sup>

The fact of direct negotiations and the conclusion of an agreement with the Taliban over the fate of Afghanistan undermines the Afghan government’s authority *per se* as well as its authority vis-à-vis ‘supporting’ parties to its NIAC.<sup>463</sup> It casts doubt as to its control over its territory. This is more pronounced when one takes into account the 2016 Commentary to CA 2 in GC I, defining international armed

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457 Louise Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, in *Yearbook of International Humanitarian Law – 2009*, eds., Michael N. Schmitt and Louise Arimatsu, Volume 12 (The Hague: T.M.C. Asser Press, 2010): 160-161.

458 Author interview with Martin Steindal, 11 December 2022.

459 Author interview with David Schwendiman, 10 April 2023.

460 Doha Agreement; *see also* Part I, Sec. C.

461 Kathy Gannon, “Afghan peace deal hits first snag over prisoner releases”, *Associated Press*, 1 March 2020, <https://web.archive.org/web/20210824144745/https://apnews.com/article/asia-pacific-ap-top-news-afghanistan-kabul-ashraf-ghani-8cfce4344ad386697c78b033a3cb3dc6>.

462 Gannon, “Afghan peace deal hits first snag over prisoner releases”; Lindsay Maizland, “U.S.-Taliban Peace Deal: What to Know”, *Council on Foreign Relations*, 2 March 2020, <https://www.cfr.org/backgrounder/us-taliban-peace-deal-agreement-afghanistan-war>.

463 Special Inspector General for Afghanistan Reconstruction, “Why the Afghan Government Collapsed”, SIGAR 23-05-IP Evaluation Report, November 2022, <https://www.sigar.mil/pdf/evaluations/SIGAR-23-05-IP.pdf>.

conflict – ‘the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively functions usually assigned to a government within the confines of a State’s territory, including the maintenance of law and order.’<sup>464</sup> In other words, the Doha Agreement and its further endorsement by the UN suggests a certain level of authority, power, and indeed control, on the part of the US if not its allies and Coalition partners over both government and State.<sup>465</sup>

## ii. Termination of Armed Conflict: When is the End, the End?

Identifying the end of an armed conflict is as significant, and as complex as identifying the beginning of one. Its relevance lies in determining when IHL ceases to apply and is again a factual exercise.<sup>466</sup> On its face, once circumstances that gave rise to the triggering of IHL cease to exist, IHL no longer applies.<sup>467</sup> Here, distinction should be had as to the ‘end of an armed conflict’; ‘end of hostilities’;<sup>468</sup> and ‘end of participation’; furthermore obligations that attach to a party to the armed conflict may endure beyond the end of an armed conflict.<sup>469</sup> The ICTY in *Gotovina* tells us that ‘[o]nce the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases.’<sup>470</sup> A holistic approach is therefore imperative.

Treaty law, however, fails to provide clear definitions.<sup>471</sup> Applying IHL rules to identify the termination of armed conflict in Afghanistan, viz. a NIAC with foreign military intervention, is made no less complex by the collapse of its *de jure* government. International courts have suggested that IHL applies until the achievement of a ‘peaceful settlement’ beyond the end of hostilities.<sup>472</sup> The ICRC similarly suggests a ‘complete cessation of all hostilities’ with no ‘risk of

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464 ICRC, 2016 Commentary to GC I, art 2, ¶ 234.

465 UNSC, Resolution 2513 (2020), S/RES/2513 (2020), adopted by the Security Council at its 8742nd meeting, 10 March 2020. Additionally, it is worth noting that by the end of February 2020, the Taliban had gained control of many districts in Afghanistan. For a map of Taliban-controlled areas, see Maizland, “U.S.-Taliban Peace Deal: What to Know”. See further US-Afghanistan Joint Declaration.

466 See Commentary to Article 2 on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2<sup>nd</sup> ed., Geneva, 2016 (‘2016 Commentary on GC I’), para. 275, c.f. ICTY, *Prosecutor v. Gotovina et al*, Case No. IT-06-90-T, Trial Judgment, 15 April 2011, ¶ 1694.

467 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, (Oxford: Oxford University Press, 2012): 253; Emily Crawford, “The Temporal and Geographic Reach of International Humanitarian Law”, in *The Oxford Guide to International Humanitarian Law*, eds., Ben Saul and Dapo Akande (Oxford: Oxford University Press, 2020): 60-65.

468 See GC 3, art 118 and GC 4, art 113 that mention ‘cessation of hostilities’; see further Nathalie Weizmann, “The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF”, *Columbia Law Review* 47(3) (2016): 221.

469 Paul Strauch and Beatrice Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”, *International Review of the Red Cross* 102(914) (December 2021): 9354-935.

470 *Prosecutor v. Gotovina et al*, Case No. IT-06-90-T, Trial Judgment, 15 April 2011, ¶ 1694.

471 See, e.g., GC IV, art. 6; Article 3(b), AP I; arts 75(6), 99. See further 2016 Commentary to GC I, art 2, ¶ 278-279.

472 *Prosecutor v. Duško Tadić a/k/a “DULE”*, Appeals Chamber, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’, Case no. IT-94-1-AR72, ¶ 70 (“*Tadić* Jurisdiction Decision 2 October 1995”); *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber), 21 March 2016, ¶ 141.

resumption.<sup>473</sup> Taking the armed conflict as a whole from 2001 to 2021, it would be reasonable to conclude that the NIAC between the Afghan government with its intervening foreign forces, and the Taliban, ended when the Afghan government fled, and the remaining foreign forces left the territory.<sup>474</sup>

### iii. Obligations Within the Context of Withdrawal

A key question for this report is whether there were obligations attached to the intervening States as they withdrew their military forces from Afghanistan, particularly those relating to groups who now face probable harm through circumstances created in large by the withdrawing States. The answer to this turns on both the classification or characterisation of the armed conflict, and accordingly determinations of control and responsibility, and the withdrawal itself; as well as the foreseeability of such harm. In other words, did reality on the ground reflect (a) a purely NIAC (with intervening foreign forces in mere supporting roles); (b) ‘double classification’ in that an IAC and NIAC coexisted;<sup>475</sup> (c) a level of direction and control on the part of intervening States such that operations can be attributed to these States;<sup>476</sup> and (d) probable harm to groups of persons which harm arose as a result of the armed conflict and for which precautionary and preventive action could have been taken?

#### a. The Principle of Precautions and the Duty to Protect

The principle of precautions in attack and against the effect of attacks form a cornerstone in IHL. It is found in both customary international law and treaty law and as such applicable to both an IAC and NIAC.<sup>477</sup> The principle of precautions forms part of the general principle to protect, and although Articles 57 and 58 of Additional Protocol I (AP I) are limited to ‘the conduct of military operations’, the general duty to protect should not be so easily dismissed nor narrowly interpreted.<sup>478</sup> One should also recall that under occupation, the inviolability of rights apply pursuant to Article 47 of GC IV.<sup>479</sup>

For this reason, the distinction between IACs and NIACs is less relevant. Furthermore, IHL has clearly developed to encompass the protection of civilians where a ‘human-being-oriented approach’ has supplanted the ‘State-sovereignty-

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473 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, October 2015: 10-11.

474 The termination of this NIAC may also rest on the Taliban’s announcement of an interim government on 7 September 2021. See Rule of Law in Armed Conflicts, Geneva Academy of International Humanitarian Law and Human Rights, “Non-International Armed Conflicts in Afghanistan”, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan#collapse2accord>.

475 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016): 74.

476 Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016): 74.

477 AP I, arts 57, 58; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2005): 51-55, 68-71 (Rules 15 and 22).

478 See ICRC Commentary to GC I 2016, ¶ 278-279; see also Carina Lamont, *International Law in the Transition to Peace: Protecting Civilians under Jus Post Bellum*, Post-Conflict Law and Justice series (New York: Routledge, 2022): 187.

479 GCIV, art. 47.

oriented approach’,<sup>480</sup> so much so that ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’.<sup>481</sup> Given the foothold that the maxim ‘*hominum causa omne jus constitum est* (all law is created for the benefit of human beings)’ now has within the international community,<sup>482</sup> it would not be unreasonable to expect that action should be taken to prevent foreseeable harm to civilians whether in the case of an IAC, NIAC, internationalised NIAC, or occupation; and/or where military withdrawal ends both participation to an armed conflict and the armed conflict itself.<sup>483</sup> Resort to humanitarian evacuation is thus one way of guaranteeing protection of civilians.

The *Vukovar Hospital Case* illustrates the duty to protect in the event of troop withdrawal.<sup>484</sup> The case involved Colonel Mile Mrkšić and Major Veselin Šljivančanin of the JNA, and the transfer of prisoners to the custody of Serb paramilitary forces following the JNA’s withdrawal in the area where these prisoners were held.<sup>485</sup> The ICTY found an ‘ongoing duty to protect’ in that Šljivančanin’s duty to protect the prisoners did not end with Mrkšić’s withdrawal order and was obliged ‘not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed’.<sup>486</sup> As an agent of the Detaining Power, Šljivančanin remained ‘bound by Geneva Convention III not to transfer the prisoners of war to another agent who would not guarantee their safety’.<sup>487</sup>

The Court also discussed the scope of Šljivančanin’s *de jure* authority over both hospital evacuation and the relevant military police, finding that the withdrawal order ended his *de jure* authority but that regardless, he could have gone beyond this to inform the military police that the withdrawal order breached ‘the overriding obligation under the laws and customs of war to protect the prisoners of war’.<sup>488</sup> The presence of the military police would have made the killings of the prisoners in the hands of a vengeful group ‘substantially less likely’.<sup>489</sup> Šljivančanin was thus found guilty of aiding and abetting murder by omission.<sup>490</sup> Although the case, confined to individual criminal responsibility and concerned a specific protected group, elicited the principle that an officer may act beyond his *de jure* authority to counteract an illegal order, it also highlighted the imperative to consider the

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480 *Tadić* Jurisdiction Decision, ¶ 97.

481 Stuart Casey-Maslen and Tobias Vestner, “Protection of Civilians under International Humanitarian Law”, in *International Law and Policy on the Protection of Civilians*, eds., Stuart Casey-Maslen and Tobias Vestner (Cambridge: Cambridge University Press, 2022): 30.

482 *Tadić* Jurisdiction Decision, ¶ 97.

483 Dieter Fleck, “Protection of Civilians”, in *The Handbook of International Humanitarian Law*, eds. Dieter Fleck, 4th Edition, (Oxford: Oxford University Press, 2021): 253.

484 *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment (Appeals Chamber), 5 May 2009 (“*Vukovar Hospital Case*”).

485 The Yugoslav People’s Army, a.k.a. Yugoslavia Narodna Armija (“JNA”).

486 *Vukovar Hospital Case*, ¶ 74-75.

487 *Vukovar Hospital Case*, ¶ 74.

488 *Vukovar Hospital Case*, ¶ 91-93.

489 *Vukovar Hospital Case*, ¶ 100.

490 *Vukovar Hospital Case*, ¶ 103.



consequences of military withdrawal, as well as the imperative to protect.<sup>491</sup>

Additionally, Strauch and Walton posit that just as individuals may be liable by omission, so too can States under general international law particularly if one were to take into account the International Law Commission’s Responsibility of States for Internationally Wrongful Acts.<sup>492</sup> Furthermore, having knowledge of imminent harm precipitated by withdrawal may be sufficient for a State to be liable under Article 16 of the instrument where withdrawing States may be found to have aided or assisted another State (Afghanistan) in the internationally wrongful act.<sup>493</sup>

## **b. Common Article 1: Respect and Ensuring Respect for the Conventions and IHL**

Common Article 1 (CA 1) obliges States to ‘respect and to ensure respect for the present Convention in all circumstances’ and forms part of customary international law.<sup>494</sup> A plain reading of the provision provides for no temporal or geographical delineation, and is applicable during times of peace or conflict. This is both a positive and negative obligation—a State may not encourage, aid or assist the violation of the Conventions; and ‘must do everything reasonably in their power to prevent and bring such violations to an end...the obligation to ensure respect for the Conventions goes beyond the principle of *pacta sunt servanda*.<sup>495</sup> Significantly, the positive obligation encompasses prevention in case of both foreseeable risk of violation or further violations of the Conventions, and stopping ongoing violations.<sup>496</sup> Preventive actions take into account the gravity of the violation, the foreseeability of violations, the means, and the States’ degree of influence. States must have done ‘everything reasonably in their power to bring the violations to an end.’<sup>497</sup>

In the case of Afghanistan, Strauch and Walton suggest that the US could have considered continued support to Afghan security forces as part of its obligation to comply with CA 1 post-withdrawal.<sup>498</sup> One could also question if the fall of Afghanistan to the Taliban might have been delayed, possibly prevented, if the US did not withdraw hastily. This is more pronounced in view of a recent SIGAR

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491 *Vukovar Hospital Case*, ¶ 94; Strauch and Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”: 943.

492 Strauch and Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”: 944. *See also* Report of the International Law Commission on the work of its fifty-third session at art. 1: 32 (23 April-1 June and 2 July-10 August 2001), UN Doc A/56/10 (2001).

493 Strauch and Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”: 945; Draft Articles on State Responsibility, art. 16. *See further*, Miles Jackson, *Complicity in International Law*, (Oxford: Oxford University Press, 2015): 157.

494 CA 1; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (Cambridge: Cambridge University Press, 2005): 495-498 (Rule 139).

495 2020 Commentary to GC III, art 1, ¶. 186-187.

496 2020 Commentary to GC III, art 1, ¶ 197.

497 2020 Commentary to GC III, art 1, ¶ 198.

498 Strauch and Walton, “*Jus ex bello* and international humanitarian law: States’ obligations when withdrawing from armed conflict”: 951.



report that found, among other things, ‘the length of the U.S. commitment was disconnected from a realistic understanding of the time required to build a self-sustaining security sector’.<sup>499</sup> Despite a decade of withdrawal, contested territories hard-won by US and Coalition forces were hastily handed over to local Afghan officials who were ill-equipped and underprepared; allowing for the Taliban to seize these areas in a matter of weeks.<sup>500</sup> It was clear over the decade of withdrawal that but for foreign military presence, the Afghan government was unable to hold onto territory.

While the speed of the simultaneous collapse of the Afghan government and Taliban takeover of the country was unexpected, the anticipation that this would eventually occur and likely in a relatively short period of time following foreign military withdrawal was not.<sup>501</sup> Furthermore, existing knowledge of a pattern of retributive acts by the Taliban speak to the foreseeability of probable harm to certain groups. That policies were in place to protect specific groups from such harm, and that some had organised the evacuation of certain groups of persons prior to August 2021 speaks plainly to this knowledge.<sup>502</sup>

#### iv. Structural Challenges and NSEs

As intimated above, the path to securing permanent resettlement for the refugee is often a bureaucratic and expensive one. It is also one impacted by the realities of politics and world events. This section explores the ways in which NSEs have confronted and navigated these structural challenges in their support to Afghans seeking refuge. While the list of these challenges is non-exhaustive, we highlight two of the most pressing issues—financial capacity, and the impact of the war in Ukraine.

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499 Special Inspector General for Afghanistan Reconstruction, *Why the Afghan Security Forces Collapsed* (SIGAR: Arlington, Feb 2023): ii. <https://www.sigar.mil/pdf/evaluations/SIGAR-23-16-IP.pdf>.

500 Special Inspector General for Afghanistan Reconstruction, “What We Need to Learn: Lessons from Twenty Years of Afghanistan Reconstruction”, August 2021, <https://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf>: 18-19. At least one interviewee with two decades of experience in Afghanistan expressed the opinion that the chaos of withdrawal is attributed to President Ghani’s departure on 15 August 2021 and the subsequent US’s decision to withdraw immediately in August 2021, and that in general the international community ‘handed over’ responsibilities to an inexperienced ‘and incompetent’ Afghan government ‘too soon’. Author interview with Christoph Klawitter, 20 January 2023.

501 General Mark Milley, quoted in United States Senate, Committee on Armed Services, “Hearing to Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations”, Washington, D.C., 28 September 2021: 40-41, [https://www.armed-services.senate.gov/imo/media/doc/21-73\\_09-28-2021.pdf](https://www.armed-services.senate.gov/imo/media/doc/21-73_09-28-2021.pdf). Other reports similarly indicate the expectation that Afghanistan would fall to the Taliban relatively quickly although not with the speed at which it actually occurred. See, e.g., Government of Denmark, Joint Authority Evaluation, *Evacuation from Afghanistan*, February 2022: 9-12.

502 See, for e.g., Government of Denmark, *Agreement on the Management of the Situation for Interpreters and other Locally Employed in Afghanistan*, Copenhagen, 22 May 2013; the UK similarly had an ‘intimidation scheme’, UK Ministry of Defence, “Plans to bring vulnerable Afghan interpreters to the UK accelerated”, 1 June 2021, <https://www.gov.uk/government/news/plans-to-bring-vulnerable-afghan-interpreters-to-the-uk-accelerated>; French authorities evacuated local embassy staff as early as May 2021. Embassy of France in Indonesia and Timor Leste, “Afghanistan – Evacuation operation – Statement by the Ministry for Europe and Foreign Affairs Spokesperson”, 3 December 2021, <https://id.ambafrance.org/France-and-Qatar-conduct-humanitarian-operation-for-Afghan-people>.

## a. Funding

Money plays a critical role in the protection of persons and in humanitarian evacuations, especially for NSEs who needed funds to facilitate travel both within and out of the country, as well as the provision of safehouses.<sup>503</sup> It also continues to impact efforts to support Afghan refugees still seeking permanent resettlement. Laura Deitz of Task Force Nyx, for instance, describes the process as a ‘self-funded evacuation programme’.<sup>504</sup> Many interviewees spoke about the need to raise emergency funds to support individuals on the ground, as well as bigger funding shifts, for example to raise funds for chartering flights. Larger organisations that chartered flights, and housed people who had been evacuated were able to raise those funds on the basis of their well-established reputation and well-connected leaders.<sup>505</sup> Somewhat notoriously, Instagram influencer Tommy Marcus (known for his Twitter page, @quentin.quarantino) raised US\$7.2 million to fund evacuation flights, and though his efforts—titled Operation Flyaway—were to pay for hundreds of evacuations, few flights materialised.<sup>506</sup> Other groups turned to GoFundMe and other creative crowd sourcing options.<sup>507</sup> Organisations with flexible funding sources fared much better in the crisis because of access to funds for the wide range of purposes needed by possible evacuees on the ground.

Whether or not support was provided within private or professional capacities, many NSEs also offered personal financial support to purchase flight tickets or visas, or for the provision of food and shelter after the withdrawal. One interviewee forked out US\$35,000 in order to pay for visas and flights for those she was supporting.<sup>508</sup>

Interviewees also discussed wealthier Afghans facing fewer challenges because they were able to pay for expensive flights, or for security to reach the airport.<sup>509</sup> Bribes were also demanded at HKIA gates, not to mention the costs of visas to neighbouring States through ‘agents’.<sup>510</sup> Many interviewees mentioned hearing claims of this sort, and at least two had direct knowledge of this kind of corruption.

At the time of writing, many NSEs continue to support Afghans who were unable

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503 Jessica Donati, “Hundreds Seeking Evacuation From Afghanistan Forced to Leave Safehouses”.

504 Author interview with Laura Deitz, 9 September 2022. Ms. Deitz observes that from her experience, “[unlike the situation in other refugee-hosting States, international] commitment to basic humanitarian support to those fleeing war and violence is not present in countries neighboring Afghanistan, shifting the burden of responsibility to NGOs, individual volunteers, or the families themselves to have substantial financial resources to both access and maintain legal status, but also provide funding for their housing, food, and medical care while they wait for asylum”.

505 Author interview with Emily Foale and Dr. Ewelina U. Ochab, 22 November 2022; Author interview with Tanya Henderson, 4 November 2022; Author interview with Scott Shadian, 2 November 2022.

506 Jon Swaine, “How an Instagram star’s \$7 million mission to rescue Afghan civilians struggled to get off the ground”, *Washington Post*, 29 September 2021, [https://www.washingtonpost.com/investigations/flyaway-afghanistan-rescue-quentin-quarantino/2021/09/29/2e94666a-1b22-11ec-bcb8-0cb135811007\\_story.html](https://www.washingtonpost.com/investigations/flyaway-afghanistan-rescue-quentin-quarantino/2021/09/29/2e94666a-1b22-11ec-bcb8-0cb135811007_story.html).

507 Author interview with Fárnoosh Hashemian, 27 February 2023.

508 Author interview with Anonymous Development Worker, 14 November 2022.

509 Author interview with Anh-Thu Nguyen, 3 February 2023.

510 See Part III.

to evacuate in August 2021, and who now find themselves in third countries or who remain in hiding in Afghanistan. Afghan Women on the Run for instance, continues to seek donations via their website, as well as funding from other groups or organisations.<sup>511</sup> Monies are channelled directly to individuals and families to support their daily needs, as well as to securing flights and visas. Other groups also continue to solicit donations to support those remaining in Afghanistan.

## b. War in Ukraine and its Impact

This report would not be complete without mention of how the Russian invasion of Ukraine on 24 February 2022, and the subsequent fleeing of civilian populations from Ukraine—including through humanitarian evacuations—has impacted the international response towards Afghans seeking to permanent resettlement. Specifically, we note three impacts on the ongoing efforts in Afghanistan. First, a shift in international focus from the crisis in Afghanistan to events in Ukraine and the emerging humanitarian crisis there. Interviewees were at pains to acknowledge the importance of supporting civilians in Ukraine but also point out that the same level of international support had not been forthcoming during a similar crisis in Afghanistan only six months prior.<sup>512</sup> The disparate response was difficult to accept where governments had not only failed to sufficiently support evacuations themselves, but had also not taken steps that would have eased the facility of resettlement, for example:

- Activation of the Temporary Protection Directive;<sup>513</sup>
- Waiving fees for Humanitarian Parole or emergency visas;<sup>514</sup>
- Staffing relocation programmes and resettlement efforts; and
- Stories of communities welcoming Ukrainian families as a contrast to the experience of Afghans.<sup>515</sup>

Similarly, while Ukrainians were often provided with free sim cards, free transportation, and quick facilitation to enrol children in schools, Afghans were

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511 Written author interview with Queralt Puigoriol, 2 April 2023.

512 Author interview with Ben Polk, 18 November 2022; Written author interview with Queralt Puigoriol, 15 April 2023.

513 European Commission, “Temporary Protection”, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en). The first and only time the Temporary Protection Directive has been activated was in relation to Ukraine, and it should be noted that ‘the European Parliament unsuccessfully called for the activation of the temporary protection directive in...the 2015 refugee crisis and following the takeover of Afghanistan by the Taliban in 2021.’ Eleonora Vasques, “Infringement procedures could apply to Italy if EU law violated, says leading MEP”, *EURACTIVE*, 15 November 2022, <https://www.euractiv.com/section/politics/video/infringement-procedures-could-apply-to-italy-if-eu-law-violated-says-leading-mep/>.

514 On 21 April 2022 US President Biden announced the Uniting for Ukraine program which creates a specific pathway for Ukrainians to be more efficiently paroled into the United States, and provides for a range of fee waivers unavailable outside of the program. US Department of Homeland Security, “Uniting for Ukraine”, [dhs.gov/ukraine](https://dhs.gov/ukraine).

515 Author interview with Anonymous Development Worker, 14 November 2022; Author interview with Natasha Latiff, 16 October 2022.

not welcomed in the same way.<sup>516</sup> The disparate response to individuals and communities is mirrored by a systemic unequal allocation of resources towards large-scale, State-backed efforts on behalf of Afghans and Ukrainians, a distinction that has led to speculation that discrimination can be the only answer.<sup>517</sup> The disproportionate attention given to the Ukraine crisis has raised uncomfortable questions on whether the geography and race of refugees evoke varying levels of urgency and support:

Unfortunately, I think Ukraine is a little bit different because they're White Europeans; they have more appeal when it comes to relocation and acceptance and assimilation; many speak English; many are European in their outlook on things; and frankly, it's Europe we're dealing with and it's Russia pushing on the other side. It wasn't like that for the Afghans, and it never would be like that for the Afghans.<sup>518</sup>

At a minimum, these different responses to crises that were unfolding within a year and with similar protection needs for individuals expose a demand for clarity around best practices for States responding to crises and guidelines for State-led efforts to address personal crises in the context of a humanitarian disaster. Multiple interviewees indicated that ‘everything changed’<sup>519</sup> after the Russian invasion of Ukraine:

The change was overwhelming... people were already tired of Afghanistan, and after March [2022], the window to talk about Afghanistan completely closed.<sup>520</sup>

Once Putin attacked Ukraine unleashing the largest refugee crisis in Europe since WWII, States focused on addressing this new crisis and did not seem to be willing to take people from Afghanistan.<sup>521</sup>

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516 Author interview with Imogen Canavan, 7 September, 2022; “VodafoneZiggo donates 12,000 SIM cards to refugees from the Ukraine”, VodafoneZiggo, 18 March 2022, <https://www.vodafoneziggo.nl/en/nieuws/vodafoneziggo-donates-12000-sim-cards-refugees-ukraine/>.

517 Author interview with Anonymous Development Worker, 14 November 2022; Author interview with Natasha Latiff, 16 October 2022.

518 Author interview with David Schwendiman, 10 April 2023.

519 Written author interview with Queralt Puigoriol, 2 April 2023.

520 Author interview with Mélissa Cornet, 21 October 2022.

521 Interview with Dr. Ewelina U. Ochab, 22 November 2022.

## CONCLUSION

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Our findings indicate that private individuals, networks, and organisations that responded to the crisis did so rapidly, without prior planning or intention, originating from disparate physical, personal, and professional backgrounds. New technology and digitisation across national borders boosted support to people on the ground in Afghanistan; in ways that would not have been possible even a decade ago. With ineffective State execution of evacuation plans, if any; lack of transparency; and poor communication, these NSEs provided a critical need and delivered it with a great deal of passion and persistence. Thousands of uncompensated volunteer hours of work are represented through the people we interviewed alone.

Yet, our findings also reveal that traditional access to positions of privilege persists where networks to, and among, power-holders and decision-makers could mean the difference between life or death.<sup>522</sup> Those without the ‘right’ Global North connections often lacked the means to access opportunities to evacuate. Finances also played, and continues to play, a significant part—wealthier individuals and families were, and continue to be, able to access resources unavailable to others, creating more division. The role the international community has played in politicising differences such as ethnicity, and resulting instances of racial and ethnic discrimination during August 2021 should also be taken into consideration.

In an international system that promotes non-discrimination and equal treatment, and whose leading authorities have both championed the invasion of Afghanistan and the promotion of the rule of law and human rights principles, the failure to ensure compliance of these principles is foreboding to the future and legitimacy of international law. Luck and happenstance appear to have played a larger than ideal role in the evacuation process, particularly in the days of State-organised evacuations in August 2021. The lack of both clarity and transparency in processes; the proclivity of inflexible bureaucracy; and above all, what has been characterised as the ‘Pippi Longstocking Principle’—the inability to accept the reality of the Taliban’s swift approach towards Kabul and its inevitable capture of the capital—in a failure to prepare and execute preventive measures have all pointed to a failed system.<sup>523</sup>

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522 See, e.g., “Several Afghans on Germany’s evacuation list have died”, *Deutsche Welle*, 8 October 2022, <https://www.dw.com/en/afghanistan-several-locals-on-germanys-evacuation-are-now-dead/a-63381696>; Amnesty International Report 2021/22: The State of the World’s Human Rights, (London: Amnesty International, 2022): 64-65.

523 Matthias Gebauer and Konstantin von Hammerstein, “Escape from Afghanistan, Part I “We’re Destroying the IT. Have a Nice Sunday””, *Spiegel International*, 2 September 2022, <https://www.spiegel.de/international/world/germany-s-escape-from-afghanistan-we-re-destroying-the-it-have-a-nice-sunday-a-743070b2-feb-4d43-863a-96e8157165bc> (The Pippi Longstocking Principle, or PLP for short, is described by psychologists and management trainers as a state of persistent denial of reality... In the summer of 2021, half of Berlin seems to be suffering from PLP. From the government’s perspective, after all, there are reasons to ignore developments in Kabul.); Author interview with Scott Shadian, 2 November 2022.

The evacuations from Afghanistan present an opportunity for further—and greater—reflection where such systems, processes, and practices necessitate improvement. Furthermore, where applicable laws lack clarity or are underdeveloped, robust discussions and research within the legal community will contribute to better eliciting legal principles and their application particularly where State responsibilities and obligations are concerned. Courts, domestic and international, are also responsible for developing the law and applying interpretive methods that serve the purposes of enumerated laws on the protection and dignity of persons. State obligations that follow the end of an armed conflict is but one example.

Further research should also examine the role that for-profit actors have played in humanitarian evacuations. In particular, the engagement of such actors and the types of accountability mechanisms in place for such situations and parties. While much criticism has been levelled against for-profit groups in humanitarian situations, we note that during an emergency situation it is sometimes the ability to circumvent bureaucracy—and indeed, accountability—that can lend the much-needed flexibility in a crisis. This double-edged sword requires examination in order to formulate the right balance between the rule of law, principles of humanity, and profit-making.

While it is impossible to create a comprehensive set of guidelines that would prepare the international community for a future, similar, emergency requiring humanitarian evacuations due to the many differences that will stem from geography, history, demographics, and presence on the ground, the experiences of these NSEs who participated in this report do generate some guiding principles around evacuations. This report concludes by turning attention to recommended guidelines derived from the findings here.

## RECOMMENDATIONS

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### **1. *Planning and preparation***

States, its agencies, and other relevant institutions, particularly those present in volatile environments, should both emphasise and enhance preparation and preparedness. Operational guides that unambiguously include when an evacuation should take place; who to evacuate; how the evacuation will be conducted; and where persons should be evacuated to must be developed with the input of relevant stakeholders and implemented with post-evacuation support in place.<sup>524</sup> Operational needs such as a clear line of decision-making processes and hierarchy must also be in place. Where possible, drills and ‘red team’ assessments may be conducted. Staff should be trained and knowledgeable on these procedures.

### **2. *Clear identification of coordinators and decision-makers in event of evacuation***

Interviewees pointed to the lack of clear authority and scope of responsibilities during the period of August 2021. In an emergency situation, it is imperative that individuals’ responsibilities are not only clearly defined, but that persons know who to approach for specific decisions and direction.

### **3. *Transparency and clear communication***

A source of constant frustration for interviewees was the ambiguous and seemingly changing eligibility requirements for evacuation, resettlement and/or entering airport compounds. These criteria should already have been outlined in operational guides and implemented in an emergency situation with a level of flexibility to adapt to fast-changing situations on the ground. Furthermore, they should clearly be communicated to relevant stakeholders. Moreover, States should also commit to inter-State coordination, to identify points of interest conversion, or opportunities to evacuate and resettle individuals.

### **4. *Identity and travel documents***

States should recognise and acknowledge the difficulties in securing identity and travel documents in an emergency situation, an issue that many refugees continue to face around the world and that worsens the already vulnerable situation. Additionally, while the World Bank has issued the Principles on Identification for Sustainable Development, the problem of birth registration continues to pose a major challenge to underdeveloped and developing States from where most refugees

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<sup>524</sup> For instance, key indicators can be used for assessing when an evacuation should take place; a pro forma on risk assessment can also be developed in prioritising persons or groups for evacuation; various options for land, air, and/or sea transport as well as security needs should also be thought out.



originate.<sup>525</sup> Interviewees pointed to States’ unwillingness to issue emergency travel documents, or *laissez-passer*, even for those approved to resettlement programmes. The International Bar Association’s proposed Emergency Evacuation Visa could also be considered.<sup>526</sup> Where concerns over admission of ‘excluded’ persons within the meaning of the Refugee Convention arise, States should employ the principle of universal jurisdiction in prosecuting these individuals, thereby contributing to the strengthening of international criminal justice and the rule of law.

## 5. *Flexible funding & compensation*

Those who were able to obtain funding to perform private evacuations were grateful that funders exercised flexibility for the emergent situation in Afghanistan. Some interviewees also pointed to the willingness of parent organisations to allocate part of their annual budget for this purpose. Where State-Non-State collaboration occurred, particularly with the outsourcing of processes, NSEs should not only be compensated for both their time and operational costs by the State, but should also receive State funding to ensure the efficient, effective, and accountable execution of programmes.

## 6. *Community networks*

In many instances, a strong diaspora of community members and leaders already exist in host States. They represent a wealth of knowledge and extensive networks that can support and facilitate evacuation operations and other emergent crises. For instance, many NSEs used the system of *hawala* to provide financial aid to individual Afghans and families in need since most financial institutions had halted operations during that time.<sup>527</sup>

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525 World Bank, *Principles on Identification for Sustainable Development : Toward the Digital Age*, (Washington, D.C.: World Bank Group, 2022), <http://documents.worldbank.org/curated/en/213581486378184357/Principles-on-Identification-for-Sustainable-Development-Toward-the-Digital-Age>; see also, Bronwen N. Manby, *Identification in the Context of Forced Displacement : Identification for Development (ID4D)*, (Washington, D.C.: World Bank Group, 2016) <http://documents.worldbank.org/curated/en/37581146972770030/Identification-in-the-Context-of-Forced-Displacement-Identification-for-Development-ID4D>; Bronwen Manby, Jonathan Marskell, and Julia Clark, “‘Papers please?’: The importance of refugees and other forcibly-displaced persons being able to prove identity”, *World Bank Blogs*, 20 June 2017, <https://blogs.worldbank.org/dev4peace/papers-please-importance-refugees-and-other-forcibly-displaced-persons-being-able-prove-identity>; The World Bank, “The ID4D Initiative”, <https://id4d.worldbank.org/about-us>.

526 Violeta Moreno-Lex, *A Model Instrument for an Emergency Evacuation Visa* (London: International Bar Association, 2019).

527 *Hawala* is an informal funds transfer system. Mohammed El-Qorchi, ‘*Hawala*’, *Finance and Development* 39, No. 4, (December, 2002), <https://www.imf.org/external/pubs/ft/fandd/2002/12/elqorchi.htm>.

### **7. *Responsible outsourcing***

In several instances, States have outsourced certain processes of the evacuation to NSEs. Consideration should be given to the impact of the rule of law and accountability. For example, in admissions and relocation programmes that require a referral through a non-governmental organisation, applicants should not only receive a clear response within a reasonable timeframe, but in cases of refusal, also be provided clear reasons. Accountability and checks and balances rest on the opportunity to appeal or request for reconsideration. Furthermore, the entire burden of ‘selecting’ beneficiaries for both programme and priority placement should not fall squarely on the shoulders of NSEs. Clearer guidance, criteria, and training should be provided; and the process should be conducted transparently in concert with authorities.

### **8. *Making migration and resettlement mechanisms accessible***

Simple steps to ensure that vulnerable groups and individuals can access evacuation mechanisms are possible, including providing for fee waivers and reducing or delaying paperwork burdens in the midst of a crisis. Temporary limits on the exigencies of administrative processing should be possible in the context of a humanitarian disaster.

### **9. *Legal and policy developments***

Clarifying and specifying the types of obligations States have in the context of withdrawal from an armed conflict or occupation would not only illuminate the kinds of acts States should or can take as they withdraw, but can also inform the feasibility and wisdom of engaging in armed conflict in the first place.

## INTERVIEWEES

<b>Name</b>	<b>Position</b>	<b>Organisation/Affiliation</b>
<i>Anonymous Development Worker</i>	-	-
<i>Anonymous Private Security Coordinator</i>	-	-
Jean Ayoub	Secretary General and Chief Executive Officer	International Social Service
Imogen Canavan	Legal Consultant	Max Planck Foundation for International Peace and the Rule of Law
Mélissa Cornet	Researcher	CARE
Laura Deitz	Co-Founder and Chief of Strategy	Task Force Nyx
Carolyn Edgerton	Legal Consultant Associate Member	Guernica 37
Marta Noval Felgueroso	Security Analyst & Emergency Response Officer	-
Asma Faizi	President	Afghan Women's Organization
Emily Foale	Project Manager	International Bar Association's Human Rights Institute
Karin M Frodé	Co-Founder PhD Candidate Supervisor	Ham Diley Campaign Monash University Monash Afghanistan Support Clinic
Fárnoosh Hāshemian	Founder and Executive Director	Afghan Legal Empowerment Portal
Kevin Haidary	Chairman	World Hazara Council USA
Tanya Henderson	Founder and President	Mina's List
Zachery Kallenborn	Former Master Coordination Director	Project Exodus Relief
Christoph Klawitter	Independent Consultant	-
Ruchi Kumar	Independent Journalist	-
Natasha Latiff	Founder and Legal Director	Strategic Advocacy for Human Rights
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