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Elusive Justice: Reflections on the Tenth Anniversary of Afghanistan's Law on Elimination of Violence Against Women

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ELUSIVE JUSTICE: REFLECTIONS ON THE TENTH ANNIVERSARY OF AFGHANISTAN'S LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN

Mehdi J. Hakimi^{*1}

ABSTRACT—The Taliban's fall in 2001 elevated hopes for improving the plight of women and girls in Afghanistan. Those aspirations were bolstered with the promulgation of the country's landmark Law on the Elimination of Violence against Women (EVAW) in 2009. The tenth anniversary of Afghanistan's EVAW Law, however, offers little cause for celebration. This essay examines Afghanistan's legal framework on combating gender-based violence against women, and the mounting challenges on the ground. The ongoing rampant violence against women, pervasive use of mediation in criminal cases, and violations perpetrated by State agents have made Afghan women's quest for justice increasingly more elusive. These breaches of the State's due diligence obligations under international law constitute human rights violations. As women remain effectively sidelined in the peace negotiations with a resurgent Taliban, the Afghan government and the international community cannot solely talk the talk, but must also walk the walk of confronting violence against women.

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I. INTRODUCTION

The Taliban’s fall in 2001 ushered in great hope for improving the grim human rights picture in Afghanistan, particularly in curbing systemic gender-based violence against women. That optimism was further elevated by the international community’s commitments to support the empowerment of women and girls in the war-torn country. Indeed, America’s military engagement in Afghanistan was partly billed as “a fight for the rights and dignity of women.”²

The most momentous attempt to translate those aspirations into action was the promulgation of Afghanistan’s landmark Law on the Elimination of Violence Against Women (EVAW) in 2009. The impending tenth anniversary of Afghanistan’s EVAW Law might be a cause for celebration, especially against the backdrop of Afghan women’s historical oppression. This essay, however, contends that a closer scrutiny of the state of violence against women in the intervening period should give pause for concern.

This essay examines the legal framework on combating gender-based violence against women in Afghanistan, including international mechanisms and national measures such as the EVAW Law. It will then analyze the gap

² Text: *Laura Bush on Taliban Oppression of Women*, WASH. POST (Nov. 17, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/laurabushtext_111701.html.

between the law and the on-the-ground reality over the past decade since the EVAW Law's inception. The ongoing rampant violence against women, pervasive use of mediation in criminal cases of gender-based violence, and violations perpetrated by State agents have made Afghan women's quest for justice increasingly more elusive.

These breaches of the State's due diligence obligations under international law constitute human rights violations. To make matters worse, Afghan women have been effectively sidelined in the rapidly evolving peace negotiations with a resurgent Taliban. A number of pressing measures, including legislative amendments and other systemic reforms, must be implemented to address the growing gulf between the rhetoric and the reality of fighting gender-based violence in Afghanistan. To prevent further backsliding on women's rights, the Afghan government and the international community cannot solely talk the talk, but must also walk the walk of confronting violence against women.

II. LEGAL FRAMEWORK TO CURB VIOLENCE AGAINST WOMEN IN AFGHANISTAN

A. *International Mechanisms*

Afghanistan has ratified a number of key conventions on the rights of women including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³ the International Covenant on Civil and Political Rights (ICCPR),⁴ and the Rome Statute of the International Criminal Court.⁵ Moreover, pursuant to *opinio juris* and State practice, gender-based violence against women is prohibited under customary international law.⁶

Afghanistan is bound to observe the United Nations (U.N.) Charter and the Universal Declaration of Human Rights.⁷ Pursuant to the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Afghanistan should ensure access to justice and fair treatment of

³ Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

⁴ Among other protections, the ICCPR requires States Parties to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights" enshrined in the convention. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁵ The Rome Statute criminalizes sexual and gender violence. *See* Rome Statute of the International Criminal Court arts. 7(1)(g)–(h), July 17, 1998, 2187 U.N.T.S. 90.

⁶ Comm. on the Elimination of Discrimination Against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, ¶ 2, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).

⁷ CONSTITUTION OF AFG. Jan. 26, 2004, art. 7.

women and girls.⁸ Additionally, the international community has adopted important measures to prevent and respond to conflict-related gender-based violence against women through a number of U.N. Security Council resolutions.⁹

Pursuant to CEDAW, Afghanistan is required to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”¹⁰ As such, the State will be responsible if it fails to meet this “due diligence” obligation under international human rights law to prevent, investigate, punish, and provide reparations for gender-based violence against women.¹¹ Such failures constitute human rights violations. Afghanistan’s Constitution further emphasizes the State’s obligations under international law.¹²

B. National Measures and the Elimination of Violence Against Women (EVAW) Law

Afghanistan has developed important legal frameworks to protect women and girls from violence. The Afghan Constitution prohibits discrimination and guarantees equality of rights and duties between men and women.¹³

The recently promulgated Penal Code has also addressed certain acts of violence against women. For instance, unlike the previous criminal law, the new Penal Code no longer treats “honor killing” as a mitigating factor in murder cases.¹⁴ In addition, Afghanistan also recently passed the Law on the Prohibition of Harassment against Women and Children.¹⁵

The Law on the Elimination of Violence against Women (EVAW), promulgated in 2009, represents the Afghan government’s most significant

⁸ G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).

⁹ S.C. Res. 1325 (Oct. 31, 2000); S.C. Res. 1820 (June 19, 2008); S.C. Res. 1888 (Sept. 30, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (June 24, 2013).

¹⁰ CEDAW, *supra* note 3, at 16.

¹¹ Comm. on the Elimination of Discrimination against Women, *Rep. on the Work of Its Eleventh Session*, ¶ 9, U.N. Doc. A/47/38 (1993).

¹² CONSTITUTION OF AFG. Jan. 26, 2004, art. 7.

¹³ *Id.* art. 22.

¹⁴ “Honour killings are crimes committed frequently in the name of ‘honour’, on suspicion of engagement in actions deemed dishonourable for the family as a whole. The motives of these crimes range from mere association with the opposite sex to sexual relations or running away from home, as highlighted by the previous mandate holder in his mission report.” Christof Heyns, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 72, U.N. Doc. A/HRC/17/28/Add.6 (May 27, 2011).

¹⁵ Gulabuddin Ghubar, *MPs, Activists Welcome Anti-Harassment Law*, TOLO NEWS (Apr. 27, 2018), <https://www.tolonews.com/afghanistan/mps-activists-welcome%C2%A0anti-harassment-law> (last visited May 17, 2019).

measure—albeit on paper—to prevent and punish violence against women and girls in Afghanistan.¹⁶

The EVAW Law aspires to protect the rights and human dignity of Afghan women and girls by criminalizing violence against them and prosecuting perpetrators.¹⁷ The law defines “woman” as “an adult or underage female person.”¹⁸ In particular, the EVAW Law criminalizes twenty-two specific acts of violence against women.¹⁹

In an attempt to inject some flexibility, the law permits the victim of violence to withdraw her complaint for most of these crimes. Victims of violence may withdraw their complaints at any stage of the proceedings—even after conviction—resulting in the stoppage of the case or punishment.²⁰

There is an exception to this flexibility for five crimes deemed the most serious: sexual assault, enforced prostitution, publicizing the identity of the victim, burning or using chemical substances, and forced self-immolation or suicide.²¹ Due to the gravity of these five crimes, the perpetrators of these violent acts must be prosecuted and punished even if the complaint is subsequently withdrawn.²²

The EVAW Law establishes the High Commission for the Elimination of Violence against Women, and obliges eight government ministries to take action to combat gender-based violence against women.²³ The law grants victims various rights including access to shelter, free health and legal services, compensation for harm suffered, and confidentiality.²⁴

The legislation further underscores the seriousness of violence against women. It expressly obliges the prosecutor’s office and the court to prioritize EVAW cases and to process them as expeditiously as possible.²⁵ It prohibits the suspension, pardon, or mitigation of punishments in EVAW cases.²⁶ It also clarifies that the EVAW Law trumps other laws in case of conflicts.²⁷

¹⁶ Law On The Elimination Of Violence against Women [EVAW Law] art. 2 (Afg.).

¹⁷ *Id.*

¹⁸ *Id.* art. 3(1). This essay will adopt the EVAW Law’s definition of “woman.”

¹⁹ *Id.* art. 5.

²⁰ *Id.* art. 39.

²¹ *Id.* arts. 17–21.

²² *Id.* art. 39.

²³ *Id.* arts. 8–16.

²⁴ *Id.* art. 6.

²⁵ *Id.* art. 7(4).

²⁶ *Id.* art. 42.

²⁷ *Id.* art. 43.

III. GAP BETWEEN PROMISE AND ACTION

A. Rampant Gender-based Violence

Despite the legal protections outlined above, gender-based violence against women is a grim and endemic reality in the patriarchal and conservative Afghan society. Afghanistan is ranked as “the worst place in the world to be a woman.”²⁸ According to a study, 87 percent of Afghan women experience at least one form of domestic violence (physical, sexual, or psychological).²⁹ Most women, 62 percent, experience multiple forms of violence.³⁰ In short, “domestic violence is highly normalized in Afghan society.”³¹

Violence against women is rarely reported to the authorities.³² There are various reasons for this widespread underreporting such as cultural norms that regard violence against women as a “private family matter,” treating victims as perpetrators of moral crimes, social and cultural stigma and shame associated with sexual violence, discrimination, fearing retaliation from perpetrators who are often male relatives, economic vulnerability, and general lack of support for victims.³³ Moreover, other systemic challenges include lack of access to the formal justice system, poor implementation of the law, overreliance on informal dispute resolution mechanisms, and political instability and conflict.³⁴

While violence is widely unrecorded, the cases that are reported to the authorities are often ignored.³⁵ For instance, as of 2014, only 10.6 percent of

²⁸ *The World’s Worst Places to Be a Woman*, AMNESTY INT’L (May 17, 2019), <https://www.amnestyusa.org/the-worlds-worst-places-to-be-a-woman/>.

²⁹ Diya Nijhowne & Lauryn Oates, *Living with Violence: A National Report on Domestic Abuse in Afghanistan*, GLOBAL RIGHTS 13 (2008), <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/Living%20with%20Violence%20-%20A%20National%20Report%20on%20Domestic%20Violence%20in%20Afghanistan%2C%20Global%20Rights%2C%202008.pdf>.

³⁰ *Id.*

³¹ *Id.* at 47.

³² See, e.g., Rashida Manjoo, *Rep. of the Special Rapporteur on Violence against Women, its Causes and Consequences*, ¶ 13, 65, U.N. Doc. A/HRC/29/27/Add.3 (May 12, 2015) [hereinafter *Report of the Special Rapporteur*]; *Injustice and Impunity: Mediation of Criminal Offences of Violence against Women* 25, OHCHR.ORG (May 2018), https://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_EVAW_Report2018_InjusticeImpunity29May2018.pdf [hereinafter OHCHR].

³³ *Id.*

³⁴ *Report of the Special Rapporteur*, *supra* note 32, ¶¶ 63, 65.

³⁵ This lack of access to justice is driven by similar factors that contribute to the underreporting issue such as strong cultural norms—even within State institutions—that regard violence against women as private matters, discrimination, insufficient resources, dearth of female police officers and prosecutors,

4,873 registered cases had been processed according to the EVAW Law.³⁶ Instead of protecting victims and prosecuting perpetrators, violence is often attributed to a woman's disobedience to her husband and summarily dismissed.³⁷

In cases of murder and "honor killings" of women, there is *de facto* impunity.³⁸ According to a recent U.N. study covering the period January 2016 through December 2017, only 18 percent of perpetrators of murder and "honor killings" of women were convicted and imprisoned.³⁹ Over this same two year period, the vast majority of the cases were not prosecuted and the perpetrators remain at large.⁴⁰ Moreover, in more than one third of the documented cases, the police did not forward the case for prosecution.⁴¹

Forced, as well as child, marriages are rife. Nearly 80 percent of Afghan women face forced marriages.⁴² Moreover, approximately 46.4 percent of women are married before the age of 18, with 15.2 percent married before age 15.⁴³ Harmful yet widespread traditional practices, such as the "bride price" and "*baad*," which treat women as exchangeable assets increase the prevalence of forced and child marriages.⁴⁴ Early marriages often compromise young women's development and increase the risk of domestic

corruption, and prevalence of informal dispute resolution mechanisms. *See, e.g., Report of the Special Rapporteur, supra* note 32, ¶ 65–67.

³⁶ MINISTRY OF WOMEN'S AFF. OF AFG., *Status of Women in Afghanistan* 17 (Dec. 2015), <http://mowa.gov.af/Content/files/Status%20of%20Women%20Report%20English.pdf> (last visited May 17, 2019).

³⁷ *See Report of the Special Rapporteur, supra* note 32, ¶ 13.

³⁸ OHCHR, *supra* note 32, at 21.

³⁹ *Id.* at 22.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *The World's Worst Places to Be a Woman*, AMNESTY INT'L, <https://www.amnestyusa.org/the-worlds-worst-places-to-be-a-woman/> (last visited May 17, 2019).

⁴³ *Report of the Special Rapporteur, supra* note 32, ¶ 14.

⁴⁴ *Id.* *See also* Fazal Muzhary, *The Bride Price: The Afghan Tradition of Paying for Wives*, AFG. ANALYSTS NETWORK (Oct. 25, 2016), <https://www.afghanistan-analysts.org/the-bride-price-the-afghan-tradition-of-paying-for-wives/> (explaining that "bride price" refers to the money paid by the groom to the bride's family, in exchange for the marriage); *Afghanistan: Stop Women Being Given as Compensation*, HUMAN RIGHTS WATCH (Mar. 8, 2011), <https://www.hrw.org/news/2011/03/08/afghanistan-stop-women-being-given-compensation> (defining "baad" as the customary practice of giving women to an aggrieved family as compensation for wrongdoing or as a method of dispute resolution); EVAW Law, art. 3(4) (defining "baad" as blood money, used to reconcile families after incidents of murder, sexual assault, or other unfortunate circumstances).

violence.⁴⁵ According to the Afghan government, 79 percent of victims of gender-based violence against women are aged 35 or younger.⁴⁶

In addition, refusal to enter into an arranged marriage can have grave ramifications for Afghan women and girls, including death.⁴⁷ Similarly, mere accusations of having inappropriate relationships can result in “honor killings.”⁴⁸ Even victims of sexual violence and rape are viewed as having brought “dishonor” upon their families and communities.⁴⁹

Moreover, there is a close nexus between the level of education of Afghan women and girls and potential risk of violence. According to the Ministry of Women’s Affairs, most victims of violence against women in Afghanistan have no education (76 percent) compared to those with primary (13 percent), secondary (8 percent), and higher education (3 percent).⁵⁰

That said, pursuing education is a perilous undertaking for Afghan girls. Despite progress in education since 2001, the regular attacks on girls’ schools,⁵¹ continued stigma against girls’ education, and increasing influence of violent extremism pose mounting obstacles.⁵² The overall literacy rate of women in Afghanistan is 17 percent—and below 2 percent in some provinces⁵³—while the global literacy rate for women stands at 83 percent.⁵⁴

The escalating conflict in Afghanistan has led to record-setting internal displacement⁵⁵ and, in turn, heightened exposure to gender-based violence

⁴⁵ *Child Marriage*, UNICEF, (Mar. 2018), <https://data.unicef.org/topic/child-protection/child-marriage/>.

⁴⁶ MINISTRY OF WOMEN’S AFF. OF AFG., *Fifth Report on Implementation of ERAW Law 20* (Jan. 2018), <http://mowa.gov.af/Content/files/Englisg.pdf>.

⁴⁷ For instance, the Afghanistan Independent Human Rights Commission recorded more than 280 women killed by family members during 2011 and 2012—mostly for rejecting arranged marriages or for suspicions of inappropriate relationships. The actual figures are likely considerably higher due to the customary underreporting of such tragedies. *Report of the Special Rapporteur*, *supra* note 32, ¶ 17.

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 19.

⁵⁰ MINISTRY OF WOMEN’S AFF. OF AFG., *Fifth Report on Implementation of ERAW Law 22* (Jan. 2018), <http://mowa.gov.af/Content/files/Englisg.pdf>.

⁵¹ See, e.g., Najim Rahim & David Zucchini, *Attacks on Girls’ Schools on the Rise as Taliban Make Gains*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/world/asia/taliban-girls-schools.html>.

⁵² *Afghanistan*, U.N. WOMEN, <http://asiapacific.unwomen.org/en/countries/afghanistan/about-us> (last visited May 17, 2019). See *Report of the Special Rapporteur*, *supra* note 32, ¶ 11 (stating approximately 3.5 million school-aged children—mostly girls and other vulnerable groups—are out of school).

⁵³ *Afghanistan*, U.N. WOMEN, <http://asiapacific.unwomen.org/en/countries/afghanistan/about-us> (last visited May 17, 2019).

⁵⁴ *Education: Literacy rate*, UNESCO, <http://data.uis.unesco.org/index.aspx?queryid=166> (last visited Aug. 24, 2019).

⁵⁵ The number of internally displaced people (IDPs) in Afghanistan has increased three-fold from 486,300 in 2012 to more than 1.5 million in 2016. Approximately 653,000 people were newly displaced

risk such as domestic violence.⁵⁶ In addition, trafficking in women and children is another major challenge, with 60 percent of Afghanistan's trafficking in women and children cases happening domestically.⁵⁷ Female victims suffer sexual exploitation and slavery at the hands of the perpetrators, and—after being “rescued” from traffickers—violence and “honor killings” by their own families.⁵⁸

The consequences of violence against women in Afghanistan have been dire. Pervasive gender-based violence has driven many Afghan women and girls to attempt suicide.⁵⁹ In the relatively more developed Herat province, for instance, there were approximately 1,300 registered suicide attempts by women and girls—mostly between 15 and 25 years old—during the period of March 2018 and February 2019.⁶⁰ According to the Herat Women's Affairs Directorate, some women choose to commit suicide “instead of suffering domestic violence.”⁶¹ The situation is more bleak in less developed and rural areas of Afghanistan. Based on some estimates, a staggering 80 percent of suicide attempts in Afghanistan are made by women—a stark contrast to the global picture where male suicides outnumber female suicides.⁶²

The scale and horrific nature of the violence have prompted even key government officials to voice growing dismay. The Minister of Women's Affairs, Dilbar Nazari, has demanded that perpetrators of violence against

in 2016 alone—the highest annual figure on record for the country. NRC, IDMC & Samuel Hall, *Escaping War: Where to Next? A Research Study on the Challenges of IDP Protection in Afghanistan*, NORWEGIAN REFUGEE COUNCIL 13, (2018), https://www.nrc.no/globalassets/pdf/reports/escaping-war--where-to-next/nrc_idp_escaping-war_where-to-next.pdf.

⁵⁶ *Id.* at 11 (demonstrating heightened exposure of internally displaced women to domestic violence stems from various factors including the dearth of community-based safety networks, unavailability of psychosocial and mental health services, and lack of specialist gender-based violence support and female field responders).

⁵⁷ Cross-border trafficking in women and children accounted for the remaining 40 percent of such cases in Afghanistan. *Report of the Special Rapporteur*, *supra* note 32, ¶ 28.

⁵⁸ *Id.* ¶ 28.

⁵⁹ *See, e.g.,* Sana Safi, *Why Female Suicide in Afghanistan is So Prevalent*, BBC (July 1, 2018), <https://www.bbc.com/news/world-asia-44370711> (citing domestic violence, abuse, and forced marriages as key drivers of the high female attempted suicide rate). Under the EAW Law, “[i]f the violence against a woman forces her to commit . . . suicide,” the perpetrator shall be punished by a maximum imprisonment of 10 years in case of the victim's death. EAW Law, *supra* note 16, art. 21.

⁶⁰ Fariba Aram, *Suicide Attempts On The Rise In Herat: Officials*, TOLO NEWS (Feb. 16, 2019), <https://www.tolonews.com/afghanistan/suicide-attempts-rise-herat?fbclid=IwAR06KtZGDh1cJ2SkWTYF92JAuqwEV1Ln-fLNjnBIN2zFcA9FJn-J4DB8liA>.

⁶¹ *Id.*

⁶² *See, e.g.,* Sana Safi, *Why Female Suicide in Afghanistan is So Prevalent*, BBC (July 1, 2018), <https://www.bbc.com/news/world-asia-44370711>.

women be publicly punished.⁶³ According to the Deputy Minister of Women’s Affairs, “these laws are not followed as [they] should be” partly due to low budgetary allocation and because women are not informed of the rights these laws confer to them—an admission of the widening gap between lofty rhetoric and sobering reality.⁶⁴

B. *Illegal Mediation of EAW Cases*

As noted earlier, violence against women has been criminalized in Afghanistan and must be punished according to the EAW Law.⁶⁵ The only legally mandated mechanism of adjudicating such cases is the formal justice system—not informal processes such as *shuras* or *jirgas*.⁶⁶

Pursuant to the EAW Law, a complaint may only be lodged to formal government institutions such as the “police, *Huqooq* Department, courts and other relevant authorities.”⁶⁷ Unless the complaint is withdrawn by the victim in certain cases, the authorities must continue with the criminal proceeding.⁶⁸

The law underscores the importance of addressing violence against women through the formal justice sector. Article 7(4) states that the “[p]rosecutor’s office and court are *obliged* to take [the] violence case as a *priority* and process it as expeditiously as possible.”⁶⁹ This means that prosecutors and judges must prioritize cases of violence against women over all other proceedings. In addition, the EAW Law does not make any reference to informal dispute resolution processes or mediation. As such, the use of traditional mechanisms—such as *shuras* or *jirgas*—to mediate such criminal cases is illegal.

The EAW Law’s disapproval of traditional dispute resolution processes in resolving cases of gender-based violence against women is

⁶³ Zarghona Salehi, *Nazari Wants Public Punishment for Offenders of Women Right*, PAJHWOK AFGHAN NEWS (Aug. 11, 2018), <https://www.pajhwok.com/en/2018/08/11/nazari-wants-public-punishment-offenders-women-rights>.

⁶⁴ Naheed Bashardost, *53pc of Afghan Women Experience Physical Violence*, PAJHWOK AFGHAN NEWS (Jul. 25, 2018), <https://www.pajhwok.com/en/2018/07/25/53pc-afghan-women-experience-physical-violence>.

⁶⁵ EAW Law, *supra* note 16, art. 4.

⁶⁶ *Shuras* and *jirgas* are informal dispute resolution mechanisms involving tribal leaders, disputants, and community members. *See, e.g.*, Hamid M. Khan, *Islamic Law, Customary Law, and Afghan Informal Justice*, U.S. INST. OF PEACE SPECIAL REP. 363, 7 (Mar. 2015), <https://www.usip.org/sites/default/files/SR363-Islamic-Law-CustomaryLaw-and-Afghan-Informal-Justice.pdf>.

⁶⁷ EAW Law, *supra* note 16, art. 7(1).

⁶⁸ The victim may withdraw her complaint with respect to the crimes set out in Articles 22–39. However, for the five most serious crimes set out in Articles 17–21, the authorities must continue the criminal proceedings irrespective of whether the complaint is withdrawn. *See* EAW Law, *supra* note 16, art. 39.

⁶⁹ EAW Law, *supra* note 16, art. 7(4) (emphasis added).

consistent with international standards. The Committee on the Elimination of Discrimination against Women (the “Committee”) has warned that informal mechanisms may lead to further violations of women’s rights and impunity for perpetrators.⁷⁰ As such, the Committee has recommended that States parties “[e]nsure that cases of violence against women, including domestic violence, are *under no circumstances* referred to any alternative dispute resolution procedures.”⁷¹

Despite these legal proscriptions against using informal dispute resolution mechanisms in cases of violence against women, *shuras* and *jirgas* routinely mediate such criminal offenses.⁷² Based on the U.N.’s monitoring of 237 EVAW cases reported to the authorities across Afghanistan, 145 cases (61 percent) were resolved by mediators—in violation of the EVAW Law.⁷³ The offenses mediated included murder, “honor killings,” and the five most serious EVAW offenses.⁷⁴

As forewarned by the Committee, resolving cases of violence against women through traditional dispute resolution mechanisms often leads to abuses of women’s rights.⁷⁵ For instance, *jirga* resolutions of such criminal cases sometimes require giving a girl in “*baad*.”⁷⁶ The customary practice of “giving *baad*”—criminalized under the EVAW Law⁷⁷—refers to selling girls or women in marriage to resolve a dispute.⁷⁸ Moreover, mediations of

⁷⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33 on Women’s Access to Justice*, ¶ 57, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015) [hereinafter *General Recommendation No. 33*].

⁷¹ *Id.* ¶ 58(c) (emphasis added).

⁷² There are various reasons for the prevalence of informal justice mechanisms in such cases. Broadly speaking, formal courts are avoided due to being “corrupt, expensive, time consuming, and difficult to access.” Noah Coburn, *Informal Justice and the International Community in Afghanistan*, U.S. INST. OF PEACE 11 (Apr. 17, 2013). See also OHCHR, *supra* note 32, at 28–29 (finding survivors of gender-based violence and mediators highlighted the more accessible and swift system of informal justice and perceived corruption in the formal justice sector). In addition, disputes concerning women’s rights and domestic violence are especially more likely to be addressed through informal routes due to entrenched social and cultural norms that view these issues as “deeply tied to the honor of the family” and “private family matters.” See, e.g., Noah Coburn, *Informal Justice and the International Community in Afghanistan*, U.S. INST. OF PEACE 45 (Apr. 17, 2013), <https://www.usip.org/publications/2013/04/informal-justice-and-international-community-afghanistan>. Moreover, other contributing factors are Afghan women’s general unawareness of their legal rights and high illiteracy rate. OHCHR, *supra* note 32, at 32.

⁷³ OHCHR, *supra* note 32, at 24.

⁷⁴ *Id.* at 24–27.

⁷⁵ *General Recommendation No. 33*, *supra* note 70, ¶ 57. See also OHCHR, *supra* note 32, at 27 (explaining traditional mediators’ decisions “often resulted in acts of violence against women.”).

⁷⁶ *Id.* at 27–28.

⁷⁷ EVAW Law, *supra* note 16, art. 25.

⁷⁸ See, e.g., Khan, *supra* note 66, at 6.

criminal offenses of violence against women have also led to the recurrence and intensification of violence against the victims.⁷⁹

The underlying assumptions, design, and processes of such traditional dispute resolution mechanisms practically guarantee that survivors will face an uphill battle for protection and justice. Mediation of such offenses wrongly assumes that the victim and the perpetrator have equal bargaining power, and that both parties are equally at fault for the abuse.⁸⁰ It reduces offender accountability and removes crimes from judicial scrutiny.⁸¹ Reflecting deeply ingrained patriarchal norms, such mediation panels are composed almost entirely of men.⁸² As such, the victims of violence rarely, if ever, participate directly in the proceedings—effectively rendering them hapless bystanders with no right to be meaningfully heard.⁸³ Furthermore, the small proportion of victims who may be aware of their legal rights are often under significant pressure, by their family and community, to agree to mediation and its decision, rather than exercising their right to access justice through the formal system.⁸⁴

C. Violations Perpetrated by State Actors

1. Complicity in Mediation of EAW Cases

Mediation of violence against women cases is not limited to private or non-State actors. In contravention of the EAW Law and the due diligence standard under international law, government institutions have also been processing criminal offenses of gender-based violence against women through mediation.⁸⁵

⁷⁹ This vicious cycle of violence persists due to the traditional justice system's lack of "capacity or authority to carry out [. . .] systematic monitoring of mediated cases." OHCHR, *supra* note 32, at 28. The U.N. has documented several egregious cases of the recurrence and intensification of violence following the decisions of traditional dispute mechanisms. In one case, the victim approached the local Taliban court to stop regular beatings by her husband. The Taliban secured a commitment by the husband to refrain from further violence. After arriving home, however, the husband cut off her nose with a knife. OHCHR, *supra* note 32, at 28.

⁸⁰ U.N. WOMEN, *Handbook for Legislation on Violence Against Women* 37 (2012), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502.

⁸¹ *Id.*

⁸² See, e.g., Thomas Barfield et al., *The Clash of Two Gods; State and Non-State Dispute Resolution in Afghanistan*, U.S. INST. OF PEACE 17 (Nov. 2006), https://www.usip.org/sites/default/files/file/clash_two_goods.pdf ("[W]omen are generally excluded from informal processes," represented by male family members, and "subject to cultural norms that impose a deep inequality on women.").

⁸³ *Id.* at 3, 9, 17.

⁸⁴ OHCHR, *supra* note 32, at 29.

⁸⁵ There are various reasons for the State actors' complicity in mediating EAW cases. An overarching factor is the absence of political will to genuinely counter violence against women. Other

Various U.N. reports have concluded that “the police and prosecution offices processed the *majority* of violence against women cases—including the five serious offences—through mediation by the police or by community elders in traditional dispute resolution mechanisms.”⁸⁶ In addition to the police and prosecutors, the provincial Departments of Women’s Affairs and the offices of the Afghanistan Independent Human Rights Commission have also been mediating domestic violence complaints.⁸⁷

According to the Ministry of Women’s Affairs, during the period of March 2016–March 2017, more cases of violence against women were resolved by “mediation and legal counseling” (18 percent) than through formal courts (17 percent).⁸⁸

In mediating criminal offenses of gender-based violence against women, State actors demonstrate significant disparity in practice due to the absence of policies and guidelines.⁸⁹

Besides mediating criminal cases of violence against women themselves, EAW Law institutions encourage or endorse this practice by *shuras* and *jirgas* through case referrals or by observing proceedings.⁹⁰ In complicity with mediators in traditional dispute resolution mechanisms, State actors even pressure victims into accepting mediation and *jirga* decisions.⁹¹

While mediation may be appropriate in civil disputes or civil aspects of criminal matters, as discussed above, mediation of gender-based violence against women is illegal and undermines women’s access to justice. The

related systemic reasons include weak rule of law, graft, and lack of adequate resources and support to relevant institutions. In addition, an underlying factor relates to strong social and cultural norms—that pervade even State institutions—favoring traditional justice mechanisms in cases of gender-based violence. These deeply held socio-cultural norms value family reunification and communal harmony—understood through a patriarchal lens emphasizing traditional gender roles—over an individual woman’s human rights. Formal courts are thus shunned because they threaten these traditional norms, while informal justice processes are preferred because they promote these deep-seated beliefs especially in disputes involving women that are viewed as private family matters to begin with. For instance, a study of Afghan police officers—charged with protecting the citizens’ rights and enforcing the law—demonstrated lenient attitudes towards violence against women due to male honor-based norms. Anna Costanza Baldry et al., *The Rule of Law at Time of Masculine Honor: Afghan Police Attitudes and Intimate Partner Violence*, 16 GROUP PROCESSES & INTERGROUP REL. 363, 368–70 (2013). See also OHCHR, *supra* note 32, at 24 (documenting the police’s unlawful refusal to investigate the crime due to missing instruction from the victim’s father).

⁸⁶ OHCHR, *supra* note 32, at 19 (emphasis added).

⁸⁷ *Id.*

⁸⁸ Ministry of Women’s Aff. of Afg., *Fifth Report on Implementation of EAW Law 25* (Jan. 2018), <http://mowa.gov.af/Content/files/Englisg.pdf> (last visited May 17, 2019).

⁸⁹ OHCHR, *supra* note 32, at 36.

⁹⁰ *Id.* at 9.

⁹¹ *Id.* at 10.

State actors' complicity in mediating criminal offenses of violence against women constitutes a human rights violation.

2. *Other Breaches of Due Diligence Standard*

In addition to the illegal mediation of criminal cases of violence against women, the Afghan government has breached its due diligence obligation under international human rights law through other actions and omissions that violate women's rights.⁹²

The impunity in the cases of murders and "honor killings" of women is partly due to the authorities' abdication of their responsibilities. For instance, in a recent U.N. study of 280 cases of murder and "honor killings" of women, only 50 cases—18 percent—resulted in conviction and imprisonment.⁹³ Crucially, the police failed to forward more than one third of these cases to the prosecutors.⁹⁴

The State actors' (mis)treatment of victims escaping violence is another transgression. Women and girls deemed to have "run away" from their "homes" (*farar az manzil*)⁹⁵ risk being detained by authorities and charged with "moral crimes" such as attempted *zina* (illicit sexual relations).⁹⁶ Such charges are laid despite the clarification by the Supreme Court that "running away" from home to escape domestic violence is generally not a crime.⁹⁷

Indeed, most female prisoners in Afghanistan are held on charges of so-called "moral crimes" such as *zina* and pre-marital sex.⁹⁸ Based on one study, 58 percent of female prisoners across the country were charged with "moral

⁹² As discussed earlier, Afghanistan is responsible to fulfill its due diligence obligation under international human rights law to prevent, investigate, punish, and provide reparations for gender-based violence against women. U.N. Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against Women*, U.N. Doc. A/47/38, ¶ 9 (1993).

⁹³ OHCHR, *supra* note 32, at 22.

⁹⁴ *Id.* As explained earlier, there are various reasons for the lack of due diligence by the authorities. One contributing factor is the dominance of socio-cultural norms driven by patriarchal beliefs, especially in sensitive cases such as "honor killings." Afghan police officers in particular have demonstrated lax attitudes towards violence against women because of such male honor-based norms. See, e.g., Anna Costanza Baldry et al., *The rule of law at time of masculine honor: Afghan police attitudes and intimate partner violence*, 16(3) GROUP PROCESSES & INTERGROUP REL. 363 (2013).

⁹⁵ Torunn Wimpelmann, *Adultery, rape, and escaping the house: The protection and policing of female sexuality in Afghanistan*, CHR. MICHELSEN INSTITUTE 8 (Dec. 9, 2017), <https://www.cmi.no/publications/file/6404-adultery-rape-and-escaping-the-house.pdf>.

⁹⁶ See, e.g., *Report of the Special Rapporteur*, *supra* note 32, ¶ 16.

⁹⁷ *Id.* ¶ 38.

⁹⁸ See, e.g., HUMAN RIGHTS WATCH, *Afghanistan: Surge in Women Jailed for 'Moral Crimes'* (May 21, 2013), <https://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes> (according to a 2012 report, approximately 95 percent of girls and 50 percent of women in Afghan prisons were charged with "moral crimes").

crimes.”⁹⁹ Convictions of such crimes often follow due process violations and minimal evidence.¹⁰⁰

Moreover, women and girls accused of “moral crimes”—including rape victims—are subjected to forced “virginity testing” as part of efforts to seek a conviction.¹⁰¹ Such coerced gynecological examinations of “virginity” have no medical basis¹⁰² and constitute serious human rights violations.¹⁰³ Unfortunately, Afghanistan’s new Penal Code has effectively preserved this cruel and inhuman practice under certain conditions.¹⁰⁴

Access to justice is further impeded by resource constraints and systemic discrimination. For instance, despite some progress, the Ministry of Women’s Affairs has been unable to implement its mandate due to inadequate budgetary allocation and support by the State—compared to other ministries—as well as lack of independence, politicization of appointments, and other challenges.¹⁰⁵

Services provided to survivors of violence are non-existent or woefully deficient due to capacity constraints, dearth of trained female professionals, and lack of policies and procedures regulating the treatment of victims of gender-based violence.¹⁰⁶ The low presence of female police officers, owing to widespread harassment and gender-based discrimination, further exacerbates the predicament of violence survivors.¹⁰⁷

Furthermore, the few non-governmental organizations exclusively working on women’s rights are viewed with hostility. For instance, women’s shelters are seen by some as prostitution houses encouraging women to leave their homes—rendering both the organizations and victims “stigmatized and shunned by society.”¹⁰⁸ Such hostile positions have raised concerns over

⁹⁹ *Id.* ¶ 23.

¹⁰⁰ *Id.* ¶ 24.

¹⁰¹ *Id.* ¶ 25. See also Patricia Gossman, *Raped, then Assaulted by the Afghan Justice System: Abusive ‘Virginity Exams’ Re-Traumatize Victims*, HUMAN RIGHTS WATCH (Dec. 13, 2017), <https://www.hrw.org/news/2017/12/13/raped-then-assaulted-afghan-justice-system>.

¹⁰² See, e.g., Rose McKeon Olson and Claudia García-Moreno, *Virginity Testing: a Systematic Review*, REPRODUCTIVE HEALTH (2017), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-017-0319-0#Abs1>.

¹⁰³ *Afghanistan: Surge in Women Jailed for ‘Moral Crimes*, HUMAN RIGHTS WATCH (May 21, 2013), <https://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes>

¹⁰⁴ Pursuant to Article 640(2) of the Penal Code, virginity tests are permitted based on either the victim’s consent or a court order. In practice, given the deeply entrenched patriarchal norms that pervade Afghan society, high illiteracy rates, and the acute vulnerability of women and girls in Afghanistan, informed consent by survivors in such cases is highly doubtful. Moreover, even in the absence of consent, virginity tests can proceed through a court order. PENAL CODE art. 640(2) (Afg.).

¹⁰⁵ *Report of the Special Rapporteur*, *supra* note 32, ¶ 32.

¹⁰⁶ *Id.* ¶ 43.

¹⁰⁷ *Id.* ¶ 26.

¹⁰⁸ *Id.* ¶ 44.

government proposals to take over control of women's shelters.¹⁰⁹ Human rights activists fear that government operation of these safe houses may put survivors in greater peril.¹¹⁰ These fears may be warranted in light of the foregoing discussion of the government's failure to shoulder its due diligence responsibility.

IV. NARROWING THE GAP

A. Legislative Amendments

While Afghanistan's legal framework on gender-based violence is a step in the right direction, these legal measures are not without flaws. The EVAW Law, for instance, may actually contribute to impunity by failing to investigate and punish most of the crimes (*viz.* seventeen) because of the law's latitude on complaint withdrawals. Instead, the law must treat violence against women seriously by prosecuting *all* twenty-two crimes, to ensure that perpetrators are held to account.¹¹¹ Moreover, the current passive practice of relying solely on victims to file a complaint should be changed to a proactive one where the authorities initiate investigations of criminal offenses of violence against women.¹¹²

In addition, the EVAW Law must expand its punitive measures to incorporate alternatives to imprisonment for certain offenses. Indeed, one of the key reasons for the withdrawal of complaints, or not filing one at all, is the fear of economic and social repercussions of imprisoning the offender.¹¹³ Most victims are economically dependent on the perpetrators who tend to be male relatives—often spouses.¹¹⁴

Moreover, the law must send a strong message that traditional dispute resolution processes that bypass the formal justice system in resolving criminal cases of violence against women are prohibited. In doing so, the law must hold individuals involved in mediation of such cases accountable.¹¹⁵

¹⁰⁹ See, e.g., Anum Mirza, *Vulnerable Afghan women left at risk by government proposals to take control of women's shelters*, THE TELEGRAPH (May 10, 2018), <https://www.telegraph.co.uk/news/2018/05/10/vulnerable-afghan-women-left-risk-government-proposals-take/>.

¹¹⁰ *Id.*

¹¹¹ OHCHR, *supra* note 32, at 11–12.

¹¹² *Id.* at 12.

¹¹³ *Id.* at 35.

¹¹⁴ *Id.*

¹¹⁵ Such prohibition of mediation is emphasized in model frameworks for legislation on violence against women. See, e.g., Division for the Advancement of Women in the Department of Economic and Social Affairs of the United Nations, *Handbook for Legislation on Violence against Women*, U.N. Doc. ST/ESA/329, at 37 (2010),

<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12>

Besides the EVAW Law, other legislative amendments are needed. For instance, the recently promulgated Penal Code has effectively endorsed the cruel and inhuman practice of “virginity testing” under certain conditions.¹¹⁶ Such coerced gynecological examinations are ordered by the authorities in the cases of so-called “moral crimes” to determine if a woman or girl is a “virgin.”¹¹⁷ This unscientific, degrading, and harmful procedure has been condemned by the World Health Organization¹¹⁸ and the Afghanistan Independent Human Rights Commission.¹¹⁹ The Penal Code must be amended to ban virginity testing outright, and punish those who engage in this practice.

B. Other Reforms

Combatting gender-based violence effectively requires a comprehensive and multi-faceted approach. In addition to legislative amendments, other pressing measures are needed to address the growing gulf between the rhetoric and the reality of curbing gender-based violence in Afghanistan.

At the outset, the Afghan government and the international community must make women’s rights and gender equality genuinely top priorities. Unfortunately, the resources allocated to the Ministry of Women’s Affairs and other similar institutions mandated to promote women’s rights in Afghanistan are inadequate.¹²⁰ Amongst other urgent needs, special attention

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¹¹⁶ Pursuant to Article 640(2) of the Penal Code, virginity examinations are conducted based on either the victim’s consent or a court order. In practice, given the deeply entrenched patriarchal norms that pervade Afghan society, high illiteracy rates, and the acute vulnerability of women and girls in Afghanistan, informed consent by survivors in such cases is highly doubtful. Moreover, even in the absence of consent, virginity tests can proceed through a court order. PENAL CODE art. 640(2) (Afg.).

¹¹⁷ AFG. INDEP. HUMAN RIGHTS COMM., *Forced Gynecological Exams as Sexual Harassment and Human Rights Violation* 3, <https://www.aihrc.org.af/media/files/Forced%20Gynecological%20Exams%20Egnlish.pdf> (last visited May 17, 2019).

¹¹⁸ *United Nations agencies call for ban on virginity testing*, WORLD HEALTH ORGANIZATION (Oct. 17, 2018), <https://www.who.int/news-room/detail/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing>.

¹¹⁹ AFG. INDEP. HUMAN RIGHTS COMM., *Forced Gynecological Exams as Sexual Harassment and Human Rights Violation* 4, <https://www.aihrc.org.af/media/files/Forced%20Gynecological%20Exams%20Egnlish.pdf> (last visited May 17, 2019).

¹²⁰ The deputy Minister of Women’s Affairs highlights such “low budget” as one of the causes of rampant violence against women in Afghanistan. Naheed Bashardost, *53pc of Afghan Women Experience Physical Violence*, PAJHWOK NEWS (July 25, 2018, 5:39 PM), <https://www.pajhwok.com/en/2018/07/25/53pc-afghan-women-experience-physical-violence>.

must be devoted to women's shelters that house victims of violence.¹²¹ In addition, national frameworks and strategies for women's empowerment must also entail gender-responsive budgets and programs across State institutions, along with effective mechanisms for oversight and accountability.¹²² Without political will and leadership support, it is nigh on impossible to effect tangible results in curbing gender-based violence.

Training and public education on gender-based violence are also important. All State agents—especially police officers, prosecutors, and judges—must be trained regularly to ensure the proper implementation of the law. Guidelines and policies must be developed for all relevant State officials on the enforcement and application of the law, including the prohibition against mediating EVAW cases.¹²³ It is also crucial to ensure that religious figures, community leaders, and the general public are well-informed of the laws proscribing violence against women. The media, civil society, and women's organizations can play an important role in this regard. Awareness-raising programs are also needed to educate women on their constitutional rights and legal remedies, irrespective of decisions by traditional fora.¹²⁴

In raising awareness and public educational efforts, it is critical to highlight the Islamic principles and values associated with women's rights. The deeply religious Afghan society is much more likely to be amenable to such advocacy efforts rather than cookie-cutter approaches that ignore local realities on the ground. Indeed, many Afghans, including religious leaders, are unaware of the contradictions between commonplace traditional practices and Islamic law—especially in regards to women's rights.¹²⁵ For instance, customary practices that ignore the woman's right to consent to marriage are at odds with Islamic law principles that require the consent of

¹²¹ Unfortunately, women's shelters are increasingly under attack and dwindling. *See, e.g.*, Heather Barr, *No Shelter in Afghanistan: Afghan Government Moves to Seize Control of Women's Shelters—Again*, HUMAN RIGHTS WATCH (Mar. 19, 2018, 4:17 PM), <https://www.hrw.org/news/2018/03/19/no-shelter-afghanistan>.

¹²² *See generally* Nicole Birtsch & Ahmad Sulieman Hedayat, *Gender-Responsive Budgeting in Afghanistan: A Work in Progress*, AFG. RES. AND EVALUATION UNIT AND GERMAN FED. MINISTRY OF ECON. COOPERATION AND DEV. (Sept. 2016), <https://reliefweb.int/report/afghanistan/gender-responsive-budgeting-afghanistan-work-progress>.

¹²³ OHCHR, *supra* note 32, at 12.

¹²⁴ Afghan women are generally unaware of their rights in the justice system. *See, e.g.*, OHCHR, *supra* note 32, at 32.

¹²⁵ *See, e.g.*, Khan *supra* note 66, at 5 (Many Afghans “simply assume their practices conform with Islamic law, in part because they self-identify as Muslims.”). Indeed, even local religious leaders' proper understanding of Islamic law is suspect, which underscores the need to train the *ulama* on substantive Islamic law. *Id.* at 9, 11.

both parties.¹²⁶ Practices such as “*baad*,” forced marriage, prohibiting women from the right of marriage, and underage marriage are all contrary to Islamic law, and criminalized under the EVAW Law as well.¹²⁷ Similarly, in contravention of Islamic law, customary norms in Afghanistan routinely deprive women of their inheritance rights.¹²⁸

Moreover, in order to enhance women’s access to the formal justice system, the Afghan government must, *inter alia*, increase the recruitment and retention of women in the justice sector. To hire more female police officers, prosecutors, and judges, the government must effectively combat harassment and discrimination against women, provide necessary security protection, and hold perpetrators of violence against women accountable.¹²⁹ It is also important to raise the general public’s awareness on the significance of women’s participation in decision-making and public life.¹³⁰

Additionally, the Afghan government must drastically improve monitoring and enforcement mechanisms to ensure that the EVAW Law and other related measures are implemented in practice. To promote accountability, the government must prosecute and punish *all* perpetrators, including State officials who fail to enforce and apply the EVAW Law and related measures.

It is crucial to address other contextual and systemic factors that impact gender-based violence. The government must adopt and effectively implement strategies and measures on a range of related overarching issues including literacy (especially for women and girls), women’s economic empowerment, corruption, and broader female participation in political and public life.

The international community has an important role in supporting women’s rights and fighting gender-based violence in Afghanistan.

¹²⁶ *Id.* at 10.

¹²⁷ EVAW Law, *supra* note 16, arts. 25–28.

¹²⁸ *See, e.g.*, Khan, *supra* note 66, at 10. Deprivation from inheritance is also criminalized under the EVAW Law. EVAW Law, *supra* note 16, art. 33.

¹²⁹ Female participation in the justice sector is far from ideal. For instance, there is only one female prosecutor in the entire province of Kandahar. Haroon Janjua, ‘*I want to Empower Afghan Women*’: *Female Prosecutor on a Lonely Mission*, THE GUARDIAN (Feb. 21, 2018), <https://www.theguardian.com/global-development/2018/feb/21/afghanistan-female-prosecutor-lonely-mission>. Moreover, women comprise only 1.4 percent of Afghan security forces. Sophia Jones, *The Many Dangers of Being an Afghan Woman in Uniform*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/magazine/afghanistan-women-security-forces.html>.

¹³⁰ For more discussion of Afghan women’s underrepresentation in the justice sector, *see generally* INT’L DEV. LAW ORG., *Out of the Shadows, onto the Bench: Women in Afghanistan’s Justice Sector* (2014), https://www.idlo.int/sites/default/files/IDLO_Afghan%20Legal%20Professionals%20summary.pdf.

International actors and donors must take comprehensive and bold steps to support Afghan women's advancement, and hold the Afghan government responsible for its due diligence obligations to address violence against women.

V. CONCLUSION

The EVAW Law's passage in 2009 marked a historic step in fighting violence against women in Afghanistan. A decade later, however, this legislative initiative has been little more than a symbolic triumph. The reality is that violence against women and girls is rampant—perpetrated by both private and State actors. These breaches of the Afghan government's due diligence obligations to prevent, investigate, and punish violence against women constitute human rights violations.

As we embark on the next chapter of the struggle to curb violence against women in Afghanistan, the challenges will not be any less formidable. As the Taliban gain more territory on the battlefield,¹³¹ and as peace talks intensify, negotiations have practically excluded Afghan women.¹³² Dismissing the current constitution as illegitimate and unIslamic, the Taliban have insisted on granting women rights in accordance with their interpretation of "Islamic rule and Afghan culture."¹³³ An ominous portent that harkens back to the dark days of the extremists' gender-based persecution of women across the country, this could jeopardize the existing legal framework on addressing gender-based violence against women.¹³⁴

Rhetoric is insufficient.¹³⁵ To prevent further backsliding on women's rights, the Afghan government and the international community cannot

¹³¹ Kathy Whitehead, *Govt Control And Troop Numbers Continue To Decline*, TOLO NEWS (Jan. 31, 2019), <https://www.tolonews.com/afghanistan/govt-control-and-troop-numbers-continue-decline>.

¹³² Afghan Women's Network, *Afghan Women Call for Fair and Lasting Peace, and Lasting Peace Requires the Full, Equal and Meaningful Participation of Women* (Jan. 31, 2019), http://awn-af.net/index.php/cms/press_detail/1497/12.

¹³³ Secunder Kermani & Sami Yousafzai, *Taliban 'not Seeking to Seize All of Afghanistan'*, BBC NEWS (Feb. 6, 2019), <https://www.bbc.com/news/world-asia-47139908>.

¹³⁴ For in-depth analysis of Taliban's gender-based persecution of Afghan women, see, e.g., Windy Brown & Laura Grenfell, *The International Crime of Gender-based Persecution and the Taliban*, 4 MELB. J. INT'L L., 347 (2003).

¹³⁵ Various commitments have been made by the Afghan government to address violence against women—promises that have been criticized by women's rights activities as empty rhetoric. See, e.g., *Violence against Women in Afghanistan will not be Tolerated: President Ghani*, AFGHAN ZARIZA, <http://www.afghanzariza.com/article/articleprint/violence-against-women-in-afghanistan-will-not-be-tolerated-president-ghani> (last visited May 17, 2019). Another blatant failure of the Afghan government legal system in addressing violence against women was the shocking beating-to-death of 27-year old Farkhunda Malikzada by a mob in Kabul. See Alissa J. Rubin, *Flawed Justice After a Mob Killed an Afghan Woman*, N.Y. TIMES (Dec. 26, 2015), <https://www.nytimes.com/2015/12/27/world/asia/flawed-justice-after-a-mob-killed-an-afghan-woman.html>.

simply talk the talk, but must also walk the walk of confronting violence against women. In Afghanistan's current political and social climate, that means genuinely prioritizing women's rights by instituting the necessary reforms, ensuring the meaningful participation of women in all peace processes, and the effective implementation of the laws on gender-based violence against women.