

Injustice and Impunity

Mediation of Criminal Offences of Violence against Women



United Nations Assistance Mission in Afghanistan
United Nations Office of the High Commissioner for Human Rights
May 2018
Kabul, Afghanistan

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Glossary

<i>Baad</i>	“Giving” a woman or girl as restitution for murder, rape or another crime to resolve a dispute between families, criminalized under the EVAW Law.
<i>Badal</i>	An “exchange” of women or girls between families for marriage, usually involving the exchange between men of daughters or sisters as brides, often as a form of dispute settlement.
<i>Hadith</i>	A collection of traditions containing sayings of the prophet Mohammad which, with accounts of his daily practice (the Sunna), constitute the major source of guidance for Muslims apart from the Holy <i>Quran</i> .
<i>Hudood</i>	Crime regarded as being against God’s command as under <i>Sharia</i> law for which punishment is considered obligatory rather than discretionary. Seven crimes involve <i>Hudood</i> punishments: <i>zina</i> , theft, banditry, defamation, transgression, drinking alcohol and apostasy.
<i>Huqooq</i>	The General Department of Huqooq sits in Kabul and settles disputes arising out of debts, properties and family of real and legal persons pursuant to the <i>Civil Procedure Code</i> and the <i>Law on the Acquisition of Rights</i> . Provincial Departments of Huqooq exist in all of Afghanistan’s 34 provinces.
<i>Iddat</i>	<i>Iddat</i> or waiting period is a specific period of which expiration ceases all effects of marriage following either a death of the husband or divorce.
<i>Jirga</i>	Gathering of elders informally empowered to take decisions for families or individuals, often for the purpose of resolving disputes or community issues.
<i>Mahr</i>	Amount of money promised directly by the groom to the wife-to-be in consideration of the marriage. It is usually promised prior to the marriage but can be given later and can remain pending for many years.
<i>Sharia</i>	Code of law derived from the Holy <i>Quran</i> and teachings and examples of the Prophet Mohammed.
<i>Shura</i>	Local council.
<i>Ta’zi</i>	Discretionary sentences or punishments not fixed by <i>Sharia</i> law.
<i>Zina</i>	Sexual intercourse outside of marriage stipulated in article 643 of the 2018 Penal Code.

Mandate

This report, *Injustice and Impunity: Mediation of Criminal Offences of Violence against Women*, was prepared by the United Nations Assistance Mission in Afghanistan (UNAMA) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

The report is prepared pursuant to Security Council Resolution 2405 (2018) which calls for enhanced efforts, including on measurable and action-oriented objectives, to secure the rights and full participation of women and girls and to ensure that all women and girls in Afghanistan are protected from violence and abuse, that perpetrators of such violence and abuse are held accountable, and that women and girls enjoy equal protection under the law and equal access to justice.

In support of the establishment of a fair and transparent justice system and to work towards strengthening the rule of law, the Resolution mandates UNAMA to promote accountability, and to assist in the full implementation of the fundamental freedoms and human rights provisions of the Afghan Constitution and international treaties to which Afghanistan is a State party, in particular those regarding the full enjoyment by women and girls of their human rights, including the Convention on the Elimination of all Forms of Discrimination Against Women.

UNAMA/OHCHR efforts to promote the protection of women's rights with regard to access to justice for women survivors of violence are conducted in accordance with Human Rights Council Decision 2/113 (27 November 2006) which requests UNAMA/OHCHR to continue to monitor the human rights situation in Afghanistan, provide and expand advisory services and technical cooperation in the field of human rights and the rule of law, and report regularly to the Council on the situation of human rights in Afghanistan.

1. Executive Summary

“When I went to the police with my father, the police instructed me many times to withdraw the case before it went to the prosecutor. I told them that I would never accept mediation, I want my husband to receive punishment because he beat me for two years. I told the police that many relatives and village residents had tried to mediate the case a hundred times. Now, I want you to forward the case to the prosecution. The police officer told me ‘we are the police and you are a woman, not my commander’. He tried to force me to withdraw my complaint but I resisted and my father supported me. Community leaders and relatives told me that after two months my husband will be released from prison and he will kill me. I told them that he should be punished no matter what happens next. I will kill myself because there is nothing to live for. All of them – police, community leaders and relatives of my husband tried to force me to drop the case but I did not accept their demands.”¹

UNAMA interview with a survivor of violence against women, 7 September 2017, Herat Province

Violence against women – murder, beating, mutilation, child marriage; giving away girls for dispute resolution (*baad*) and other harmful practices – remain widespread throughout Afghanistan, notwithstanding the Government’s concrete efforts to criminalise these practices² and establish measures for accountability.

This report, *Injustice and Impunity: Mediation of Criminal Offences of Violence against Women*, prepared by the United Nations Assistance Mission in Afghanistan (UNAMA) and the Office of the United Nations High Commissioner for Human Rights (OHCHR)³, highlights the human rights implications of the wide use of mediation⁴ in violence against women cases in Afghanistan. The report documents the experiences of survivors⁵ of violence against women who underwent mediation by Elimination of Violence against Women (EVAW) institutions⁶, non-governmental organisations and by traditional dispute resolution mechanisms following an initial registration of a complaint with authorities.

¹ Case number WR21-2. The case in the testimony involved the battery and laceration of a woman from the western region, who insisted on registering her case with the formal institutions in order to achieve justice. The woman eventually withdrew her case following family pressures. UNAMA coded all cases in this report by region, case number and monitoring tranche, in order to protect the survivors’ identity. Due to the nature of UNAMA’s continuous monitoring of cases over the two-year period, specific dates have not been provided for cases in this report.

² Including through the 2009 Elimination of Violence against Women Law, establishment of EVAW commissions, courts and prosecutors.

³ The joint nature of UNAMA/OHCHR reflects the work carried out by UNAMA Human Rights Service representing the High Commissioner for Human Rights and embedded within the UNAMA Mission. The remainder of the report will refer to work carried out by UNAMA/ OHCHR as UNAMA for practicality reasons. Previous reports have been referred to in footnotes as UNAMA/OHCHR reflecting their official publication names.

⁴ The term ‘mediation’ refers to practices carried out by community leaders, *Shuras*, *Ulemas*, and *Jirgas*, as well as EVAW institutions intended to resolve disputes and criminal offences. In most mediation proceedings, mediators bring together both parties to the case (sometimes representatives of parties), decide on a guilty party, often compel the guilty party to pay compensation, and produce commitment letters signed by the guilty party; committing to refrain from the act in the future. EVAW institutions are defined and detailed in footnote 6 below. See more on mediation procedures involving traditional dispute resolution mechanisms in section 5.4 and on mediation procedures involving EVAW institutions in section 5.5 of this report.

⁵ This report refers to all women who have suffered from various forms of violence as “survivors”.

⁶ The 2009 EVAW Law identified several institutions where complainants can lodge complaints on violence against women. These are the police, *Huqooq* department, courts and “other relevant authorities” (article 7). Upon receipt of a complaint, these actors must inform the Department of Women’s Affairs in writing, who shall contact the victim. Prosecution offices are obliged to prioritise cases of violence against women and process them swiftly. The Provincial EVAW Commissions, which include provincial offices of the Afghanistan Independent Human Rights Commission and are chaired by the Provincial Governor, are entrusted with recording and monitoring incidents of violence against women as well as undertaking other roles related to the prevention of violence. In the monitoring of cases for this report, cases were reported to non-governmental institutions such as the Afghanistan Independent Human Rights Commission, Women for Afghan Women and other Non-Governmental Organisations, or reported to traditional dispute resolution mechanisms.

The report presents findings from interviews and focus group discussions with survivors of violence, women activists and mediators. Through its field monitoring between August 2015 and December 2017, UNAMA documented 237 violence against women cases reported to ERAW institutions in 22 provinces⁷, and monitored their progression within the justice system and through mediation processes. UNAMA also documented and monitored 280 cases of murder and “honour killings”. The analysis and findings related to mediation were drawn from consultations and interviews with 1,826 mediators, representatives of ERAW Law institutions, non-governmental organisations, and women’s rights activists.

UNAMA recognises significant progress made by the Government of Afghanistan to support women’s empowerment, protect women’s rights and implement the ERAW Law, which provided a strong foundation for securing accountability for violence against women in Afghanistan.

In spite of the Government’s concrete efforts, UNAMA found that the enforcement of national legislation aiming to protect women from violence remained a challenge. Women’s access to justice remained limited and women continued to face inequality before the law. At the same time, the frequent failure of State officials to exercise due-diligence in investigating, prosecuting and punishing perpetrators, and providing reparations to survivors⁸, contributed to the existing high rate of impunity and strengthened the normalisation of violence against women in the Afghan society.

UNAMA found that ERAW institutions and non-governmental organisations facilitated mediation proceedings, referred cases to traditional mediation mechanisms, observed mediation sessions, or knew about mediation taking place, in relation to “honour killings” and other offences stated in the ERAW Law⁹. Such offences included the five serious offences set out in Articles 17 to 21 of the ERAW Law in respect of which the State must take action, irrespective of whether a complaint is filed or subsequently withdrawn. These are the crimes of rape, enforced prostitution, publicising the identity of a victim, burning or the use of chemical substances and forced self-immolation or suicide.

UNAMA found that traditional dispute resolution mechanisms continued to pass decisions on cases involving allegations of criminal acts of violence against women, including murder, “honour killings” and the five serious offences - in all provinces of Afghanistan. UNAMA documented multiple incidents where survivors’ families, ERAW Law institutions and non-Governmental Organisations referred cases to mediation by these informal mechanisms. As noted above, in many cases, ERAW Law institutions either coordinated or participated in the traditional mediation process.

In relation to the crime of “honour killings” and murder of women, UNAMA found that the police often failed to forward these cases, particularly “honour killings” cases to prosecutors. UNAMA notes that the failure of law enforcement authorities to take action in “honour killings” and murder cases of women and girls undermines efforts to promote the rights of women, erodes the rule of law, contributes to an expectation of impunity, discourages the reporting of these cases and increases citizens’ perception of a corrupt and unreliable justice system in Afghanistan.

UNAMA highlights that the wide use of mediation in criminal offences of violence against women promotes impunity, enables the reoccurrence of violence and erodes trust in the legal system. Where the five serious offences under the ERAW Law and murder and “honour killings” were mediated by authorities or by others

⁷ UNAMA documented cases in the following provinces: Kunduz, Badakhshan, Takhar, Baghlan, Balkh, Samangan, Faryab, Jawzjan, Bamyan, Farah, Herat, Ghazni, Paktya, Khost, Kandahar, Kunar, Laghman, Nangarhar, Kabul, Panjshir, Parwan and Maidan Wardak provinces.

⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

⁹ The term “criminal offences of violence against women” refers to the 22 acts criminalized in the 2009 ERAW Law. All 22 acts carry criminal penalties for perpetrators ranging from one-month imprisonment to the death penalty. The criminal offense of murder is not included in the ERAW Law but is reflected in the Penal Code.

with the acquiescence of the authorities, this amounted to a direct breach of the EVAW Law, the Penal Code, and constituted a human rights violation on the part of the State.

There is no specific provision in Afghan law that permits or prescribes the mediation of criminal cases. Rather than seeing cases through to adjudication, the referral to mediation implies the State's abrogation of its primary responsibility as duty bearer under international law to ensure the effective prevention and protection of women from such crimes and to provide an effective response where they occur.

During UNAMA's focus group discussions and interviews, authorities often referred to Article 39 of the EVAW Law to justify referrals to mediation in criminal offences of violence against women. The article allows survivors to withdraw their complaint at any point of the judicial proceedings with the exception of the five serious offences, where the State is duty-bound to conduct investigations and prosecute such cases even without a complaint. The article however makes no reference to, or permits mediation. In accordance with international law and general recommendations of the Committee on the Elimination of Discrimination against Women, UNAMA recommends that authorities' obligation to investigate and prosecute criminal offences of violence against women, is expanded to cover all 22 acts criminalised by the EVAW Law, irrespective of whether a survivor filed or withdrew a complaint.¹⁰

UNAMA emphasises that there is no provision allowing for mediation in the EVAW Law, and mediation cannot replace the judicial protections provided to women by the laws of Afghanistan. UNAMA further emphasises that mediation should only be used to resolve civil disputes, or in cases involving acts that constitute petty crimes and do not carry a penalty of imprisonment. Mediation may also be used to resolve the civil aspects of certain criminal cases - such as when deciding on compensation or when resolving other family or community disputes arising from a criminal case.

UNAMA documented consistent patterns countrywide of women routinely subjected to pressure by authorities, family members and perpetrators to withdraw their criminal cases and consent to resolving these issues through mediation. Such patterns highlight the underlying imbalance of power relations in Afghan society, which place women in a subordinate position and which is perpetuated in the mediation of cases of violence against women, irrespective of whether State or non-State actors manage the mediation process. Thus, the use of mediation, which presumes in theory that both parties have equal bargaining power, is unsuitable for the resolution of criminal offences of violence against women, and does not offer women the necessary robust legal protection of their rights.

UNAMA further found that the use of mediation in criminal offences of violence against women in Afghanistan is unregulated and involves varying standards of conduct and care. In spite of the large number of cases resolved through mediation, there are no policies on minimum standards of mediation, resulting in a great disparity of standards, procedures, referral of cases by EVAW institutions and capacity of the mediators. Furthermore, there is no code of conduct or certification for mediators.

¹⁰ Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, para. 45. The Committee recommends that State parties should "Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of these procedures should be strictly regulated and allowed only when a previous evaluation by a specialised team ensures the free and informed consent by the affected victim/survivor and that there are no indicators of further risks for the victim/survivor or their family members. These procedures should empower the women victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring an adequate protection of women's and children's rights as well as an intervention with no stereotyping or re-victimisation of women. These alternative procedures should not constitute an obstacle to women's access to formal justice.", and General Recommendation No. 33 on Access to Justice, CEDAW/C/GC/33, 23 July 2015 para. 58 (c) "Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures."

The Government of Afghanistan is obliged, under customary international law¹¹ and its international human rights treaty obligations,¹² to ensure that women have the right to access to justice and to obtain remedies, including reparations¹³, to equality before the law and equal protection of the law. Under international law, the Government must act with due-diligence to prevent and respond to violence against women, whether committed by State representatives or private individuals and organisations, including non-State actors and Anti-Government Elements.¹⁴

Summary of Key Findings

De facto impunity in cases of murder and “honour killings”

According to Government reports, murder of women represents the second most prevalent form of violence against women in Afghanistan.¹⁵ UNAMA documented 280 cases of murder and “honour killings” of women from January 2016 to December 2017.¹⁶ Of these, 50 cases ended in a conviction of the perpetrator and subsequent prison sentences, representing 18 per cent of documented cases. UNAMA therefore found that the vast majority of murder and “honour killings” of women resulted in impunity for the perpetrator.¹⁷

UNAMA found that enforcement authorities did not take sufficient action in these cases- including in relation to the apprehension of suspects, in breach of their due-diligence obligations to investigate, prosecute and punish those responsible for the crime of murder. The police only forwarded one third of the documented cases over the two-year period to prosecutors. Notwithstanding the alarming levels of impunity documented for those cases which are registered, UNAMA notes that “honour killings” are under-reported in Afghanistan.

In relation to deficiencies in apprehending perpetrators, UNAMA emphasises that Article 209 of the Criminal Procedure Code, which allows trials to be held in absentia, must be utilised in murder and “honour killing” cases where the apprehension of perpetrators is not possible. The article allows the holding of a trial in absentia for misdemeanour and felony crimes following a specific procedure.¹⁸

¹¹ The Committee on the Elimination of Discrimination against Women, General recommendation No. 35 states that the prohibition of gender-based violence against women has evolved into a norm of customary law.

¹² Afghanistan is a State party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. Afghanistan should also be guided by General Assembly declarations such as the Basic Principles and Guidelines on the Rights to Remedy and Reparations (A/RES/60/147). All the applicable international human rights legal instruments are detailed in the Legal Context section of this report.

¹³ See Basic UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution adopted by the General Assembly, 29 November 1985, A/RES/40/34.

¹⁴ See: The Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, para 24(b): “Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women.”

¹⁵ According to data collected by the Ministry of Women’s Affairs in 2014. The Ministry documented 371 cases of murder of women out of a total of 4541 registered cases. According to the Ministry’s report, the most prevalent form of violence against women in Afghanistan is battery and laceration. Afghanistan Third Report on the Elimination of Violence against Women, November 2015.

¹⁶ UNAMA documented 104 cases in 2016 and 176 cases in 2017.

¹⁷ Of cases documented by UNAMA in 2016 and 2017.

¹⁸ Article 209 of the Criminal Procedure Code stipulates “For misdemeanor and felony crimes, if the accused person does not appear for the judicial session on the due date in spite having been notified, the court shall suspend the case

Murder and “honour killings” of women are acts of extreme violence and constitute a serious violation of human rights. Any act of violence against women perpetrated in the private or public sphere, whether by State or non-State actors, invokes the obligation of the State to prevent, investigate, punish and provide compensation for all acts of violence.¹⁹ The resolution of such cases by mediation must never occur; and cases must be prosecuted under the applicable general murder articles²⁰ in order to end impunity.

Absence of due-diligence by authorities: referral of criminal offences of violence against women to mediation

UNAMA found that officials of ERAW institutions widely referred criminal offences of violence against women, including the offences set out in Articles 17-21 of the ERAW Law, to mediation.

Although Article 39 of the ERAW Law allows survivors to withdraw complaints at any stage of judicial proceedings, the Law establishes an obligation for the State to carry out investigations and prosecute cases even without a complaint by the victim in the offences set out in Articles 17-21 of the ERAW Law. In relation to all other criminal offences for which the Law does not establish such an obligation, nowhere does the Law state that these cases can be mediated. In addition to the lack of an explicit legal basis for referring these cases to mediation, UNAMA further found that the authorities make the victim’s withdrawal of the complaint under the ERAW Law a pre-requisite for initiating mediation. UNAMA considers such a demand by authorities to be unlawful and a violation of women’s rights, in particular the right to access to justice.

During the reporting period, UNAMA noted that authorities repeatedly failed to exercise due-diligence to investigate and prosecute in cases involving violence against women. The decision taken by enforcement authorities to abdicate their responsibilities to prosecute in favour of mediation in these cases may also constitute discrimination in the application of the law insofar as similar crimes involving male victims may be adjudicated to a higher degree through the formal justice system.²¹ Furthermore, authorities’ sole reliance on survivors submitting complaints of violence – in particular domestic violence cases – constitutes a contravention of international human rights principles.²²

Coercion of survivors into withdrawing complaints and “consenting” to mediation

UNAMA received consistent accounts from survivors of being pressured or coerced by family members, perpetrators, communities and even ERAW Law institutions to accept mediation or the intervention of a traditional dispute resolution mechanism. Survivors also noted that they decided to withdraw their cases and seek mediation because they lacked other alternatives, given their dependent financial and family situation.²³

proceedings and issue a summons or arrest warrant. If the accused person does not appear for a second time, he/she is notified by an announcement. If he/she still does not appear within the period of time announced, the court shall appoint a legal aid provider to him and issue a decision.”

¹⁹ Committee on the Elimination of Discrimination against Women, General recommendation No. 35.

²⁰ Following the promulgation of the 2018 Penal Code, for crimes committed from February 2018 the provision applicable to all murder cases would be article 547(2) in the 2018 Penal Code.

²¹ The Universal Declaration of Human Rights, article 7 states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

²² The case of *Opuz v. Turkey*, adjudicated by the European Court of Human Rights is an example of how human rights adjudication bodies have interpreted States’ obligation to protect victims of domestic violence. In this case, the European Court of Human Rights found that where authorities are aware of instances of grave domestic violence, it falls upon them to undertake effective action of their own motion. The court also found that the State’s failure to protect women against domestic violence breaches their right to equal protection of the law. The European Court of Human Rights, *Opuz v. Turkey*, 2009, summary at <http://echrblog.blogspot.com/2009/06/landmark-judgment-on-domestic-violence.html>, accessed 11 April, 2018

²³ Therefore, UNAMA does not consider such survivors to have “chosen” mediation as a result of their free will.

Mediation panels also actively pressured women to accept their decisions, whether such decisions were fair to women or otherwise.

Often shrouded under the guise of bringing dishonour to the families, the pressure or coercion included threats of limiting survivors' access to their children and being ostracised by the families and its support networks. Women were further disadvantaged in deciding the venue to resolve their cases, due to the lack of knowledge and information about their rights. Other factors contributing to widespread mediation of criminal offences of violence against women and under-reporting of complaints to authorities included the absence of viable alternatives, perceived judicial and police corruption, fear of long adjudication processes, and a fear of social and economic repercussions in the event of incarceration of the perpetrator, who is often the sole breadwinner of the family.

Concerns related to traditional dispute resolution mechanisms mediating criminal offences of violence against women

UNAMA found that traditional dispute resolution mechanisms in all provinces of Afghanistan mediated criminal offences of violence against women, including murder, "honour killings" and the five serious offences. Survivors' families, as well as ERAW Law institutions, referred cases to mediation by these bodies. In many cases, ERAW Law institutions either coordinated or participated in the traditional dispute resolution process.

Additionally, UNAMA documented decisions of traditional dispute resolution mechanisms in relation to wider family or community disputes, which inflicted violence and punished women and girls, for example through beatings, *baad* and other forms of violent punishment. In such cases, both the act of mediation of the criminal offence by traditional mediators as well as the infliction of violent punishments constitute human rights abuses. UNAMA found that in the majority of such cases, there were no legal consequences for the actors imposing these unlawful forms of punishment nor for those who committed the original offence of violence against women. Traditional dispute resolution mechanisms operate in an unlawful, unofficial and unregulated capacity in relation to the mediation of criminal offences of violence against women; and their decisions are not subjected to any Government oversight or scrutiny.

UNAMA emphasises that the mediation of criminal offences of violence against women by non-State actors such as traditional dispute resolution mechanisms constitutes a human rights abuse. Where authorities know about such practices but do not take action against them, refer survivors to such mediation, or participate as observers, this is also unlawful and amounts to a human rights violation on the part of the State.

Concerns with existing legal framework for sentencing criminal offences of violence against women

In addition to the identification of gaps in the ERAW Law which allows for complaints to be withdrawn and the State to cease its criminal investigation in relation to some crimes, UNAMA also notes a gap in relation to the available range of punishments for criminal offences of violence against women, which contributes to the wide use of mediation.

Women whose cases were mediated noted to UNAMA a predominant concern over the possible incarceration of perpetrators of violence as a result of prosecution and court adjudication; a concern that is exacerbated since many perpetrators of violence are also the sole breadwinners in the family. This concern perpetuated the common perception that mediation is a more suitable alternative to prosecution and adjudication, contributed to withdrawal of complaints, and enabled external parties to use threats of economic repercussions to coerce women to withdraw their cases and enter into mediation.

In order to promote accountability and strengthen the rule of law framework applicable to criminal offences of violence against women, UNAMA encourages the Government to develop robust mechanisms for alternatives

to imprisonment²⁴ that would apply to the less serious criminal offences of violence against women - the vast majority of which are currently mediated.²⁵

The development of alternatives to imprisonment that would be applicable to less serious ERAW Law crimes would admittedly only address some of women's concerns with the criminal justice system, which lead them to withdraw their official complaints and enter mediation. However, if such alternative sentences are made available to judges in certain criminal offences of violence against women, it may serve as an encouraging factor for those survivors who are seeking the conviction and punishment of the perpetrator by the criminal justice system without undermining their family unity (for practical or other reasons).

If alternatives to imprisonment succeed in encouraging survivors both to file complaints and reduce the withdrawal of complaints, this would arguably reduce the normalisation of the violence, allow the State to take institutional action to prevent recidivism and provide better protection for women who had previously been subjected to such violence. Judicially imposed alternatives to imprisonment - in particular a strong probation system - would ensure State monitoring of decisions and allow for the possibility of escalating the punishment to imprisonment if the perpetrator repeats his crimes.

1.1. Recommendations

UNAMA offers the following recommendations to the Government of Afghanistan, to support its efforts to ensure women's access to justice and uphold its women's rights obligations under international human rights law and domestic laws.

Preventing Impunity and Guarantees of Non-Repetition of Crimes

- Promptly investigate and prosecute cases of violence against women, including “honour killings”. ERAW institutions must refer criminal offences of violence against women to the criminal justice system and never to traditional dispute resolution mechanisms.
- ERAW institutions must never mediate or refer to mediation cases of violence against women, including murder and “honour killings” and the crimes set out in Articles 17-22 of the ERAW Law, except for civil disputes resulting from such offences.
- Ensure that ERAW judges and prosecutors are fully resourced, supported and empowered to carry out their mandated functions.
- Ensure the full implementation of the ERAW Law and the 2018 Penal Code provisions regarding the elimination of violence against women. Survivors should be awarded full compensation for the harm suffered in accordance with the ERAW Law.
- Apply article 209 of the Criminal Procedure Code, which permits trials in absentia, in cases of “honour killings” where the apprehension of perpetrators is (reportedly) not possible.

Amendments to Legislative Framework

- Consider amending the ERAW Law to expand authorities' obligation to investigate and prosecute - from the offences set out in Articles 17-21 of the ERAW Law- to include other ERAW criminal

²⁴ Articles 148-157 of the 2018 Penal Code provide the following options for alternatives to imprisonment: probation, community service, deprivation from social rights, and home imprisonment. The Penal Code stipulates that alternatives to imprisonment may be used to sentence perpetrators of crimes whose maximum punishment is up to five years of imprisonment. The Penal Code specifically notes that rape is exempt from alternatives to imprisonment, and in a later Decree, clarifies that all violence against women cases are exempt from alternatives to imprisonment. See more on alternatives to imprisonment in section 5.6 of this report.

²⁵ With the exception of murder, “honour killings”, and the five serious offences under the ERAW Law.

offences of violence against women, in particular baad, underage marriage and beating, irrespective of whether women withdraw their complaints.

- Additionally, consider amending the EVAW Law to oblige authorities to initiate investigations into all criminal offences of violence against women, rather than relying on an initial complaint by a survivor.

Policy Framework on Mediation

- Develop and implement a legal or policy framework, including guidelines and training, on the mediation of violence against women cases, clearly stating that mediation may only be used to resolve civil disputes resulting from criminal offences of violence against women and petty crimes, as well as deciding on civil remedies such as compensation. The policy framework may :
 - Specify the civil aspects of the acts stated in the EVAW Law where mediation could apply.
 - Ensure that the criminal investigation and referral to prosecution should not be delayed whilst the civil aspects of the case are mediated.
 - Identify and entrust a justice system institution to review cases before being referred to mediation.
 - Identify and entrust institutions authorised to mediate cases. Develop mediation standard procedures in accordance with international human rights standards.
 - Ensure that women practitioners are present in all mediation procedures involving civil aspects of criminal offences of violence against women.
 - Establish a centralised registry for mediation decisions and a mechanism to monitor compliance with mediation decisions.

Policy Framework on Alternatives to Imprisonment

- Review Legislative Decree 267 annexed to the Criminal Procedure Code on Implementation of Alternatives to Imprisonment and Juvenile Confinement, and consider amending it to include reference to specific criminal offences of violence against women that may be subject to alternatives to imprisonment (with the exception of the offences set out in Articles 17-22 of the EVAW Law and other harmful practices, including underage marriage and baad).
- Develop specific mechanisms and guidelines for alternatives to imprisonment in cases of violence against women, in accordance with provisions in the 2018 Penal Code²⁶, and Legislative Decree 267, concerning alternatives to imprisonment.
- Develop mechanisms of State supervision for alternatives to imprisonment to allow for an appropriate, enforceable, and State-sanctioned alternative to mediation. When such mechanisms are established, the Government should consider amending the EVAW Law to include references to alternatives to imprisonment in certain cases.

Fight and Prevent Corruption

- Monitor the implementation of the EVAW Law in the districts and provinces with a view to ensuring that law enforcement and justice officials are adequately resourced and skilled to carry out proper and timely investigations, prosecution and adjudication of reported criminal offences of violence against women, without corruption and in compliance with international human rights standards.

²⁶ Afghanistan 2018 Penal Code Articles 150-157

Protection of Women from Violence

- Ensure that women are informed about their rights during judicial and mediation procedures and that they are treated with dignity and equality in accordance with international human rights law and the Basic Principles of Crime and Abuse of Power.²⁷
- Prohibit the use of traditional dispute resolution mechanisms to resolve any types of criminal offences of violence against women, particularly “honour killings”, the offences set out in Articles 17-22 of the EVAW Law and other harmful practices, including underage marriage and *baad*. Instruct EVAW Law institutions to never refer criminal offences of violence against women to traditional mechanisms and to report to authorities if they know of such instances.
- Enforce the legal prohibition of, and hold accountable persons involved in, traditional dispute resolution processes that result in abuses of women’s rights, including but not limited to, beatings, lacerations, immolations, *baad* and “honour killings”.
- Urge non-governmental organisations to emphasise in trainings provided to traditional dispute resolution mechanisms, that traditional mediators must not mediate criminal offences, particularly murder, the offences set out in Articles 17-22 of the EVAW Law and other harmful practices, including underage marriage and *baad*. Mediators should only perform mediation in civil cases and to resolve family or community disputes.
- Develop and/or strengthen community-based social welfare and counselling programmes in every district and province to work with survivors of violence and their families and ensure that the violence will not reoccur.

²⁷ UN General Assembly, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”. A/RES/40/34 of 29 November 1985.

2. Legal Framework for the Elimination of Violence against Women in Afghanistan.

International Framework

International treaties to which Afghanistan is a party prohibit all forms of discrimination against women and girls and compel the State to take action to ensure the equal right of men and women to the enjoyment of civil and political rights and eliminate violence and other harmful practices against women. The Afghan Constitution acknowledges the obligation to adhere to international treaty obligations in Article 7 (1): “The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.”

Afghanistan has obligations to ensure that women receive legal protection and are not discriminated against before the law. Afghanistan’s international legal obligations under Article 9, 10 and 14 of the International Covenant on Civil and Political Rights, entail a right of all persons to a fair trial and the equality of treatment before the law. Fair treatment is a basic tenet of international law, which should be interpreted not only as a safeguard for the defendant but also as a legal safeguard for victims and survivors before the justice system. As such, women should be treated with dignity and granted protection before, during and after the legal process. This is further acknowledged by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁸, principles 4 and 5.

Afghanistan is party to the Convention on the Elimination of all forms of Discrimination against Women. Articles 2 (c), 3, 5 (a) and 15 of the Convention relate to access to justice. Article 5 (a) requires the removal of social norms which impede women to claim their rights. Articles 15-17 establish obligations for ensuring women’s equality before the law and preventing all forms of discrimination against women regarding education, social and economic life and equality of women’s rights in the family life. Furthermore, the Convention establishes that the marriage of a child would render the marriage null.

International Treaty Bodies’ general comments and recommendations on States’ due diligence to prevent violations of rights, investigate, and prosecute cases of violence against women, are also applicable to Afghanistan. These obligations apply irrespective of whether the acts of violence are carried out by private or State actors. In its General Recommendation No. 35 (2017) on violence against women (updating General Recommendation No. 19), the Committee on the Elimination of Discrimination against Women stated that: “Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due-diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women”.

The Committee on the Elimination of Discrimination against Women’s General Recommendation No. 33 (2015) on Access to Justice, provides that States parties must “(a) Inform women of their rights to use mediation, conciliation, arbitration and collaborative resolution of dispute processes; (b) Guarantee that alternative dispute settlement procedures do not restrict access by women to judicial and other remedies in all areas of law, and does not lead to further violation of their rights; and (c) Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures”.

²⁸ UN General Assembly, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”.

The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines forced marriages as a practice similar to slavery,²⁹ and international law has further reiterated and reinforced the provisions within the Convention that prohibit forced marriages in adults and children.³⁰ Practices involving selling or exchange of girls may be considered a form of trafficking in women and girls which has been banned by different international treaties of which Afghanistan is party, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol).

Mediation of criminal cases is not currently governed by an international codified framework of legally-binding norms. However, a set of general principles based on the experience of mediators working at international, national and local levels, may be used to guide practitioners and States.³¹ These principles include preparedness, consent, impartiality, inclusivity, a normative framework, coherence, coordination and complementarity of mediation efforts, and quality of agreements.

The UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power³² acknowledges that informal mechanisms, including mediation, can be used "where appropriate"³³ for the resolution of disputes, to facilitate reconciliation and redress for victims and survivors. Based on the principles enshrined in the Declaration, non-judicial mechanisms should be voluntary and grounded on principles of participation, equality and non-discrimination in both processes and outcomes. The Declaration also calls for the establishment and strengthening of judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.

National Legal Principles on the Elimination of Violence against Women

Article 22 of the Constitution of Afghanistan states that any kind of discrimination and distinction between the citizens of Afghanistan is prohibited and that the citizens of Afghanistan – whether men or women – have equal rights and duties before the law.³⁴

The EVAW Law was enacted by presidential decree in 2009 and remains the key law governing issues of violence against women in Afghanistan.³⁵ The EVAW Law was seen to be a significant legislative step towards

²⁹ Statement of United Nations Special Rapporteur on Contemporary forms of Slavery, Gulnara Shahinian, on the International Day for the Abolition of Slavery, 2 December 2012, Geneva.

³⁰ See Article 1, Section I. - Institutions and practices similar to slavery of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956. Entry into force: 30 April 1957, in accordance with article 13.

³¹ Among many sources of literature on mediation, see the United Nations Guidance on Effective Mediation, (September 2012), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf

³² Adopted by General Assembly resolution 40/34 of 29 November 1985. Available at <http://www.un.org/documents/ga/res/40/a40r034.htm>.

³³ See UN General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", section 7.

³⁴ The Constitution of the Islamic Republic of Afghanistan.

³⁵ Article 5 - Commission of the following [22] acts shall be deemed as violence against women: Rape; Forcing into prostitution; Recording the identity of victim and publicizing it in a manner that damage the personality of victim; Setting into flames, using chemicals or other dangerous substances; Forcing into self-immolation or suicide or using poisonous or other dangerous substances; Causing injury or disability; Battery and laceration; Selling and buying women for the purpose or under pretext of marriage; *Baad* [offering a woman in marriage to compensate for a murder or restore peace]; Forced marriage; Prohibiting from right of marriage or choosing husband; Marriage before the legal age; Abusing, humiliating, intimidating; Harassment/ persecution; Forced isolation [denying visit to family]; Forcing a woman into drug addiction; Depriving from inheritance; Preventing from possession of personal property; Denying

ending harmful practices and other forms of violence against women in Afghanistan. Among its objectives, the law lists “fighting against customs, traditions and practices that cause violence against women contrary to the religion of Islam,” and preventing and prosecuting violence against women.

Pursuant to Article 39 (1) (2) of the EVAW Law, the law permits a woman complainant to withdraw her case at any stage of proceedings, with the exception of five acts of violence against women which the State must act on, irrespective of whether a complaint is filed or subsequently withdrawn. These are the crimes of rape, enforced prostitution, publicising the identity of a victim, burning or the use of chemical substances and forced self-immolation or suicide – commonly referred to as the ‘five serious violence against women offences’.

All other crimes stipulated in Articles 22 to 38 of the EVAW Law must be investigated and referred to prosecution following the filing of a complaint by the survivor or a family member. In practice, many such complaints are withdrawn at some stage of the proceedings, due to a decision to opt for mediation or a decision not to proceed with the case. A survivor may withdraw her complaint at any stage of the proceedings, even after a perpetrator is convicted by a court of law. Therefore, if a mediation decision is reached after conviction, or if a survivor chooses to withdraw her complaint, the sentence that was imposed will not be executed.

The EVAW Law obliges the Government to take protective and supportive measures in favour of victims. It outlines specific obligations for seven Government ministries and establishes a national High Commission for the Elimination of Violence against Women instructing governors in Afghanistan’s 34 provinces to create provincial level EVAW commissions (known as the Commissions on Elimination of Violence against Women).

As a specialised law, the EVAW Law refers to the 1976 Penal Code for cases involving rape, injury and/or disability. Other sections of the 1976 Penal Code and the 2018 Penal Code criminalise additional acts of violence perpetrated against women that the EVAW Law does not capture, such as murder and kidnapping.

The EVAW Law includes no specific civil remedies (e.g., protection and restraining orders) protecting survivors and their children, *de facto* exposing them to risk of further violence, nor does it make any reference to mediation. In line with international best practices, effective legal remedies should include specific provisions regulating the custody of children, the right to maintenance after dissolution of marriage and the right to a home, each of which may greatly influence a woman’s decision on whether to remain or to escape from an abusive situation.

The Afghan legal framework largely awards custody of the children to the mother, with certain limits; boys may stay with the mother up until the age of seven and girls up until the age of nine. Despite allowing a mother to have custody for a few years, Afghan tradition and practice generally favour the father or another male guardian of children for long-term custody.

When a marriage is terminated in Afghanistan, the husband is liable to provide maintenance for the *iddat* (waiting period) only. Maintenance is defined in the law as taking care of the basic needs of the wife. Women have no legal right to reside in the marital home without the consent of the husband and his family. This weakens a woman’s position in cases of violence, as raising a complaint, and subsequent dissolution of marriage, would potentially mean losing her home.

The 2018 Penal Code

The 2018 Penal Code originally included a specific chapter on the elimination of violence against women. This chapter incorporated the provisions criminalising the majority of the 22 acts set out in Article 5 of the EVAW Law, but also included new provisions prohibiting both the detention of women on charges of “running away” and the practice of “exchange marriage” or *badal* (when feuding families or clans exchange brides in settlement of disputes).

right to education, work and access to health services; Forced labour; Marrying more than one wife without observing the provision of Article 86 of Civil Code; Denial of relationship.

The final version of the 2018 Penal Code did not include any reference to criminal offences of violence against women (with the exception of rape), and required a later amendment to the Code in order to make EVAW Law crimes enforceable. This amendment was necessary since Articles 7 and 8 of the 2018 Penal Code explicitly prohibit the enforcement of any punishment not provided for in the Penal Code itself.

In early March 2018, the Cabinet of Ministers approved the amendment to the Penal Code, which would exclude the EVAW Law from being affected by the provisions of article 7(2) and 8 of the Penal Code. The amendment was issued shortly thereafter in a presidential decree on 3 March 2018.³⁶

Afghanistan's 1976 Penal Code stipulated that a person who kills or injures his wife or a relative in order to defend his honour, will not be subject to the punishment for murder or laceration, and instead shall be imprisoned for a period of no more than two years.³⁷ The 2018 Penal Code does not mention "honour killings" at all and such justification can therefore no longer be used as a mitigating factor for the defendant in murder cases.

Many violence against women acts criminalised in the EVAW Law are also criminalised in the 2018 Penal Code, highlighting their seriousness. All five serious offences in the EVAW Law are also criminalised by the 2018 Penal Code. According to the EVAW Law the State must investigate and prosecute these crimes, irrespective of a woman's failure to file a complaint or her subsequent withdrawal of a complaint. The five crimes are rape, enforced prostitution, publicising the identity of a victim, burning or using chemical substances and forced self-immolation or suicide.³⁸

Mediation in cases of violence against women

There is no explicit provision in Afghan law that defines, permits or prohibits mediation in criminal cases. Article 39 of the EVAW Law allows a complainant to withdraw her complaint at any stage of judicial proceedings in relation to all but the five serious criminal offences, and Article 54 of the Constitution enshrines the State's overarching obligation to protect the family and family unity.³⁹ These articles, when read in conjunction, have been interpreted to allow for mediation by officials or traditional dispute resolution mechanisms with the primary aim of maintaining the family unity.

EVAW Law institutions and non-state actors are known to be mediating criminal offences of violence against women. These institutions include the Commissions on Elimination of Violence against Women, the provincial Departments of Women's Affairs, the Afghanistan National Police's Family Response Units, the Afghanistan Independent Human Rights Commission, the EVAW Prosecution Units, women protection centres and some civil society organisations who work on women's rights.

³⁶ Presidential Decree No. 262 of 3 March 2018.

³⁷ Article 398 of the 1976 Penal Code says: "a person defending his honour, who sees his spouse, or another of his close relatives, in the act of committing adultery or being in the same bed with another and immediately kills or injures one or both of them, shall be exempted from punishment for laceration and murder, but shall be imprisoned for the period not exceeding two years, as a "Tazeeri Punishment".

³⁸ The 2018 Penal Code criminalises rape in article 636-641 and 643(2); forcing into prostitution in article 618; disclosing the identity of a victim in article 866, forcing into self-immolation in article 548(3). The crime of burning or using chemical substances does not appear in the Penal Code. However, the provision on "giving harmful and non-lethal substance" (article 582), would arguably apply. Article 582 states: "A person who intentionally gives harmful and non-lethal substance to another person resulting in his/her permanent disability, limb dysfunctionality or its failure or loss of one of his/ her senses, shall be sentenced to medium imprisonment of more than three years or long imprisonment".

³⁹ Article 54 of the Constitution of the Islamic Republic of Afghanistan states: "Family is the fundamental pillar of the society and shall be protected by the state. The State shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam." Article 3 of the Constitution of the Islamic Republic of Afghanistan states: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan".

The use of mediation to resolve cases of violence against women remains highly contested. In addition to the lack of legal basis and policy guidelines, concerns are centred on existing power imbalances between the abuser and the abused, and the fairness, inclusivity and effectiveness of the mediation process.

The status of the draft laws on mediation of violence against women cases

Following a review of the 2010 draft law on “Traditional Dispute Resolution Mechanisms”, it was renamed “the Law on Reconciliation in Civil Affairs by Jirgas”, and presented to the Cabinet on 26 July 2017. The Second Vice President chaired a committee to further review the draft law. The committee was composed of representatives from the Ministry of Justice, Ministry of Women’s Affairs, Ministry of Borders and Tribal Affairs, the President’s Special Representative on Political Affairs, Independent Department of Local Government and the Attorney General’s Office. Although the draft law does not specifically address violence against women issues or cases, it codifies the handling of financial aspects of personal disputes. The draft law is currently with the Ministry of Justice’s General Directorate for Legislation.

The recommendations of the 2013 UNAMA/OHCHR report on the Implementation of the EVAW Law⁴⁰ urged the Government to introduce mediation guidelines for EVAW Law institutions. In mid-2014, the Ministry of Women’s Affairs, with the support of UNAMA, drafted a Mediation Regulation. Following a review by the Legislative Committee of the Ministry of Women’s Affairs, the Ministry decided that the draft Mediation Regulation would only focus on family-related disputes and exclude violence against women cases. The draft Mediation Regulation has undergone several reviews by the Ministry of Women’s Affairs and the Ministry of Justice. As of March 2018, the draft Mediation Regulation is with the Ministry of Justice’s General Directorate for Legislation.

Legal process for violence against women cases

Within the existing legal framework, a survivor of violence against women has the right to approach the Department of Women’s Affairs, the Department of Huqooq⁴¹, the police or the prosecutor’s office to register a complaint.

Under the EVAW Law, once the complaint is registered with the police, the police must refer the case to the relevant prosecutor’s office for investigation. Once the prosecutor receives the case, based on a preliminary investigation and prosecutorial discretion, he or she should make a decision to prosecute under the EVAW Law, or the Penal Code, or both. If decision is taken to prosecute, the case should be referred without delay for swift court adjudication. Unless the case involves one of the five serious offences under the EVAW Law, a complainant can stop the prosecution, trial or implementation of punishment at any stage by withdrawing her complaint.

⁴⁰ UNAMA/OHCHR “A Way to Go – An Update on Implementation of the Law on the Elimination of Violence against Women in Afghanistan”, 2013.

⁴¹ The General Department of Huqooq sits in Kabul and settles disputes arising out of debts, properties, and family of real and legal persons pursuant to the Civil Procedure Code and the Law on the Acquisition of Rights. Provincial Departments of Huqooq exist in all of Afghanistan’s 34 provinces.

3. Background

Since 2009, UNAMA has provided technical and advisory support to the Government of Afghanistan to assist its implementation of the EVAW Law. UNAMA aims to continue its engagement with the Government of Afghanistan to end the culture of impunity for crimes committed against women. During the reporting period, UNAMA carried out rigorous country-wide monitoring, documentation, public reporting, and ongoing dialogue with the Government, EVAW Law institutions, representatives of non-governmental organisations, survivors and other relevant actors working to eliminate violence against women.

UNAMA observed concrete steps, considerable progress and an increase in attention paid to the elimination of violence against women by the Afghan Government. On multiple occasions, His Excellency, President Ghani, committed to taking serious steps to tackle violence against women, including through the appointment of EVAW judges and prosecutors as well as the issuance of Government reports. Between January 2014 and November 2015, the Ministry of Women's Affairs published three reports on the implementation of the EVAW Law. Each report provided information on the number of complaints of violence against women registered by authorities, the location, types of complaints and action taken by authorities. The reports acknowledged the widespread use of mediation in violence against women cases.

Many of the findings set out in this report are consistent with those identified in the previous UNAMA reports published in 2009, 2010, 2011, 2012, 2013 and 2015. These six reports found compelling indications that most violence against women cases, including the five serious offences, are not prosecuted or adjudicated in courts, with a large number of cases referred to mediation. UNAMA found 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. UNAMA also documented Departments of Women Affairs and offices of the Afghanistan Independent Human Rights Commission mediating domestic violence complaints.⁴²

This current report aims at ascertaining the impact of mediation of criminal offences of violence against women on women's enjoyment of their rights, and identifying human rights violations and abuses arising from this practice. The report relies on UNAMA's observation of mediation processes through focus group discussions, consultations with mediators and women activists, and direct observations of mediation procedures.

⁴² UNAMA/OHCHR, "A Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan", 2011.

4. Methodology

Between 1 August 2015 and 31 December 2017, UNAMA selected 237 cases of violence against women reported to ERAW institutions in 22 provinces,⁴³ and monitored and documented their progress through the justice system. UNAMA conducted this monitoring in two separate tranches. Between 1 August 2015 and 31 March 2016, UNAMA monitored and documented 165 cases across 20 provinces; and between 19 January and 31 December 2017, UNAMA monitored an additional 72 cases across 21 provinces.

In addition to cases documented for this report, UNAMA routinely records reported incidents of violence against women across Afghanistan and monitors their progression through the criminal justice system. In this regard, UNAMA documented and monitored 280 cases of murder and “honour killings”: 104 cases in 2016 and 176 cases in 2017.

UNAMA employed the following criteria in its case selection: cases of violence against women criminalised by the ERAW Law⁴⁴; and cases that could be monitored by UNAMA field teams through direct access to survivors. UNAMA’s case monitoring aimed to track the progress of individual complaints, and to gain precise knowledge on the methodology, criteria, outcomes, and follow-up of mediation cases.

In addition to monitoring the progression of cases, UNAMA conducted interviews and focus group discussions across Afghanistan, documenting the experience of survivors, mediators and women’s groups. UNAMA carried out 103 individual interviews with mediators and representatives of ERAW Law institutions in 24 provinces;⁴⁵ 44 focus group discussions with mediators in 34 provinces; and 39 focus group discussions with women activists.⁴⁶ UNAMA consulted 1,826 mediators, representatives of ERAW Law institutions and women’s rights activists.

UNAMA’s methodology for group consultations focused on encouraging open discussion within a culturally sensitive context. UNAMA selected specific locations, times and venues in order to enable participants to meaningfully participate and share their opinions and experiences. UNAMA developed a semi-structured focus group tool in order to help facilitators guide the discussions. UNAMA conducted all interviews and focus group discussions in Dari and/or Pashtu, with the responses collated and summarised into English.

UNAMA observed the principles of confidentiality, non-interference and non-intervention in all its interactions. Mindful of the extreme sensitivity of interviewing survivors of violence, UNAMA’s monitoring, consultations and documentation modalities remained grounded in the core human rights principle of “do no harm”.

⁴³ UNAMA documented cases in the following provinces: Kunduz, Badakhshan, Takhar, Baghlan, Balkh, Samangan, Faryab, Jawzjan, Bamyan, Farah, Herat, Ghazni, Paktya, Khost, Kandahar, Kunar, Laghman, Nangarhar, Kabul, Panjshir, Parwan, Maidan Wardak provinces.

⁴⁴ Excluding acts of rape that authorities re-qualified as adultery cases.

⁴⁵ UNAMA conducted interviews with mediators in 24 provinces: Badakhshan, Kunduz, Baghlan, Takhar, Faryab, Saripul, Jawzjan, Bamyan, Daikundi, Badghis, Farah, Ghor, Herat, Khost, Ghazni, Laghman, Kunar, Nangarhar, Paktiya, Kandahar, Nimroz, Uruzgan, Zabul and Helmand.

⁴⁶ UNAMA conducted focus group discussions with women activists in all 34 provinces.

5. Key Findings: Injustice and Impunity

5.1. *De facto* impunity in cases of murder and “honour killings”

There are many causes of violence against women in our province. The main causes for violence against women in this province are poverty, lack of employment, lack of awareness of women’s rights and people selling their girls for 10 to 40 thousand US Dollars. The heavy dowries for girls lead to many murders of women and increase violence cases and sometimes they create tension between two tribes. The provincial council has registered violence against women cases involving forced marriage, running away from home and sometimes murder. These are the majority of cases we deal with and we deal with these types of cases on a daily basis through family committees in the provincial council.⁴⁷

UNAMA interview with a provincial council member, 31 August 2015, Nimroz province

According to Government reports, murder of women represents the second most prevalent form of violence against women in Afghanistan (with the first being battery and laceration).⁴⁸ UNAMA found a *de facto* impunity for murder and “honour killings” of women in cases monitored in 2016 and 2017. UNAMA noted the judicial discretionary authority concerning “honour killings” provided for under the 1976 Penal Code, which was in place during this period, as a contributing factor to impunity,⁴⁹ as well as the resolution of murder cases by mediation. The resolution of such cases by mediation must never occur; and cases should be prosecuted under the applicable general murder articles⁵⁰ in order to end impunity.

Murder and “honour killings” of women are acts of extreme violence and constitute a serious violation of human rights. Any act of violence against women perpetrated in the private or public sphere, whether by State or non-State actors, invokes the due diligence obligation of the State to prevent, investigate, punish and provide compensation for all acts of violence.⁵¹ As noted by the UN Secretary General, when the State fails to hold the perpetrators accountable, impunity not only intensifies the subordination and powerlessness of the targets of violence, but also sends a message to society that male violence against women is both acceptable and inevitable. As a result, patterns of violent behaviour are normalised.⁵²

United Nations treaty bodies have expressed concerns that honour-related crimes often go unreported, are rarely investigated and usually go unpunished. Where the courts hand down guilty convictions, the sentences are far less than those handed down for equally violent crimes without the ‘honour’ dimension.⁵³ Afghanistan’s recent promulgation of the revised Penal Code, which abolished previous discriminatory provisions in relation to “honour killing” cases⁵⁴, is in line with international treaty body recommendations⁵⁵, and is encouraging in this regard. However, this is only the first step in ending impunity for such crimes.

⁴⁷ Interview with a member of the Provincial Council in a province in the western region, 31 August 2015.

⁴⁸ According to data collected by the Ministry of Women’s Affairs in 2014. The Ministry documented 371 cases of murder of women out of 4541 registered cases. Afghanistan Third Report on the Elimination of Violence against Women, November 2015.

⁴⁹ “Honour killings” are not criminalised in the EVAW Law and appeared in Afghanistan’s 1976 Penal Code as a mitigating factor to murder. Article 398, 1976 Penal Code.

⁵⁰ From February 2018 the provision applicable to all murder cases would be article 547(2) in the 2018 Penal Code.

⁵¹ Office of the High Commissioner for Human Rights, “Gender-Related Killings of Women and Girls”, August 2013.

⁵² Human Rights Council Twentieth session, “Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo”, 23 May 2012, A/HRC/20/16, para 19.

⁵³ For example, para. 60 and 63. Report of the Committee against Torture, Forty-third session (2-20 November 2009), Forty-fourth session (26 April-14 May 2010). A/65/44.

⁵⁴ Article 398 of the 1976 Penal Code stipulated: “a person defending his honour, who sees his spouse, or another of his close relatives, in the act of committing adultery or being in the same bed with another and immediately kills or injures one or both of them, shall be exempted from punishment for laceration and murder, but shall be imprisoned for the period not exceeding two years, as a “Tazeeri Punishment”.

⁵⁵ For example the Convention on the Elimination of all Forms of Discrimination against Women, Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan, CEDAW/C/AFG/CO/1-2, 30

UNAMA documented 280 cases of murder and “honour killings” of women from January 2016 to December 2017.⁵⁶ Of these, 50 cases resulted in the conviction and imprisonment of the perpetrator, representing 18 per cent of the cases documented. As in previous years, the vast majority of murder and “honour killing” cases involving women did not reach prosecution and the perpetrators are still at large.⁵⁷ UNAMA found that in more than one third of cases documented over the two-year period, the police did not forward the cases to prosecutors.⁵⁸ UNAMA’s interviews with traditional mediators suggest informal mediators resolved some of these cases. The documented circumstances for the dismissal of cases ranged from perpetrators fleeing to areas controlled by Anti-Government Elements, perpetrators not being apprehended for other reasons, and dismissal of cases due to lack of evidence.

In relation to deficiencies in apprehending perpetrators, UNAMA notes that Article 209 of the Criminal Procedure Code allows trials to be held in absentia for misdemeanour and felony crimes⁵⁹, and strongly recommends that such trials must be utilised in murder and “honour killing” cases where the apprehension of perpetrators may not be possible.

UNAMA’s interviews with mediators found that mediators in nine provinces have adjudicated murder cases.⁶⁰ Further, UNAMA observes that such practices were carried out almost exclusively by traditional dispute resolution mechanisms⁶¹ rather than by ERAW institutions. Mediation of murder cases by traditional dispute resolution mechanisms often aims to restore harmony between the families by giving a woman or girl in restitution (*baad*), a practice that is a criminal offence under the ERAW Law and which constitutes a serious violation of human rights.⁶²

UNAMA notes that deficiencies in Afghanistan’s applicable legislative framework for prosecuting “honour killings” may have contributed to impunity during the period covered in this report. The 1976 Penal Code allowed “honour killings” as a mitigating circumstance in murder cases.⁶³ The 2018 Penal Code, however, does not contain this reference and the justification of “honour killing” cannot now serve as a mitigating factor in

July, 2013, Paras 24, 25. The Committee: “[urged Afghanistan] to repeal article 398 of the Penal Code to ensure that perpetrators of so-called “honour killings” are not given legal concessions, and include a definition of rape in the Penal Code, in line with international standards.”

⁵⁶ UNAMA documented 104 cases in 2016 and 176 cases in 2017.

⁵⁷ See UNAMA/OHCHR, “Still a Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan”, 2012, p. 34. See figure 1 for breakdown of cases.

⁵⁸ UNAMA’s findings in this regard are broadly consistent with those of the Afghanistan Independent Human Rights Commission (AIHRC), which documented 160 murder cases of women during the first 8 months of 1395 (21 March 2016- 21 November 2016) of which 119 were reported to be “honour killings”. According to the AIHRC only 33 percent of such cases were referred for prosecution. (AIHRC Report available online in dari at http://www.aihrc.org.af/home/research_report/6019)

⁵⁹ Article 209 of the Criminal Procedure Code stipulates “For misdemeanor and felony crimes, if the accused person does not appear for the judicial session on the due date in spite having been notified, the court shall suspend the case proceedings and issue a summons or arrest warrant. If the accused person does not appear for a second time, he/she is notified by an announcement. If he/she still does not appear within the period of time announced, the court shall appoint a legal aid provider to him and issue a decision.”

⁶⁰ Such statements were made in focus group discussions with mediators in Badghis, Paktya, Ghazni, Kunar, Maidan Wardak, Paktika, Khost, Balkh and Jawzjan provinces.

⁶¹ Although one member of the Family Response Unit in a province in the eastern region told UNAMA that the police mediates in murder cases. Interview with a mediator from the Police Family Response Unit, province in the eastern region of Afghanistan.

⁶² UNAMA/OHCHR, “Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan”, December 2010, p. 11.

⁶³ Article 398 of the 1976 Penal Code states that a person who kills or injures his wife or a relative in order to defend his honour, will not be subject to the punishment for murder or laceration, and instead shall be imprisoned for a period of no more than two years.

murder trials. Justice sector officials should investigate, prosecute and adjudicate “honour killings” under the general murder provision in Article 512, and sentence convicted persons accordingly.

Figure 1: Cases of murder and “honour killings” documented by UNAMA in 2016-2017

Year	# of cases	Cases where perpetrator convicted and imprisoned	Cases disposed of by the prosecutor	Cases not forwarded by police to prosecutor ⁶⁴	Cases where perpetrator could not be apprehended ⁶⁵	Cases under process ⁶⁶	Cases not reported to authorities ⁶⁷
2016	104	19	2	37	18	19	9
2017	176	31	0	68	40	28	9
	280	50	2	105	58	47	18

5.2. Absence of due-diligence by authorities: referral of criminal offences of violence against women to mediation

I was treated well by the police officials who recorded my case. However, when I was taken by my legal councillor to the EVAW prosecutor, I felt that I was not welcomed by her. The prosecutor told me that she cannot legally intervene and/or arrest my husband for justice, but she can mediate the case in order for me to go back to husband which at that time I did not want to do. I refused mediation and tried to open a divorce petition at the court.⁶⁸

UNAMA interview with a survivor, 8 May 2017, Mazar-i-Sharif province

Violence against women has been recognised as a form of discrimination and is one of the most widespread human rights violations.⁶⁹ International human rights law recognises that the prohibition of gender-based violence has evolved into a principle of customary international law. Violence against women is an attack on the psychological and physical integrity and dignity of women, and may amount to torture. States’ failure to ensure due-diligence in cases of violence against women amounts to a human rights violation under international human rights law.⁷⁰

⁶⁴ These include cases that were closed due to lack of evidence.

⁶⁵ This category includes cases where perpetrators fled to Taliban or Anti-Government Elements controlled areas.

⁶⁶ This category includes cases being investigated by police, cases with prosecution offices and cases with the courts, as of the time of data collection.

⁶⁷ This category includes one case where the complainant died and the case was withdrawn. UNAMA documented cases that were not registered with authorities through community networks and ongoing monitoring.

⁶⁸ Testimony of a survivor of repeatedly beating by her husband in the northern region. Case NR1-3. Although beating cases do not fall within the five serious crimes in the EVAW Law, EVAW Law institutions must carry out their due-diligence in registering, investigating and prosecuting criminal cases, and must not pressure complainants to seek mediation.

⁶⁹ United Nations, “Ending Violence against Women: From Words to Action” Study of the Secretary General, 2006, P. 131

⁷⁰ States’ responsibility to ensure the protection and fulfilment of human rights means that States must take measures to respond to actions by non-State actors that violate human rights of individuals. The concept of states’ due diligence is used to determine when a state is responsible for failing to protect individuals from acts committed by non-State actors. This concept was first developed in jurisprudence in other areas of international law in connection to mass disappearances in Latin America. The Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras* found that Honduras was in breach of its due-diligence obligations in that disappearances were carried out or tolerated by Honduran officials and that the Government failed to guarantee the human rights affected by this practice. Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, Brill Academic Publishers, Inc., 2011, p. 249.

UNAMA found that, in breach of their due-diligence obligations, officials of ERAW institutions often referred criminal offences of violence against women, including the five serious offences, to mediation. UNAMA reiterates the State's obligation to investigate, prosecute and punish perpetrators in criminal offences of violence against women in accordance with national laws.

Mediators in most provinces informed UNAMA that they have mediated criminal offences of violence against women, including the five serious offences set out in Articles 17 to 21 of the ERAW Law, such as acid attacks and forced suicide.⁷¹ Of the 237 cases monitored by UNAMA, mediators resolved 145 cases.⁷² UNAMA documented the mediation of murder, beating, attempted rape, causing injury, domestic violence, "running away"⁷³, forced marriage and *baad* by State and non-State actors. Mediators in some provinces were either not aware of the limits on their authority to mediate cases, or did not admit to mediating the five serious offences, despite UNAMA findings to the contrary.⁷⁴

Women activists informed UNAMA that dedicated ERAW Law institutions – including the police, prosecutors and judges – are aware that people resolve ERAW cases, including those involving the five serious offences, through traditional dispute resolution mechanisms, and that these ERAW Law institutions sometimes encourage or endorse this practice through case referrals or by observing proceedings. UNAMA's focus group discussions with mediators support this assertion. In 12 focus group discussions, participants said that they mediate cases of *baad* and in one focus group discussion, a participant said that he had mediated rape cases.⁷⁵

As one example of the involvement of authorities in informal mediation proceedings, in a traditional mediation session observed by UNAMA on 7 September 2015 in Herat province, a community leader from the survivor's village opened the session by telling parties:

*"I came here to mediate the case with cooperation of the police officer. Following the case within the justice system is not the solution."*⁷⁶

In another illustration of the State's failure to uphold the provisions of the ERAW Law, UNAMA documented a case from the north east region in which the survivor tried to commit suicide using a chemical substance after many years of suffering from beatings by her husband. The survivor's father registered the case with the police but the community pressured the family to agree to community mediation. Although police officers were aware of the ongoing mediation and the severity of the violence, they refused to intervene. The police cited several justifications, including that they require an additional instruction by the survivor's father to pursue the criminal case; that they are waiting for the results of the mediation; and that they cannot arrest the perpetrator as he is a

⁷¹ UNAMA's focus group discussions with mediators included representatives of Ulemas, Shuras, Jirgas, as well as separate focus group discussions with representatives of ERAW Law Institutions and Non-Governmental Organisations working on ERAW such as police Family Response Units, Commissions on ERAW, the Afghanistan Independent Human Rights Commission, Departments of Women's Affairs and more. In nine provinces where focus group discussions were held, mediators reported to UNAMA that they mediate cases of murder. This was reported in focus groups in Badghis, Paktya, Ghazni, Kunar, Wardak, Paktika, Khost, Balkh and Jawzjan provinces.

⁷² Representing 61 per cent the cases monitored by UNAMA. Figure 2 shows where the survivors initially reported their complaint while Figure 3 shows the result of the mediation in the 237 cases. ERAW Law institutions, traditional dispute resolution mechanisms and mixed mechanisms resolved these cases through mediation.

⁷³ "Running away" cases most commonly refer to situations in which Afghan women and girls leave their homes without permission from their mahram, or without providing information to their families about their whereabouts, and are subsequently arrested and charged with "running away from home." Afghan authorities investigate and register such cases as "attempted zina". See UNAMA/OHCHR, "A Way to Go: An Update on the Implementation of the Law on Elimination of Violence against Women in Afghanistan", 2013, p. 22.

⁷⁴ This included local leaders and community elders involved in traditional dispute resolution mechanisms in Badakhshan, Bamyan, Daikundi, Balkh, and Jawzjan provinces.

⁷⁵ Representatives of informal dispute resolution and ERAW institutions participated in these discussions.

⁷⁶ Statement of community elder taken verbatim during a mediation proceeding observed by UNAMA, involving a survivor's complaint of battery and laceration. Case WR21-2.

member of an illegally armed group.⁷⁷ Since this case involved a suspected forced self-immolation or suicide, the police had an obligation to carry out a formal criminal investigation and refer the case to the prosecution. Thus, in this case, UNAMA notes that, by failing to pursue the criminal investigation, the police acted in breach of the ERAW Law and committed a human rights violation.

UNAMA stresses that mediation should only apply to the resolution of civil disputes, petty crimes (that do not carry a penalty of imprisonment), or civil aspects of criminal cases.⁷⁸ UNAMA discourages mediation for any crime in the ERAW Law that is punishable by imprisonment, notwithstanding that the law allows survivors to withdraw their complaints in such cases at any time during judicial proceedings. UNAMA further recommends that the ERAW Law is amended to expand the authorities' positive obligation to investigate and prosecute not just the offences set out in Articles 17-21 of the ERAW Law, but also to include all criminal offences of violence against women, irrespective of whether women withdraw their complaints.

UNAMA considers ERAW institutions, as State actors, representatives of the State of Afghanistan⁷⁹, and distinguishes between the legal obligations of State and non-State actors involved in the mediation of criminal offences of violence against women. UNAMA notes that where officials of ERAW institutions refer survivors to informal mediation, have knowledge of proceedings, or participate as observers, this is unlawful and amounts to a human rights violation.

5.3. Survivors of violence avoid seeking redress through the formal justice system

“Most of the district people are wary of resolving or referring violence against women cases to the formal justice system. They believe that once the case goes to the formal justice system, it will be publicised and that is something that they wish to avoid. They believe that they will lose respect in society if they go to the formal system. That is the primary reason why women in the districts want to go through mediation.”⁸⁰

UNAMA interview with the Head of a District Women's Council, 13 June 2017, Badakhshan province

Consistent with UNAMA's findings in previous reports, UNAMA notes the widespread under-reporting of violence against women cases to the formal justice system. Those that did report incidents to the authorities, primarily reported to provincial Departments of Women's Affairs, followed by women's protection centres and the police.⁸¹ Many survivors in cases documented by UNAMA preferred to report their cases to the Afghanistan Independent Human Rights Commission and other non-governmental organisations.

Violence against women is considered to be a private family matter in many societies including in Afghanistan. This stems from a dominant ideology and social norm regarding masculinity that require the assertion of masculine control or power over women and the enforcement of “traditional” gender roles. Proponents of this ideology discourage female behaviour which they consider as being “unacceptable”. In Afghanistan, the underlying cultural norm of viewing sexual and domestic violence as ‘private family matters’ contributes to under-reporting. Studies have shown that Afghan women in general are less likely than men to report violence outside of their families.⁸²

⁷⁷ Case NER17-2.

⁷⁸ Article 29 of the 2018 Penal Code defines petty crimes as crimes for which the penalty is a cash fine of up to 30,000 Afs. Civil aspects of criminal cases refers to matters such as compensation, divorce, as well as wider inter-family or tribal disputes arising as a result of criminal offences.

⁷⁹ ERAW institutions are detailed in footnote 6 in this report.

⁸⁰ Focus group discussion with district council members held on 2 December 2015, Badakhshan province, north eastern region.

⁸¹ See Figure 2 for detailed breakdown of where women reported cases.

⁸² The Asia Foundation's Afghanistan Survey found that women are less likely than men to report crimes or violence outside of their family (59.6 per cent of women, compared to 65.6 per cent of men). The Asia Foundation, “A Survey of the Afghan People: Afghanistan in 2017”, p. 161.

UNAMA notes from interviews with survivors that perpetrators of violence against women are predominantly family members, specifically male family members. This also contributes to under-reporting, as women may fear family and/or spousal retaliation as a result of reporting. Of the 237 cases monitored by UNAMA, 194 survivors stated that the perpetrator was a male relative, predominantly a spouse. The majority of violence stemmed from family misunderstandings, disputes and tensions that often led to violent recriminations against women, such as battery and laceration, causing injury and sometimes death.

Women activists highlighted that when survivors approach the formal justice system for the resolution of their case, it would often be as a last resort, particularly where there has been recurring violence of a serious nature, or where past mediation has not worked.⁸³ In the 237 cases observed by UNAMA, 71 per cent involved complaints lodged because the violence was recurrent.

The possible incarceration of the perpetrator – who is in most cases the sole breadwinner for the family – also contributed to under-reporting.⁸⁴ Criminal offences of violence against women in the EVAW Law carry a mandatory incarceration of convicted persons for periods ranging from one month to life imprisonment, depending on the crime committed and any aggravating circumstances.⁸⁵ Certain crimes carry the death penalty where the prohibited act resulted in the death of the victim. Women activists noted that the law's sole reliance on incarceration as a punishment becomes a key determinant in survivors' under-reporting and withdrawal of complaints, in particular where the perpetrator is a breadwinner for the family.⁸⁶ This is primarily due to Afghan women's economic vulnerability, the absence of social security schemes, Afghan women's low employment rates and their financial dependency on male members of the family.⁸⁷

Survivors also described the prevailing insecurity and movement constraints as a hindrance to reporting cases to authorities. Women continued to suffer confinement and movement restrictions throughout Afghanistan, particularly in the more rural areas, due to family restrictions stemming from cultural norms, financial dependency and general insecurity.⁸⁸

⁸³ This was noted in Kandahar and Khost provinces.

⁸⁴ See more on this in section 5.5.2.: "Survivors withdrawal of complaints and agreement to mediation for fear of economic and social repercussions to their lives".

⁸⁵ Articles 17 to 41, "Chapter 3 – Criminal Provisions", Law on Elimination of Violence against Women, Presidential Decree No. 91 of 20 July 2009.

⁸⁶ For example, Case NR13-3 in which the survivor withdrew her complaint of beating because her husband was the family sole breadwinner.

⁸⁷ See more on women's economic vulnerability in UNAMA/ OHCHR, "Justice through the Eyes of Afghan Women: Cases of Violence against Women Addressed through Mediation and Court Adjudication", April 2015. p. 32

⁸⁸ Focus group discussion with mediators from Farah province.

Figure 1: ERAW Law institutions where survivors initially reported their complaint

ERAW Law Institutions where Survivors Reported their Complaint	Cases
Departments of Women’s Affairs	80
Women’s Protection Centres/other non-governmental organisations	34
Police	76
ERAW Prosecution Unit	13
Afghanistan Independent Human Rights Commission	21
Traditional Dispute Resolution Mechanism	13
TOTAL	237

5.4. Traditional dispute resolution mechanisms mediate criminal offences of violence against women

When I asked them if I could attend the session, they didn’t allow me and said [you must] accept what the community elders will decide.⁸⁹

UNAMA interview with a survivor, 7 June 2017, Baghlan province

UNAMA found that traditional dispute resolution mechanisms in all provinces of Afghanistan resolved criminal offences of violence against women, including murder, “honour killings” and the five serious offences set out in Articles 17-21 of the ERAW law⁹⁰ following direct referrals by families, referrals by ERAW Law institutions, and in some cases through subsequent participation of those ERAW institutions.⁹¹ Traditional mechanisms, however, are not State-actors, and are not legally mandated to resolve criminal cases. Such mechanisms operate in an unofficial and unregulated capacity, their decisions in criminal cases are unlawful, and as such, are not subjected to any Government oversight or scrutiny.

UNAMA documented two different types of mediation procedures carried out by traditional dispute resolution mechanisms in relation to violence against women. Traditional mediators – in particular *Jirgas*⁹² convened by Anti-Government Elements – resolved wider community or family conflicts, through decisions that often resulted in acts of violence against women. For example, *Jirgas* sometimes decided to ‘give’ a girl in *baad* as a gesture to resolve a dispute or criminal act between families. Traditional mediators however also mediated criminal offences of violence against women such as beating by spouses, harassment, causing isolation and

⁸⁹ Case NER11-3.

⁹⁰ This was also confirmed by the Government of Afghanistan’s third report on the Elimination of Violence against Women: according to Government’s third ERAW report, out of 2,018 documented cases Departments of Women Affairs forwarded 94 (5 per cent) to traditional dispute resolution; out of 4,340 incidents, the Afghan Independent Human Rights Commission referred 106 Incidents (2.5 per cent) to traditional dispute resolution. Afghanistan third report on the Elimination of Violence against Women, November 2015.

⁹¹ A legal officer of the Department of Women’s Affairs in one of the provinces of the eastern region told UNAMA: “We have mediated cases alone or together with other mediators such as ANP, Prosecution Office, Women for Afghan Women, Provincial Council, Tribal Elders, MPs, and if necessary with Provincial Governor Office as well.” Interview with Department of Women’s Affairs Representative, in the eastern region. This was also confirmed in several other provinces across Afghanistan.

⁹² UNAMA primarily documents decisions by parallel justice structures of Taliban and Anti-Government Elements through its protection of civilians monitoring and mandate, and reports on cases in the mid-year and annual reports on protection of civilians in armed conflict.

more, in a similar way to the mediation carried out by ERAW institutions. In such cases, traditional mediators' decisions largely involve commitment letters by the perpetrator to refrain from violence in the future.

UNAMA emphasises that both types of procedures and decisions by traditional dispute resolution mechanisms – whether the mediation of criminal offences of violence against women or the mediation of wider disputes resulting in decisions which inflict abuse or violence to women – are unlawful and constitute human rights abuses. Where authorities know about such practices but do not take action against them, refer survivors to these mechanisms, or participate as observers, this is unlawful and amounts to a human rights violation on the part of the State.

Survivor statements indicate that traditional dispute resolution mechanisms are seen as offering families and survivors an easily accessible and quick system of informal and unregulated justice. However, UNAMA reiterates that such a system often leads to abuses of women's rights. These rights include the right to freely choose a partner, the right to health and physical integrity, and the rights enshrined in the Child Rights Convention in relation to forced child marriages. For example, UNAMA documented a case from the eastern region in which local families referred the case of a girl, who had "run away" from her home for the purpose of marriage, to a *Jirga* for resolution. The *Jirga* decided to 'give' another 13-year-old girl from one of the families to the other family involved, in order to resolve the dispute. The two families involved in this case insisted to the authorities that they had carried out a routine exchange marriage, which under the ERAW Law may also be illegal. However, UNAMA's monitoring revealed that the illegal practice of *baad* had taken place following the *Jirga's* decision.⁹³

In another example from the Northeast region of Afghanistan, UNAMA documented the case of a woman who had run away after being forcibly married. The survivor was brought before a Taliban *Jirga* convened to decide her case and determine her fate. The survivor joined the *Jirga* at the very end of the process. The *Jirga* was composed of four men representing both families in the dispute, including her father, who acted as her representative during proceedings. Following deliberations, the *Jirga* decided to impose a punishment of beating for the survivor, for running away from her home.⁹⁴

UNAMA documented several egregious cases where violence recurred and intensified following decisions of traditional dispute mechanisms, further endangering women's lives and constituting serious human rights abuses. UNAMA documented a case where a survivor approached the local Taliban court seeking their intervention and assistance in the ongoing beatings by her husband. The Taliban mediated the case and secured a verbal commitment from the husband to refrain from further violence. When the survivor returned home, her husband cut off her nose with a knife.⁹⁵ UNAMA stresses that such a horrific outcome was preventable if the survivor had sought an intervention by the criminal justice system and the Government taking comprehensive measures to discourage the use of traditional dispute resolution mechanisms. While the Taliban itself did not inflict further human rights abuses on the survivor in this case, traditional dispute mechanisms – including the Taliban's – lack the capacity or authority to carry out any official or other form of systematic monitoring of mediated cases and the situation of survivors, thereby increasing the likelihood of such brutal outcomes.

UNAMA documented several instances where ERAW institutions collaborated with mediators in traditional dispute resolution mechanisms to pressurise survivors into accepting mediation and mediation decisions. UNAMA emphasises that whether or not ERAW institutions actively participate in such coercion, where representatives of ERAW institutions are aware that traditional dispute resolution mechanisms are resolving

⁹³ UNAMA notes that exchange marriages are also criminalised in the ERAW Law. Case ER3-3.

⁹⁴ Case NER21-3.

⁹⁵ Case NR6-2.

criminal offences of violence against women but take no action, it may amount to a human rights violation and a breach of the EVAW Law.

As an example of a case in which EVAW Law institutions actively coerced a survivor to agree to mediation, UNAMA documented the following statement, made by a police officer from a Family Response Unit in a battery and laceration case, during a mediation by community elders in the western region:

“You should accept [mediation] and withdraw the case; mediation is the best way. I have arrested the perpetrator, shaved his head and put him in the police lock-up. The perpetrator is in police lock-up. If you do not accept mediation, the community leader and I will never cooperate with you. If you do not withdraw your case, later you will not have the support of police and community leaders. This is the best time to resolve the issue. Don’t send your case to the prosecutor office. Accept mediation because of your children and reputation. I will prepare a [commitment] letter stating that the perpetrator cannot beat you again. If he beats you again, I will put him in prison for five years. To the letter I will add the finger prints of the community leader of the village [and] relatives of the perpetrator [as a guarantee].”⁹⁶

UNAMA found in several cases that mediation proceedings attempted to resolve wider family and community disputes in their procedures and decisions, thereby intermingling a range of other interests and objectives in decisions. Such decisions have broader goals than addressing the violence suffered by women and may therefore not be beneficial to survivors’ interests. UNAMA monitored such cases in relation to disputes involving land, security, illegally armed groups, the Afghan Local Police, and inter-family arguments. In these cases, survivors endured even stronger pressure to agree to the mediation decision, since wider communal interests were at stake.

Survivors interviewed by UNAMA described the referral to traditional dispute resolution mechanisms using passive language, noting that others (usually family members and sometimes EVAW institutions), referred the case to the mechanism. For example, a 12-year-old girl who was engaged to a man in another family, as part of an exchange marriage, said:

“As per my fiancé and his family’s request and my consent, the case was referred to a traditional justice mechanism.”⁹⁷

In another example, a survivor who complained of battery by husband, told UNAMA:

“My brothers-in-law resolved the issue through a local Jirga with my consent and guaranteed not to subject me to violence in the future...”⁹⁸

Such testimonies suggest the absence of agency of the survivor in the decision to refer the case to a traditional dispute resolution mechanism.

Women activists and female mediators highlighted to UNAMA that where survivors choose traditional mediation mechanisms, this was often linked to perceptions of corruption in the justice sector. However, these sources confirmed to UNAMA that traditional mediators themselves routinely ask for money, sheep and land from both parties (known as *machalgha*). A woman activist from Daikundi province provided several examples of such fees including a demand for a payment of 10,000 Afs to secure a woman’s divorce from her husband and a demand of payment of sheep in order to secure a divorce.⁹⁹ Some mediators requested payment, as a method of ensuring that parties adhere to the mediation decision.¹⁰⁰ Other mediators and parties to mediation

⁹⁶ Case WR21-2.

⁹⁷ Case ER7-3.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Focus group discussion with mediators in Laghman and Ghazni provinces.

demanded payment at the end of a successful mediation, (known as *sherin*).¹⁰¹ Mediators also commonly requested payment of their expenses.¹⁰²

Women activists and mediators interviewed denounced such practices, highlighting that mediation should be voluntary. They further noted that where parties disagree with a decision, they should have the right to appeal the decision, either to a court of law or to a relevant Government institution.¹⁰³ Such statements reflect community confusion over the legal status of traditional dispute resolution mechanisms, which is likely exacerbated when EAW institutions are seen to be collaborating with such mechanisms.

Where UNAMA was able to view mediation decisions by traditional dispute resolution mechanisms, UNAMA noted a predominant absence of legal reasoning, with decisions often based on mediators' own judgment and discretion.¹⁰⁴

UNAMA's monitoring confirms that mediation panels in traditional dispute resolution mechanisms are largely composed of men, and that often, survivors were not present during proceedings. For example, in the case of a woman who complained of physical abuse, humiliation and forced isolation imposed by her husband, the survivor's father represented her in front of a panel of five men who mediated the case.¹⁰⁵ In such proceedings, the survivor is an external element, precluded from all discussions about her case, with no opportunity to defend her concerns and no consultation on mediation decisions.

Women activists highlighted to UNAMA that in some ethnic groups, cultural norms dictate that women cannot participate in mediation processes. In other ethnic groups, there is greater latitude and sometimes specific 'roles' reserved for female mediators, particularly with regard to specific 'evidentiary' tasks, such as conducting interviews with survivors, or inspecting survivors' injuries.¹⁰⁶ The same sources stated in consultations that women should be included as mediators in traditional dispute resolution mechanisms, as this would facilitate survivors' participation in mediation processes in violence against women cases and enable them to express their complaints and concerns comfortably.¹⁰⁷

UNAMA learned that many traditional mediators have received some form of training from non-governmental organisations. Mediators reported undergoing training in Maidan Wardak, Logar, Kapisa, Baghlan, Jawzjan, Samangan, Helmand, Kandahar, Nimruz and Herat provinces. Mediators in these areas reported receiving training by the Asia Foundation, the Swedish Embassy, the National Solidarity Programs, Save the Children, Action Aid, Sanayee Development Organisation, Norwegian Refugee Council, Reintegration and Development Assistance for Afghanistan (RADA), and by the Afghanistan Independent Human Rights Commission. UNAMA was unable to review the training materials for this report, or discuss the training content with the organisations noted above. However, UNAMA urges non-governmental organisations to emphasise in their training that traditional mediators must not mediate criminal offences, particularly murder and the five serious offences of violence against women set out in Articles 17-21 of the EAW Law, and should only perform mediation in civil cases and to resolve family or community disputes.

¹⁰¹ Focus group discussion with mediators in Jawzjan province.

¹⁰² Focus group discussions with mediators in Panjshir, Laghman, Nuristan, Baghlan, Jawzjan, Samangan provinces.

¹⁰³ Focus group discussions with women activists in Faryab and Balkh provinces.

¹⁰⁴ Case NER11-3; Focus group discussion with mediators in Laghman province, second tranche.

¹⁰⁵ Ibid.

¹⁰⁶ Focus group discussions with women activists in Helmand, Nimruz, and focus group discussions with mediators in Laghman, Kapisa, Paktiya, and Helmand provinces.

¹⁰⁷ Focus group discussions with women activists in Khost, Kunduz, Saripul, Ghazni, Paktika, Helmand, Uruzgan, Zabul, and Takhar provinces.

5.5. Observations on mediation processes involving EVAW institutions

“First when we receive a violence against women case, we register the case and after initial investigation we appoint a defence lawyer to the victim. We then share the case with our committee members. The committee includes representative from the police, Department of Women’s Affairs, Justice Department, Afghanistan Independent Human Rights Commission, Family Court, prosecution and the victim’s defence lawyer. Then we meet with both parties individually. After that with the consent of the victim we call both parties together and we also call all committee members and we mediate the case in the presence of the victim.”¹⁰⁸

UNAMA interview with a legal officer in a Department of Women’s Affairs office, 19 September 2017, Nangarhar province

UNAMA monitored mediation proceedings carried out by EVAW Law institutions and other organisations in criminal offences of violence against women across Afghanistan. UNAMA monitored proceedings carried out by prosecutors, police, Departments of Women’s Affairs, the Afghanistan Independent Human Rights Commission, Women for Afghan Women and other non-governmental organisations.¹⁰⁹ UNAMA carried out individual interviews with mediators from these institutions and found that, in the majority of cases mediated by EVAW Law institutions, survivors were present during proceedings, guarantee letters were produced, and survivors had noted their general satisfaction with the decision and proceedings.

UNAMA notes that international human rights advocates recognise that survivors of gender-based violence against women are often required to enter into mediation processes especially in cases of family-related violence, divorce and child maintenance, and custody disputes.¹¹⁰ The use of mediation in violence against women cases is, however, widely discouraged, with UN Treaty Bodies highlighting risks related to enforcement of decisions and implementation, when using mediation especially in domestic violence cases.¹¹¹ In its General Recommendation No. 33, the Committee on the Elimination of all Forms of Discrimination against Women prohibits the use of any alternative dispute resolution including mediation in cases of violence against women.¹¹² Experts recommend that where justice programmes include mediation components for resolution of violence against women cases, these should at least comply with the following principles:

The process must offer the same or greater measures of protection of the victim/ survivor’s safety as does the criminal justice process; the perpetrator has accepted responsibility; the justice service provider approves; the mediators are trained and qualified; a validated risk assessment has determined that the woman is not at high risk; the victim/survivor is fully informed of the process and she approves of the mediation; the victim/survivor

¹⁰⁸ Testimony of a legal officer in a Department of Women’s Affairs office in a province in the eastern region.

¹⁰⁹ Some EVAW institutions reported to UNAMA that they were not allowed to mediate cases. In such cases, where mediation occurred, it may have been facilitated by the EVAW Law institutions and hosted within the institution itself but it was actually carried out by traditional leaders. In these cases, EVAW Law institutions noted that the role of the EVAW Law institution was to ensure that survivors were not pressured or threatened. Interview with Family Response Unit representatives in a province in the northern region.

¹¹⁰ “A Practitioner’s Toolkit on Women’s Access to Justice Programming: Module 3: Ending Violence against Women”, UN Women, UNODC, UNDP and OHCHR, 2018, P. 17

¹¹¹ The Committee on the Elimination of Discrimination against Women in its General Recommendation No. 35 noted for example that States must ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of these procedures should be strictly regulated and allowed only when a previous evaluation by a specialised team ensures the free and informed consent by the affected victim/survivor and that there are no indicators of further risks for the victim/survivor or their family members. These procedures should empower the women victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring an adequate protection of women’s and children’s rights as well as an intervention with no stereotyping or re-victimisation of women. These alternative procedures should not constitute an obstacle to women’s access to formal justice.

¹¹² The Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, para 58

consents to participate in the mediation process.¹¹³ In addition, women should always be allowed to file a complaint in the formal justice system.¹¹⁴

UNAMA's monitoring and documentation indicates that EVAW Law institutions do not currently meet these standards when they mediate criminal offences of violence against women; primarily because mediation is unregulated in Afghanistan and consequently EVAW Law institutions do not apply uniform standards and procedures, resulting in varying levels of duty of care.

Despite these challenges, survivors nonetheless informed UNAMA of largely positive experiences of mediation by EVAW Law institutions. However UNAMA also documented a small number of cases where survivors voiced their dissatisfaction with the mediation process following the resolution of their cases.

In cases where survivors shared their dissatisfaction, it was often related to a requirement to withdraw their official complaint, which may not have been clearly explained to them from the start. For example, UNAMA documented a forced marriage and "running away" case of a woman in the north eastern region where the Department of Women's Affairs and Women for Afghan Women mediated the case and required the survivor to withdraw her complaint. The survivor told UNAMA:

*"I withdrew my case and decided to be with my family. I am sad and disappointed."*¹¹⁵

Women activists highlighted to UNAMA that Afghan women generally lack an awareness of their rights in the justice system, a contributing factor being women's high rate of illiteracy – which is on average 83 per cent – making it likely that most survivors of violence against women would not be educated.¹¹⁶ Women's high rates of illiteracy, in conjunction with their confinement to the home/village, means that a large proportion of Afghan women do not have direct access to legal information or societal networks that would help them understand the justice system and applicable laws and procedures.

UNAMA found that mediation proceedings by EVAW Law institutions and organisations took different lengths of time, depending on the case and the institution. UNAMA observed that in some cases, the length of procedures was in direct correlation to the severity of the crime, with shorter proceedings held in less serious cases. However, in other cases, the length of the proceedings appeared to be more related to the level of agreement between the survivor and the families involved. Many cases documented by UNAMA took the form of one- to two-hour single sessions,¹¹⁷ for example, a case of beating by a mother in law from the northern

¹¹³ "Essential Service Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines: Module 1 Overview and Introduction", UN Women, UNFPA, WHO, UNDP, UNODC, p. 21

¹¹⁴ The Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, para 58

¹¹⁵ Case NER1-3.

¹¹⁶ Afghanistan has one of the lowest literacy rates in the world, currently estimated at about 31 per cent of the adult population (over 15 years of age). Female literacy levels are on average 17 per cent, with high variation, indicating a strong geographical and gender divide. The highest female literacy rate, for instance is 34.7 per cent, found in the capital, Kabul, while rate as low as 1.6 per cent is found in two southern provinces of the country. Male literacy rates average about 45 per cent, again with high variation. The highest male literacy rates are in Kabul, at 68 per cent, while the lowest is found in Helmand, at 41 per cent. This high variation between male and female literacy rate, is due to combination of factors, such as cultural norm of women not attending school and spending time managing the household, security problems in travelling to classes, and sometimes family not allowing women to attend classes. The disparity in urban and rural areas in adult education rate is due to several factors as well, including security problems, lack of schools in remote areas, long walking distance to schools, and low demand for literacy in particular for women literacy, due to cultural barriers. Source: <http://www.unesco.org/new/en/kabul/education/enhancement-of-literacy-in-afghanistan-ela-program/>, retrieved 10 February 2018.

¹¹⁷ UNAMA also documented a single case in which the mediation was carried out in 15 minutes by the Department of Women's Affairs in the southern region. The case involved the prevention of education and "running away". Case SR2-3.

region.¹¹⁸ Other cases - such as a “running away” and forced marriage case from the north eastern region.¹¹⁹ - took the form of two- to three-hour sessions over several days.

Many survivors informed UNAMA that mediation procedures were held in a supportive environment and were respectful of survivors’ needs.¹²⁰ In some cases, family members’ escorted survivors to the proceedings, while in other cases, survivors were alone. One survivor shared with UNAMA that if her brother had not escorted her to the proceedings, she would not have filed the initial complaint with the police, due to cultural norms.¹²¹

EVAW institutions and other organisations that registered complaints and carried out mediation often placed survivors in protective facilities, such as women’s shelters, during the proceedings. EVAW institutions usually consulted the survivor and her family before placing her in a protective institution.¹²²

UNAMA’s monitoring revealed a wide disparity in practices in relation to monitoring compliance with mediation decisions. Most EVAW institutions reported that procedures exist for the monitoring of survivors on a periodic basis. For example, a representative of a Department of Women’s Affairs Office in the western region stated that the Department monitors in person and on a regular basis. A representative of the Family Response Unit in the same province noted that the Unit monitors by phone for a period of two months following the resolution of the case.¹²³ A representative of the Family Response Unit in a different province in the western region informed however, that the Unit monitors survivors for one month, and that thereafter, survivors may call a provided telephone number where they can update the Family Response Unit on their situation.¹²⁴ Given that mediation decisions rely on the non-repetition of the violent behaviour by perpetrators, the proactive monitoring of survivors and perpetrators by authorities is critical. Authorities highlighted their lack of resources as a key challenge in this regard, particularly in rural or remote areas outside the provincial capitals.¹²⁵

UNAMA emphasises that the consequences of insufficient follow-up can be catastrophic for survivors, who may suffer from additional violence or subjected to “honour killings”, in retribution for speaking up. UNAMA documented the case of a 20-year-old survivor of a “running away” to escape forced marriage case who returned to her father’s house following a mediation decision. When UNAMA enquired of her situation following the decision, none of the parties involved – including her father – could locate her. Her father told UNAMA that the survivor had married, moved away to an insecure area and was unreachable.¹²⁶ UNAMA assesses that in cases like these, there is a high likelihood of recurring violence.

In another case, a survivor filed her complaint of battery and laceration, trafficking in persons, forced marriage and induction to commit suicide, to the Department of Women’s Affairs who, in turn, contacted the survivor’s in-laws several times to enquire of her well-being. The Department of Women’s Affairs accepted satisfactory reports of her well-being, all the while failing to take into account that the in-laws were also alleged to be involved in the violence reported by the survivor.¹²⁷

¹¹⁸ Case NR12-3.

¹¹⁹ Case NER1-3.

¹²⁰ Cases NR7-3, NR8-3, NR10-3 among others.

¹²¹ Case NR13-3.

¹²² For example, in case NER1-3 and case NER7-3.

¹²³ Interview with Family Response Unit in province A in the western region.

¹²⁴ Interview with Family Response Unit in province B in the western region.

¹²⁵ This was also noted by some EVAW institutions in the provincial capitals. For example, a representative of the Family Response Unit in a northern region province told UNAMA that there is no follow up on decisions due to lack of resources. Interview with a representative of the Family Response Unit in a province in the northern region.

¹²⁶ Case NER7-3.

¹²⁷ Case ER7-2.

UNAMA found that most mediation decisions largely resulted in a guarantee letter signed by the perpetrator, committing to abstain from carrying out the act of violence against the survivor. In some cases, EVAW Law institutions provided survivors a number to call if the violence recurred. In other cases, the EVAW Law institution, or the organisation that facilitated the mediation, committed to monitor the survivor and ensure her safety.¹²⁸ Overall, UNAMA found that mediation lacked a centralised, official or dedicated mechanism entrusted with ensuring that perpetrators adhere to their commitment letters, despite the fact that the mediated cases involved the commission of violent crimes with a high potential for recidivism.

Since decisions resulting from mediation processes have no legal standing, even when handed down by EVAW institutions, they are not enforceable by authorities. While a survivor can submit a new complaint to authorities about renewed violence, her previous mediation proceeding provides her with no legal protection, as the mediation process where the decision emanated is not prescribed in Afghan law.

Figure 3: Results of the Mediation

Result of Mediation	Cases
Mediation settlement reached	124
No agreement reached	7
Case referred to another entity / mediation extended	11
No response from survivor	3
TOTAL	145

5.5.1. Mediation is primarily aimed at re-uniting families and solving family disputes

UNAMA found that the main objective of mediators in violence against women cases was to achieve a re-unification of families, at the expense of criminal accountability and formal justice, with the woman's choice about the matter not properly taken into account, and with insufficient or no attention given to the protection of the survivor from future violence.

For example, UNAMA documented one case where a survivor registered a complaint of battery and laceration with the police. The survivor – who had already undergone several mediation sessions by traditional dispute resolution mechanisms in her village – insisted on registering her complaint and pursuing formal justice. While sheltered at a women's protection centre, staff at the centre convinced the survivor to withdraw her complaint and undertake another mediation process, facilitated by the non-governmental organisation, aimed at unifying the family.¹²⁹ The women's protection centre staff told her that:

“[the formal justice system] would break the family system and will add more to your sufferings as an almost aged woman. Women who are divorced or separated are not well respected by the community, in particular when they are aged.”¹³⁰

In this case, a mediator also contributed to the reinforcement of gender stereotypes and power imbalance by emphasising the potential negative societal stigma that the survivor would suffer from if she insisted on a divorce.

¹²⁸ For example, in a case of battery and laceration from Bamyan province, the Department of Women's Affairs provided the survivor with a phone number to call if her husband continues beating her and breaking his commitment letter.

¹²⁹ Case CHR2-2.

¹³⁰ Ibid.

In the few cases where survivors refused to re-unite with their husbands, mediation practitioners helped facilitate a separation or divorce by referring the survivor to the family court or traditional/religious officials. In such cases, authorities required survivors to withdraw their official complaints and survivors did not pursue any further criminal investigations into the violence they suffered.

Where divorce proceedings were initiated as a result of mediation, survivors explained to UNAMA that they were happy to be freed from abuse in their marriages, some of which had resulted from *baad* or exchange marriages. Survivors reported satisfaction with the divorce as the ultimate result of mediation even in cases where they initially insisted on registering a case with the police and formal proceedings.¹³¹

Women across Afghanistan were required to withdraw their official complaints, upon the initiation of divorce proceedings. UNAMA found that perpetrators of violence used the threat of divorce or withholding divorce to force women to withdraw their complaints. In some cases, perpetrators used survivors' desire to receive a divorce as leverage to force them to withdraw their cases.

In other cases, perpetrators of violence against women used threats of divorce to pressure survivors to withdraw cases. UNAMA documented a case where the survivor registered a complaint of battery and laceration with the police. The investigation was ongoing when the woman's husband threatened to divorce her if she did not withdraw the case. The survivor told UNAMA:

*"...The perpetrator came to my father and asked me to withdraw the complaint. My husband told me either I withdraw my complaint or he will divorce me. I know this was a kind of threat. Despite my wish to follow up the claim, because of my children, I have to withdraw the complaint. As I do not want a divorce. I am happy with the justice system but I am dissatisfied with the EVAW Law because the law only mentions prison as a punishment for perpetrators and there are no other measures for victims. So I know if my husband is convicted and sent to prison, after his release he will divorce me."*¹³²

UNAMA documented threats related to divorce as a method employed to pressurise survivors to withdraw cases, even when cases had already been adjudicated by the formal justice system. UNAMA documented a case where the survivor registered a complaint of battery and laceration by her husband. Following a trial, the court sentenced the survivor's husband to three-month's imprisonment. When the husband began serving his sentence, he contacted the survivor and promised her a divorce if she withdrew the case. The survivor consented, withdrew the case and the convicted perpetrator was released from prison.¹³³

5.5.2. Survivors withdrawal of complaints and agreement to mediation for fear of economic and social repercussions on their lives

UNAMA documented several additional reasons for survivors deciding to withdraw their official complaints and agreeing to mediation. Some survivors were encouraged to withdraw their complaints by mediators or pressured by perpetrators or family members. Additionally, many survivors informed UNAMA that if the perpetrator were imprisoned, they would not be able to sustain the family, as they were economically dependent on the perpetrator. UNAMA documented such statements in relation to the survivor's spouses as well as other male relatives.¹³⁴

In one example, UNAMA documented a case from the south east region where a survivor filed a complaint with the police of battery and laceration by her husband. The police subsequently arrested the survivor's

¹³¹ For example, case WR10-2.

¹³² Case WR16-2.

¹³³ Case WR27-2. According to the EVAW Law, a survivor can withdraw her complaint at any point in the proceedings. Article 39 (2) of the EVAW Law.

¹³⁴ For example, cases WR7-2, WR4-2.

husband but shortly afterwards the survivor withdrew her complaint since she needed her husband’s earnings to sustain herself and the children.¹³⁵ The survivor told UNAMA:

“The prosecutor told me that she would like to send my case file to the primary court for further processing, but I told her no, I want to withdraw my case because I have small children and my husband is the only one who works and feeds me and my children. We don’t have any other income.”¹³⁶

UNAMA observed that families and authorities sometimes used threats of removing survivors’ access to their children to encourage them to withdraw their complaints and/or agree to mediation.¹³⁷ For example, a survivor told UNAMA that:

“I am a mother of four children. I am withdrawing my complaint for fear of having the social stigma and shame, but I also fear being separated from my children”¹³⁸

The majority of women activists and female mediators interviewed highlighted that in a large number of mediated cases, survivors of violence agreed to the final mediation decision, even when the decision is not to their benefit. Women and mediators explained that survivors have a limited understanding of their rights and of mediation procedures. However, in many cases, survivors lack other viable options and have no independent means of sustaining themselves and their families if they proceed with the formal justice system, resulting in their acceptance of the decisions of the mediation panel.

Figure 4: Reasons for withdrawal of cases¹³⁹

Reasons for withdrawal of cases	Number of cases
Case mediated and parties reconciled	107
Threats/ pressure relating to divorce or losing custody of children	22
Other pressure/ threats by family members/ in laws	10
Other reasons ¹⁴⁰	14
Total	153

5.5.3. EAW Law institutions engaging in mediation demonstrate disparity in standards and procedures and lack official guidelines and policies

UNAMA found a significant disparity in mediation practices between different EAW institutions and different geographical areas. Mediators used different procedures and standards from one institution to another resulting in differing standards of duty of care provided to survivors.

UNAMA noted that EAW Law institutions do not have a central registry for mediated cases or for violence against women cases in general. Some survivors informed UNAMA that they registered their cases in several

¹³⁵ Case SER4-3.

¹³⁶ Ibid.

¹³⁷ For example, case NR13-3.

¹³⁸ Case NR7-3.

¹³⁹ This table reflects cases in which UNAMA documented the withdrawal of an official complaint of violence against women. In the remaining cases documented by UNAMA, complaints had not been withdrawn, and cases either ended in the conviction of perpetrators or were being processed by the criminal justice system at the time of UNAMA’s documentation. Many of these remaining cases may have been withdrawn at a later date.

¹⁴⁰ Other reasons for withdrawal of cases included economic dependency on the perpetrator, referral to traditional dispute mechanisms, and withdrawal of cases for no documented reasons.

institutions concurrently. Without a central registry, ERAW Law institutions would have no way of knowing if another institution had already taken action.

In an attempt to centralise the documentation and tracking of violence against women cases in general, the Ministry of Women's Affairs led an initiative for the development of a Memorandum of Understanding with the Attorney General's Office, the Ministry of Public Health, the Ministry of Interior and the Afghanistan Independent Human Rights Commission, on 'violence against women' case management and information-sharing. The memorandum would refer to a case management database used by the Attorney General's Office, developed by the International Development Law Organisation. The memorandum's progress and implementation timeline remains unconfirmed.

The majority of mediators interviewed by UNAMA spoke of the urgent need for the regulation of mediation.¹⁴¹ Most of the mediators were also in favour of the certification and registration of specialised mediators for the resolution of violence against women cases.¹⁴²

UNAMA found that despite the large volume of violence against women cases resolved through mediation, there are still no official guidelines or policies on the minimum standards required where mediation takes place. ERAW institutions require guidelines and training on case management, professional criteria of selection of mediators, the development of a code of conduct for mediators, certification and registration of mediators, and information sharing between ERAW Law institutions.

In relation to traditional dispute resolution mechanisms, UNAMA found that despite evidence suggesting wide human rights abuses resulting from such mediation, there are still no legal repercussions for mediators involved in resolving the five serious offences of violence against women set out in Articles 17-21 of the ERAW Law.

5.6. Concerns with existing policy and legal framework for criminal offences of violence against women

As highlighted in this report, in the absence of a clear legal and policy framework governing the mediation of violence against women cases, the continuing practice of mediation of less serious criminal offences in the ERAW Law promotes impunity and the reoccurrence of violence. UNAMA identified critical gaps in the ERAW Law that allow the withdrawal of complaints, legitimising the State's cessation of criminal investigation in relation to certain criminal offences of violence against women, and in turn leading to the almost automatic mediation of these crimes. UNAMA recommends that the Government address these gaps through amendments to the ERAW Law, expanding State authorities' obligation to investigate and prosecute all 22 crimes noted in the ERAW Law¹⁴³, irrespective of any related civil complaint or proceedings.

The report also highlights that the potential for punishment by imprisonment for those convicted of any of the 22 criminal offences of violence against women contributes to the widespread withdrawal of complaints by survivors and the resort to use of mediation. UNAMA notes the absence of uniformity in Afghan law in relation to the availability of alternatives to imprisonment for less serious criminal offences of violence against women. The 2018 Penal Code provides a general framework for alternatives to imprisonment,¹⁴⁴ with Article 150 listing options such as probation, community service, deprivation of social rights and home imprisonment. The court may hand down one of these sentences where the maximum punishment for the crime does not exceed five years imprisonment.¹⁴⁵ Article 151(3) further stipulates the exemption of perpetrators of rape from such

¹⁴¹ This was highlighted by 75 interviewees and in 30 focus group discussions with mediators.

¹⁴² This was highlighted by 59 interviewees and in 28 focus group discussions with mediators.

¹⁴³ See Section 5.2 of this report "Absence of due-diligence by authorities..."

¹⁴⁴ Articles 148 to 169, Penal Code 2018.

¹⁴⁵ Article 151, Penal Code 2018.

sentencing options and remains silent throughout the Code with regard to other criminal offences of violence against women.

Decree No. 267 of 4 March 2018 (Annex No. 2 to the Criminal Procedure Code) clarifies the application of “alternatives to imprisonment” by listing the options available to the court and the types of crimes to which they may apply. It explicitly exempts “criminal offences of violence against women”. UNAMA highlights, nonetheless, that the application of alternatives to imprisonment to criminal offences of violence against women that carry a sentence of less than five years imprisonment¹⁴⁶ may address the existing gap in the applicable framework for criminal justice for survivors, currently filled by mediation, and may provide a State-sanctioned and State-monitored alternative to mediation.

UNAMA acknowledges that the increased availability of alternatives to imprisonment would only address some of women’s concerns with the criminal justice system that leads them to withdraw their official complaints, and would not necessarily change the inherent imbalance in power relations or the underlying economic dependency of women on male family members. However, if such sentencing options were available to the courts and known to women, it may potentially: i) reduce survivors’ apprehension over the family’s economic survival and unity, ii) encourage survivors to lodge complaints and not withdraw them, iii) reduce the volume of mediated cases, iv) ensure State action to prevent recidivism and provide better protection for survivors and women. In turn this would also signal to society at large that violence against women is not normal but actual criminal behaviour, and ultimately strengthen accountability for criminal offences of violence against women. Alternatives to imprisonment – in particular a strong probation system – would also ensure State monitoring of implementation of court decisions and allow for the possibility of escalating the punishment to imprisonment if the perpetrator re-offends.

¹⁴⁶ The stipulation in the Penal Code that alternatives to imprisonment would apply to crimes that carry a punishment of under five years excludes the following EAW crimes from consideration: selling and buying women for the purpose of or on the pretext of marriage (article 24) and giving *baad* (article 25), as well as the “five serious offences” noted in articles 17-21. In relation to the crime of causing injury and disability (EAW Law article 21), the Law refers to the 1976 Penal Code for determination of severity and aggravating circumstances. Article 407 of the 1976 Penal Code clarifies that if injury and disability result in the “deprivation of intellect”, or is committed with “premeditation” and “lying in wait”, the offender shall be subjected to long term imprisonment not exceeding 10 years.

6. Conclusion and Way Forward

Authorities must demonstrate greater due-diligence in processing cases involving allegations of criminal acts of violence against women following the official registration of complaints. State authorities must pursue investigation and prosecution in any of the five serious offences noted in Articles 17-21 of the EVAW Law, even in the absence of a dedicated complaint, and consider expanding this practice to all criminal offences of violence against women registered with authorities.

The report highlights a number of problems that arise when mediation is utilised in cases of violence against women. Mediation removes cases from judicial scrutiny, presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability. An increasing number of countries are prohibiting mediation in cases of violence against women, as per UN Treaty Bodies' recommendations.¹⁴⁷

UNAMA urges that mediation of criminal offences of violence against women be discouraged. However, where such mediation is taking place by State institutions, this must only apply to civil aspects of criminal cases, or in cases involving acts that constitute petty crimes and do not carry a penalty of imprisonment, and should be urgently regulated through the issuance of guidelines, provision of training, and central oversight. State officials should not pressure survivors to withdraw their cases, and must not participate in, or coordinate mediation sessions carried out by non-State actors.

Mediation of criminal offences of violence against women is widely used instead of the existing criminal justice processes, resulting in the widespread withdrawal of official complaints by survivors, and thereby contributing to the perpetuation of impunity for such crimes in Afghanistan. Survivors are required to withdraw official complaints as a pre-requisite to mediation or during mediation proceedings. The withdrawal of official complaints as part of the mediation process highlights a further problem, as this serves to distance the act from its criminal character. The mediation of incidents of violence against women essentially transforms 'criminal acts' into mere 'family disputes', and encourage women to reconcile with the perpetrator as if no actual crime occurred, or to seek a divorce if the parties cannot reach an agreement. Such outcomes directly contradict the spirit and letter of the EVAW Law.

As highlighted by women throughout this report, a key practical reason influencing survivors' decisions to withdraw their cases and agree to mediation is the exclusive reliance in the EVAW Law on the imprisonment of perpetrators. EVAW institutions and mediators also use this aspect of the EVAW Law as an argument to pressure women to agree to mediation. In the majority of Afghan families, the imprisonment of male perpetrators – many of whom are the survivor's spouses – effectively means an abrupt and severe disruption to the economic stability of the household. Survivors and their children struggle to support themselves during the perpetrator's imprisonment, and thus imprisonment of perpetrators often represents an undesirable and unsustainable solution to survivors' problems. In addition, survivors fear the marginalisation and possible stigma by families and communities if they are left alone without a husband, as well as the possible denouncement by their husband and family. In these circumstances, the idea of a family or community guarantee to stop the violence, coupled with a reunification of the family unit and continuous financial support

¹⁴⁷ For example, the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004) forbids mediation of any kind in cases of violence against women. Department of Economic and Social Affairs, Division for the Advancement of Women, "Handbook for Legislation on Violence against Women", United Nations, New York, 2010, p. 38.

for the survivor and her children, is seen by many survivors as a desirable outcome - or at the very least - represents an acceptable compromise.

Given these challenges, Afghanistan should be encouraged to reconsider the scope of the new legislation on alternatives to imprisonment and their application to some violence against women cases, as this may provide an opportunity for a State-sanctioned, culturally appropriate, alternative to mediation. A comprehensive framework on alternatives to imprisonment would require the development of guidelines, practices, institutions and methods for State supervision of such sentences.

ANNEX I- Cases Documented and Monitored by Province

	Province	Cases
1.	Badakhshan	18
2.	Baghlan	13
3.	Balkh	15
4.	Bamyan	28
5.	Farah	17
6.	Faryab	20
7.	Ghazni	1
8.	Herat	26
9.	Jawzjan	10
10.	Kabul	14
11.	Kandahar	4
12.	Khost	5
13.	Kunar	5
14.	Laghman	10
15.	Nangarhar	9
16.	Paktya	12
17.	Panjshir	4
18.	Parwan	4
19.	Samangan	8
20.	Takhar	5
21.	Maidan Wardak	1
22.	Kunduz	8
	TOTAL	237

ANNEX II: Types of Cases Documented

	Types of Cases Reported	Cases
1.	Beating	136
2.	Injury and disability	15
3.	Denial of relationship	2
4.	Marriage before legal age	10
5.	Rape	7
6.	Forced marriage	17
7.	Abuse and humiliation	11
8.	Giving in <i>baad</i>	4
9.	Denial of inheritance	3
10.	Forced self-immolation	4
11.	Prohibiting choice of husband	11
12.	Prevention from possession of personal property	1
13.	Forced Prostitution	1
14.	Burning, using chemicals or other dangerous substances	1
15.	Marrying more than one wife	4
16.	Forced Isolation	3
17.	Harassment	5
18.	Depriving women of their right to work, education and health	2
	TOTAL	237

ANNEX III- Interviews with Mediators¹⁴⁸

	Province	Number of Mediators
1.	Badakhshan	5
2.	Saripul	2
3.	Kandahar	6
4.	Laghman	2
5.	Kunduz	4
6.	Kunar	4
7.	Jawzjan	3
8.	Faryab	5
9.	Daikundi	3
10.	Bamyan	3
11.	Baghlan	5
12.	Takhar	5
13.	Badghis	6
14.	Farah	5
15.	Ghazni	2
16.	Ghor	6
17.	Herat	5
18.	Khost	2
19.	Nangarhar	3
20.	Paktiya	7
21.	Nimroz	5
22.	Uruzgon	5
23.	Zabul	5
24.	Helmand	5
	TOTAL	103

¹⁴⁸ Mediators interviewed by UNAMA represented EAW Law institutions and Non-Governmental Organisation working on women's rights including the Afghan National Police, courts, prosecutors, *Huqooq* Departments, provincial Departments of Women's Affairs, the Afghanistan Independent Human Rights Commission, Women for Afghan Women (WAW), and more. UNAMA also interviewed mediators from traditional dispute resolution mechanisms.

ANNEX IV- Focus Group Discussions with Women Activists

	Province	Date of FGD	Participants
1	Kunduz	27 December 2015 20 June 2017	50
2	Baghlan	9 December 2015	22
3	Badakshan	21 September 2015	25
4		2 December 2015	
5		21 December 2015	
6	Takhar	9 December 2015	33
7	Balkh	2 December 2015	16
8	Samangan	23 November 2015	25
9	Jawzjan	25 November 2015	26
10	Saripul	28 February 2017	15
11	Faryab	21 December 2015	19
12	Bamyan	15 October 2015	40
13	Daikundi	17 December 2015	40
14	Herat	26 November 2015	28
15	Badghis	31 August 2015	32
16	Farah	9 September 2015	26
17	Ghor	1 May 2017	19
18	Paktya	21 December 2015	25
19	Paktika	29 December 2015	72
20		29 May 2017	
21	Khost	25 November 2015	30
22	Ghazni	15 December 2015	55
23		25 May 2017	
24	Nangarhar	20 October 2015	26
25	Laghman	14 October 2015	25
26	Kunar	13 December 2015	51
27		17 April 2017	
28	Nuristan	14 May 2017	32
29	Kabul	17 December 2015	27
30	Panjshir	16 September 2015	17
31	Maidan Wardak	29 November 2015	30

32	Parwan	17 October 2015	33
33	Kapisa	30 November 2015	27
34	Logar	20 August 2017	26
35	Kandahar	22 December 2015	20
36	Zabul	17 Aril 2017	26
37	Helmand	23 May 2017	26
38	Uruzghan	24 May 2017	22
39	Nimroz	16 March 2017	14
	TOTAL		1001

ANNEX V - Focus Group Discussions with Mediators

	Province	Date	Mediators	
			Total	Women
1	Kunduz	18 June 2017	20	1
2	Baghlan	3 May 2017	13	0
3	Badakhshan	2 September 2015	23	11
4		18 May 2017		
5	Takhar	11 June 2017	29	12
6	Balkh	3 May 2017	15	15
7	Samangan	28 March 2017	15	15
8	Saripul	28 April 2017	10	4
9	Jawzjan	10 May 2017	20	12
10	Faryab	16 March 2017	14	9
11	Bamyan	2 May 2017	25	5
12	Daikundi	22 February 2017	30	8
13	Herat	27 March 2017	21	13
14	Ghor	8 March 2017	16	7
15	Badghis	24 April 2017	20	6
16	Farah	31 January 2017	17	10
17		2 February 2017		
18	Kandahar	13 February 2017	21	1
19		1 May 2017		
20		5 May 2017		
21	Zabul	19 April 2017	8	3
22	Helmand	26 April 2017	15	0
23		15 May 2017		
24	Uruzghan	30 April 2017	15	0
25		7 May 2017		
26	Nimroz	13 June 2017	5	0
27	Paktya	11 April 2017	17	0
28	Paktika	22 December 2015	22	0
29		25 April 2017		
30	Khost	14 December 2015	26	0
31		17 May 2017		
32	Ghazni	16 December 2015	27	0
33		13 April 2017		

34	Nangarhar	27 February 2017	15	1
35	Nuristan	13 May 2017	16	0
36	Laghman	26 March 2017	16	1
37	Kunar	28 March 2017	18	2
38	Logar	1 May 2017	29	19
39	Kabul	27 July 2017	22	10
40	Panjshir	25 May 2017	37	9
41	Maidan Wardak	26 April 2017	28	5
42	Kapisa	9 May 2017	34	8
43	Parwan	20 January 2015	61	14
44		12 June 2017		
44	TOTAL		720	201

A Review on the UNAMA Draft Report on Mediation of Criminal Offences of Violence against Women

Referring to its Constitution and other rules and regulations, the Islamic Republic of Afghanistan is obliged to preserve and protect the human rights of all its citizens. The police and judicial body have the responsibility to prosecute, investigate and try all criminal offences even without complaints of victims.

- 1- There is no room for forced mediation and informal justice in criminal offences because it falls under the judicial sector jurisdiction.
- 2- Based on article 39 of EVAW law only in petty crimes and based on consent of victims there may be some mediation.
- 3- EVAW law is applicable, and during last 10 years (2010-2017) almost 7261 criminal cases have been tried.
- 4- Modification and amendment of EVAW law shall be reviewed by the judicial sector and legal experts in case the need arises.
- 5- Reporting of domestic violence and people referring to the judicial sector is usually with *Black number*, which means the percentage of complaints or honor killing cases is less than real occurrence of them across the country. This matter is due to customary structure and strong social norms that restrict the complaints of women in domestic violence. Long term awareness raising, growth of public education and strengthening of culture of human rights can contribute in systematic reduction of violence against women cases.
- 6- Investigation and prosecution of all honor killing cases, if happen, fall under jurisdiction of criminal courts. Such cases shall not be referred to mediation because it is a violation of the law and breach of citizens' human rights. There is no registered case of mediation in the judicial sector.
- 7- Alternative punishment instead of 3 months confinement would facilitate better implementation of EVAW law, since based on criminology studies it has less rehabilitation purposes. Therefore, legislative experts shall scrutinize the effectiveness of the imprisonment.
- 8- Police and prosecutors of I.R. of Afghanistan are bound to execute their duties based on applicable laws of the country and no one is entitled to refer the honor killing cases to the mediation process.

¹⁴⁹ Response to the Injustice and Impunity report received from the General Directorate of Human Rights and Women's International Affairs, Ministry of Women's Affairs, email sent 29 May 2018

نظریه حقوقی راجع به گزارش یوناما پیرامون میانجیگری جرایم خشونت علیه زنان

دولت جمهوری اسلامی افغانستان برحسب قانون اساسی و سایر قوانین نافذ خود مکلف به رعایت و حمایت از حقوق بشر تمامی شهروندان کشور می باشد. تعقیب و رسیدگی به جرایم وظیفه پولیس و ادارات عدلی و قضایی است و مکلف هستند تا در صورت مشاهده ارتکاب جرایم و جنایات حتی بدون در نظر گرفتن شکایت مجنی علیه به دوسیه های جنایی رسیدگی نماید.

- 1- در دوسیه های جنایی فیصله های جرگه ها و میانجیگری خلاف قانون است چون صلاحیت رسیدگی به آن در اختیار ادارات عدلی و قضایی افغانستان می باشد.
- 2- قانون منع خشونت نیز نافذ است و در 10 سال اخیر از سال 1386 تا 1396 شمسی تعداد 7261 دوسیه جزایی براساس آن رسیدگی شده است.
- 3- موضوع تعدیل و اصلاح قانون منع خشونت می بایست مورد بررسی ارگانهای عدلی و متخصصین حقوقی قرار بگیرد و در صورتی که نیاز به اصلاح باشد به آن رسیدگی خواهد شد.
- 4- در مراجعه مردم به ارگانهای مردم و گزارش خشونت های خانوادگی همیشه یک رقم سیاه (Black Number) وجود دارد به این معنی که فیصدی شکایتها براساس قانون منع خشونت و یا قتلتهای ناموسی ممکن است کمتر از واقعی باشد که در سراسر کشور ارتکاب می یابد. این موضوع می تواند به دلیل ساختارهای سنتی و فرهنگی قدرتمندی باشد که مانع شکایت زنان در موضوعات خانوادگی می شود. آگاهی دهی بلند مدت، رشد تعلیم و تربیه و ارتقای فرهنگ حقوق بشری می تواند در بلند مدت آمار خشونت ها را به صورت سیستماتیک کاهش دهد.
- 5- موضوعات قتلتهای ناموسی درهرجایی که ارتکاب یابد رسیدگی و بررسی قضایی آن در صلاحیت محاکم رسمی افغانستان است و مربوط به جرگه های قومی نمی شود و در صورتی که مواردی خلاف آن انجام شود عملی خلاف قانون و نقض حقوق بشری مردم افغانستان است.
- 6- تبدیل بدیل های حبس مخصوصاً حبس های 3 ماهه که از نظر جرم شناسی نیز اثر اصلاحی کمتری نسبت به مجرمین دارد می تواند در تطبیق بهتر قانون منع خشونت علیه زنان موثر واقع شود. بدین منظور کارشناسان بخش تقنین وزارت عدلیه آن را مورد تحقیق و تدقیق قرار خواهند داد.
- 7- پولیس و سارنوالی جمهوری اسلامی افغانستان مکلف هستند تمامی اجراءات خودشان را براساس قوانین نافذ کشور انجام دهند و حق رجاع دوسیه های مربوط به قتلتهای ناموسی را به میانجیگری سنتی و جرگه های قومی ندارند.

