

# The Afghan State and the Hazara Genocide

---

Mehdi J. Hakimi\*

## ABSTRACT

*Hazaras in Afghanistan have been increasingly killed during premeditated attacks on hospitals, schools, places of worship, public transportation, work sites, weddings, sports clubs, markets, cultural events, social gatherings, and properties in the past few years alone. The recent wave of terror targeting this community, however, is not a new phenomenon. The assaults on Hazaras have deep historical antecedents, dating back to the late nineteenth century when Afghan ruler Amir Abdur Rahman Khan carried out a campaign of mass violence against this ethnic group, resulting in massacres, enslavement, and forced displacement of approximately sixty percent of Hazaras. Understanding the current plight of Hazaras thus necessitates investigating the enduring state-sanctioned persecution of this community.*

*This Article contributes to the literature by undertaking the first examination of the historical mass atrocities against Hazaras in light of international law. In particular, the analysis provides a reasonable basis to believe that the Afghan state's operations and policies against this group during the 1890s constituted genocide, as defined by the Convention on the Prevention and Punishment of the Crime of Genocide. Bona fide endeavors to curb the longstanding culture of impunity and cycles of bloodshed in Afghanistan require reckoning with the darkest episodes of Afghan history, whose shadow continues to loom large over the present. It is long past time to officially recognize the Hazara genocide.*

## INTRODUCTION

The recent escalation of attacks on Hazaras in Afghanistan has prompted human rights organizations to call for the protection of this community. The U.S. Holocaust Memorial Museum, for example, has warned that inaction may

---

\* Harvard Law School, Class of 2023; Oxford Law Faculty, Class of 2024; former Executive Director of the Rule of Law Program and Lecturer in Law at Stanford Law School. For valuable suggestions and insights, I am deeply grateful to Gerald L. Neuman, Gabriella Blum, and Naz K. Modirzadeh. I am also thankful to contributors to seminars and panels at Cardozo Law School, Queen's University Faculty of Law, National University of Ireland-Galway School of Law, Stanford University, and Max Planck Foundation for helpful discussions of ideas. Finally, my immense gratitude to the diligent editors of the *Harvard Human Rights Journal*, especially Jasper Johnston, Julia Kepczynska, Ivana Anna Nikolic, Tenzin Nordin, Elyse Weissberger, Tara Djukanovic, Ariq Hatibie, and Alizeh Sheikh. All views and any errors are my own.

lead to further atrocities against Hazaras, including a full-blown genocide.<sup>1</sup> Notwithstanding Afghanistan's accession to the Rome Statute in 2003,<sup>2</sup> thousands of Hazara civilians have been increasingly killed and injured in premeditated attacks on hospitals, schools, places of worship, public transportation, work sites, weddings, sports clubs, markets, cultural events, social gatherings, and properties throughout Afghanistan in the past few years alone.<sup>3</sup>

The current wave of terror targeting Hazaras, however, is not a new phenomenon. The assaults on Hazaras have deep roots in Afghanistan's history, dating back to the late nineteenth century when Afghan ruler Amir Abdur Rahman Khan ("Abdur Rahman") carried out an extended campaign of violence against this community, resulting in mass killings, enslavement, and forced displacement of approximately sixty percent of Hazaras.<sup>4</sup>

The devastation wrought by Abdur Rahman laid the foundations for the enduring persecution of Hazaras and their subsequent massacres in the twentieth century—including mass atrocities in Kabul in 1997 and in Mazar-i Sharif in 1998—as well as in more recent times.<sup>5</sup> The intensification of the assaults on Hazaras in the last few years reflects this centuries-long impunity. Understanding the current plight of Hazaras thus requires investigating the historical state-sanctioned violence against this group, a potential case of "hidden" or "lost" genocide in Afghanistan.

There is a substantial and growing body of literature on genocide, which includes studies of mass atrocities perpetrated long before the adoption of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention").<sup>6</sup> Conspicuously missing from the academic discourse, however, has been any meaningful assessment of the root causes and historical antecedents of the rampant attacks against Hazaras. This gap is especially evident in legal scholarship.

This Article contributes to the literature by undertaking the first examination of the historical mass atrocities against Hazaras in light of international criminal law. In particular, the forthcoming analysis provides a reasonable basis to believe that the mass violence perpetrated by Abdur Rahman's government

1. See *Museum Statement on the Hazara*, U.S. HOLOCAUST MEMORIAL MUSEUM (Aug. 23, 2021), <http://www.ushmm.org/information/press/press-releases/museum-statement-on-the-hazara> [https://perma.cc/4CY6-DAUL].

2. As a signatory to the Rome Statute, Afghanistan is subject to the International Criminal Court's jurisdiction over crimes against humanity, war crimes, and genocide committed within the country after May 1, 2003. See Rome Statute of the International Criminal Court Art. 12(1), Jul. 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. For an in-depth examination of the recent and ongoing attacks against Hazaras, see generally Mehdi J. Hakimi, *Relentless Atrocities: the Persecution of Hazaras*, 44 MICH. J. INT'L L. 157 (2023).

4. See *infra* Part IV.B.

5. See generally *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*, HUM. RTS. WATCH (July 6, 2005), <https://www.hrw.org/report/2005/07/06/blood-stained-hands/past-atrocities-kabul-and-afghanistans-legacy-impunity> [https://perma.cc/ZN96-W6U7]; *Afghanistan: The Massacre in Mazar-i Sharif*, HUM. RTS. WATCH (Nov. 1998), <https://www.hrw.org/legacy/reports98/afghan/Afrep00.htm> [https://perma.cc/49YR-7HP7].

6. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention or Convention].

against Hazaras in the 1890s constituted genocide pursuant to Article II of the Genocide Convention.<sup>7</sup>

The remainder of the Article proceeds as follows. Part I explains the rationale for this inquiry in more depth. Part II contextualizes the discussion with an overview of key factors and events during the pertinent period. Part III analyzes the elements of the crime of genocide under the Convention. Part IV applies the relevant legal framework to the situation of Hazaras under Abdur Rahman's reign.

## I. SIGNIFICANCE OF THE INQUIRY

Before delving into the granular aspects of the mass atrocities against Hazaras in the late nineteenth century, it is important to further explicate the rationale for and utility of this study, particularly regarding the appropriateness of scrutinizing historical incidents through the lens of legal instruments, such as the Genocide Convention, which were adopted decades after the impugned conduct took place.

There are several reasons for undertaking this inquiry. First, the prohibition against genocide was part of customary international law long before the formal adoption of the Genocide Convention.<sup>8</sup> This is reflected, among other places, in the preamble of the Convention which “[r]ecogniz[es] that at *all periods of history* genocide has inflicted great losses on humanity.”<sup>9</sup> Moreover, under Article I, the parties to the Convention merely “*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law.”<sup>10</sup>

In a similar vein, the International Court of Justice has held that the “principles underlying the [Genocide] Convention are recognised by civilised nations as binding on States even without any conventional [i.e., treaty] obligation.”<sup>11</sup> Indeed, mass killings of civilians “had been recognized as a war crime for centuries and had formed the basis for historic national and international criminal tribunals.”<sup>12</sup>

Second, the inherent gravity of genocide—the crime of all crimes—along with its enduring, intergenerational impact, warrants careful interrogation of historical mass atrocities notwithstanding temporal considerations. This is precisely why scholars have conducted considerable research on genocidal violence which predated the adoption of the Genocide Convention. These include well-known cases such as the Holocaust and the Armenian genocide as well as other genocidal campaigns committed, for example, by the

7. Genocide Convention, *supra* note 6, Art. II.

8. See, e.g., Hannibal Travis, “Native Christians Massacred”: *The Ottoman Genocide of the Assyrians during World War I*, 1 GENOCIDE STUD. & PREVENTION 327, 339–40 (2006) (discussing various international law principles and norms criminalizing genocide long before the adoption of the Genocide Convention).

9. Genocide Convention, *supra* note 6, Preamble (emphasis added).

10. Genocide Convention, *supra* note 6, Art. I (emphasis added); see also Travis, *supra* note 8, at 339.

11. Reservations to the Convention on the Prevention of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); see also Travis, *supra* note 8, at 339–40.

12. See Travis, *supra* note 8, at 340.

Ottoman Empire against Assyrians,<sup>13</sup> Greeks,<sup>14</sup> and Yezidis.<sup>15</sup> Studies on genocide have also examined historical mass killings and persecution in other parts of the world such as Australia<sup>16</sup> and Canada.<sup>17</sup>

Third, despite the copious literature on various genocidal campaigns perpetrated prior to the Genocide Convention, there is a glaring gap with respect to the mass atrocities against Hazaras in Afghanistan, especially in terms of legal scholarship. The dearth of academic discourse on the issue of genocide vis-à-vis Hazaras is particularly conspicuous considering the temporal and geographical proximity of the atrocities against Hazaras and those against other groups such as Armenians, Assyrians, Greeks, and Yezidis. For example, the Armenian genocide commenced in 1915—roughly two decades after the massacres, deportations, and enslavement of Hazaras.<sup>18</sup>

Fourth, unlike historical genocides committed against many other groups, the atrocities against Hazaras have been recurring since the late nineteenth century and continue to plague this community to the present day. Hazaras were subjected to multiple large-scale massacres in the 1990s and have been increasingly attacked in a widespread and systematic manner in recent years.<sup>19</sup>

Abdur Rahman's campaign of mass killings and persecution of Hazaras provided a blueprint for assaulting this community in subsequent periods.<sup>20</sup> The massacres of Hazaras in the twentieth century and in recent years, at the hands of the Taliban and ISIS/Daesh, are inextricably intertwined with prior episodes of atrocities against this group both in terms of ideology<sup>21</sup> and modus operandi.<sup>22</sup> From the perspective of the perpetrators, targeting Hazaras with impunity has been the longstanding norm, rendering it a routine affair for

13. See generally Travis, *supra* note 8.

14. See generally Vasileios Th. Meichanetsidis, *The Genocide of the Greeks of the Ottoman Empire, 1913–1923: A Comprehensive Overview*, 9 GENOCIDE STUD. INT'L 104 (2015).

15. See generally Maria Six-Hohenbalken, *The 72nd Firman of the Yezidis: A 'Hidden Genocide' during World War I*, 13 GENOCIDE STUD. INT'L 52 (2019).

16. See generally Hannah Baldry, Ailsa McKeon & Scott McDougall, *Queensland's Frontier Killing Times – Facing up to Genocide*, 15 QUT L. REV. 92 (2015).

17. See generally Andrew Woolford & Jeff Benvenuto, *Canada and Colonial Genocide*, 17 J. GENOCIDE RSCH. 373 (2015).

18. See generally PATRICK THOMAS, REMEMBERING THE ARMENIAN GENOCIDE 1915 (2015); *infra* Part II.

19. See, e.g., *Museum Statement on the Hazara*, U.S. HOLOCAUST MEMORIAL MUSEUM (Aug. 23, 2021), <http://www.ushmm.org/information/press/press-releases/museum-statement-on-thehazara> [perma.cc/4CY6-DAUL]. For an analysis of the widespread and systematic nature of the assaults on Hazaras, see Hakimi, *supra* note 3, at 213–15.

20. It is no surprise that perpetrators of atrocity crimes learn from their predecessors. See, e.g., Roger W. Smith, *Introduction: Ottoman Genocides of Armenians, Assyrians, and Greeks*, 9 GENOCIDE STUD. INT'L 1, 1 (2015) (noting that the “deportations and massacres of Greeks in 1913–1914 may have provided a model of how to deal with the Armenians not long after”).

21. For example, Hazaras have been labeled as infidels due to their Shi'a and Isma'ili faiths by various Afghan regimes starting with Abdur Rahman in the late nineteenth century, resulting in systematic persecution and mass killings against this community. See *infra* Part IV.C.1; see also Hakimi, *supra* note 3, at 165, 209.

22. Besides frequent massacres and general persecutory policies targeting Hazaras, other enduring strategies in attacks against this community have entailed, among other things, the destruction of property and forced displacement from their ancestral homelands. See *infra* Part IV.B.2.a–b; see also Hakimi, *supra* note 3, at 194–97, 200–204.

centuries. Accordingly, investigating the historical atrocities against Hazaras will also shed light on the abiding institutions and conditions that can perpetuate cycles of bloodshed.

Finally, if the study reveals that the state-sponsored violence against Hazaras in the 1890s amounted to genocide, as defined by international law, it is important to properly acknowledge the gravity of the crime, especially through official recognition.<sup>23</sup> Appropriately describing the atrocities as genocide, where warranted, acknowledges the suffering of the victims and their descendants, condemns and underscores the egregious nature of the crime, and emphasizes the need for accountability, especially in view of the recent and ongoing deadly attacks on this community.

## II. BACKGROUND: PERSECUTION, RESISTANCE, AND STATE-SANCTIONED VIOLENCE

Britain's withdrawal from Afghanistan following the end of the Anglo-Afghan war in 1880 was a momentous event. The British departure was a boon for Abdur Rahman, who became the Amir of Afghanistan.<sup>24</sup> Pursuant to the Lyall Agreement, which governed Anglo-Afghan relations during Abdur Rahman's reign, Britain pledged to provide the new Amir military aid and an annual subsidy.<sup>25</sup> Abdur Rahman was viewed as "Britain's key ally in Asia,"<sup>26</sup> providing strategic depth vis-à-vis Russian aggression.<sup>27</sup>

Abdur Rahman's rule was deeply autocratic—even more so than his predecessors—and inspired by his decade of exile in Russian Turkistan.<sup>28</sup> He worked hard to build a system of governance akin to the highly-centralized Tsarist administrations, ignoring Afghanistan's tribal federalism and decentralized political reality.<sup>29</sup> His efforts to consolidate all power incited rebellions.<sup>30</sup>

Abdur Rahman's policies toward the Hazara people were especially repressive. The Hazaras were Asiatic-looking, Farsi-speaking, and mainly Shi'a and Isma'ili Muslims, and hence considered *kafirs* (infidels) by the Amir, a Sunni

---

23. The road to official recognition of genocide is of course a long and arduous one. For example, it took the United States more than one hundred years to formally recognize the Armenian genocide. See, e.g., *Statement by President Joe Biden on Armenian Remembrance Day*, THE WHITE HOUSE (Apr. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/24/statement-by-president-joe-biden-on-armenian-remembrance-day/> [perma.cc/7CTU-CL7H] (President Joe Biden's statement reads, in part, "we remember the lives of all those who died in the Ottoman-era Armenian genocide and recommit ourselves to preventing such an atrocity from ever again occurring.").

24. See, e.g., JONATHAN L. LEE, *AFGHANISTAN: A HISTORY FROM 1260 TO THE PRESENT* 381–83 (2018).

25. *Id.* at 381–82. The Lyall Agreement governed an array of issues including Britain's jurisdiction over the management of Afghanistan's foreign relations. *Id.* at 396.

26. *Id.* at 395.

27. *Id.* at 383.

28. *Id.* at 384.

29. *Id.*

30. *Id.*

Pashtun.<sup>31</sup> Notwithstanding the Hazaras' allegiance to Abdur Rahman,<sup>32</sup> the Afghan government "behave[ed] tyrannically and oppressively" toward this community.<sup>33</sup>

The Afghan ruler's indifference to the "tyranny and oppression" against Hazaras emboldened his soldiers to "bec[o]me even more brutal and aggressive and oppression and injustice became widespread."<sup>34</sup> Besides arresting and killing Hazara leaders,<sup>35</sup> Abdur Rahman's forces, especially those under the command of Sardar 'Abd al-Quddus Khan, frequently committed, among other atrocities, sexual violence, rape, enslavement, and forced marriage against Hazara women and girls.<sup>36</sup>

Abdur Rahman's severe persecution of the Hazara people ultimately forced them to revolt against the Afghan ruler during the 1890–1893 period.<sup>37</sup> Despite being crushed after the initial uprising, the Hazaras still chose to resist the regime of the Afghan Amir. The reasons for the resistance by Hazaras were clearly articulated in a letter to Abdur Rahman by the leaders of the uprising:

[T]he unjust treatment of the Hazaras by Afghan commanders and soldiers, exorbitant and numerous unwarranted taxes, assaults on Hazara women, the massacre of innocent Hazaras, the looting and pillaging of homes, enslavement of Hazara children, women and men, abuse of religious and social leaders, the accusation against

---

31. SAYED ASKAR MOUSAVI, *THE HAZARAS OF AFGHANISTAN: AN HISTORICAL, CULTURAL, ECONOMIC AND POLITICAL STUDY* 114 (1997).

32. See, e.g., 3 FAYZ MUHAMMAD KĀTIB, *THE HISTORY OF AFGHANISTAN: FAYZ MUHAMMAD KĀTIB HAZĀRAH'S SIRĀJ AL-TAWĀRIKH*, at [970] (R.D. McChensey & M.M. Korrami trans., 2013) [hereinafter *SIRĀJ AL-TAWĀRIKH*] (Abdur Rahman admitting that "the Hazarabs, after initially submitting and putting their heads beneath the farman's writ without a fight, then experienced cruelty and oppression"), [760] (noting the "Obedient Hazaras").

33. *Id.* at [760].

34. *Id.*

35. See, e.g., *id.* at [788] ("[T]he Hazarabs of Bubash and Day Chupan, who up to this time had not been the source of disobedience, now were deeply aggrieved . . . because of the arrest (and deaths) of most of their leaders . . . and distribut[ion of] their wives, sons, and daughters to Afghans (as slaves).").

36. See, e.g., *id.* at [760–61] ("For example, one night in Darrah-i Pahlawan in Uruzgan, three soldiers . . . entered the home of a man who had a beautiful wife, bound the husband[s] hand and foot, and then carried out an act (on the woman) which, according to the law, should never be perpetrated. The . . . oppressed and downtrodden Hazarabs . . . swore an oath saying, '[d]eath 100 times over is preferable to enduring such things, which should never occur in a humane world.'"), [761] ("Sardar 'Abd al-Quddus Khan . . . had . . . taken several daughters of Hazarah leaders as concubines and servants. Other officers had also followed his lead, each one taking a concubine and a handmaiden to his own place and giving themselves over to pleasure."), *id.* (noting "[Hazara] women who had been forcibly taken to wife" by Abdur Rahman's forces).

37. See, e.g., *id.* at [761] ("Th[e] uprising . . . occurred because . . . they embarked on the path of tyranny and oppression towards . . . Hazarabs. As a result of this outbreak . . . [Hazarabs] . . . had put their heads beneath the writ of the farman but had (nonetheless) been tyrannized and oppressed."), [785] ("[T]he torments and oppression [Abdur Rahman's commander] had inflicted on the newly-obedient Hazarabs of Hajaristan[.] caused them to rebel."), [817] (describing the Afghan generals' "oppression and tyranny and that of the soldiers under their command which had driven the Hazarabs to rebel"), [819] ("It was because of the lawlessness and perverted thinking of these ignorant [government] officers that most Hazarabs were killed and their property, wealth, forts, gardens, and trees completely pillaged.").

Shi'a Hazaras of blasphemy, and the replacement of Shi'a Mullas by their Sunni counterparts. The letter also clearly maintained that even those Hazaras who surrendered without resistance and others who fought as loyal soldiers on the side of the regime, such as many of the Behsud, Day Zangi, Day Kundi and Ghuri clans, were not spared this treatment either. The letter concluded that, *in order to survive and free themselves from slavery*, the Hazara people were forced to take up armed rebellion and resistance against the government.<sup>38</sup>

Despite Abdur Rahman's complete knowledge and admission of the "cruelty and oppression" which finally "made [Hazaras] rebel,"<sup>39</sup> the Afghan ruler nonetheless deployed the full force of the state apparatus, in a methodical and cunning fashion, to inflict grave devastation on this community. In addition to promulgating *farmans* (edicts or royal decrees) and providing economic incentives in the form of booty and spoils, he also leveraged Sunni religious leaders to issue *fatwas* (religious rulings) of *jihad* (holy war) against Hazaras by labeling them as *kafirs*.<sup>40</sup> The Amir was thus able to galvanize Afghans, especially his fellow Pashtuns, to participate in the mass killings, pillage, sexual violence, forced displacement, and enslavement directed against Hazaras.<sup>41</sup>

After the conclusion of each uprising, Abdur Rahman "unleashed an even more fearful reign of terror."<sup>42</sup> While precise estimates are difficult to obtain, "more than 50 per cent of the male Hazara population [reportedly] died as a direct or indirect result of the wars."<sup>43</sup> Sexual violence, rape, and forced marriages were committed in a widespread manner, with "[t]housands of women . . . forcibly married to Pushtuns in a deliberate attempt to destroy Hazara social and religious hierarchies."<sup>44</sup>

Systematic deportations and expulsions of Hazaras from their ancestral regions were also commonplace, resulting in "their land [being] distributed to Muhammadzais, Ghilzai *malदार* and government loyalists."<sup>45</sup> Many Hazaras were forced to abandon Afghanistan altogether, seeking refuge in Pakistan and Iran.<sup>46</sup> Those who lacked the means to leave the country were subjected to fur-

---

38. MOUSAVI, *supra* note 31, 127–28 (emphasis added); accord SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [891].

39. See SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [970] (after the killing of nineteen innocent Hazara men, women, and children by Afghan forces, Abdur Rahman stated that "[i]t was because of this kind of ugly behavior by soldiers and the negligence of their regular officers that the Hazarabs, after initially submitting and putting their heads beneath the farman's writ without a fight, then experienced cruelty and oppression from officer and soldier alike which made them rebel. . . . Now, because of their officers' negligence and stupidity, soldiers have begun to assault them again and to reduce the number of those who have survived.").

40. See *infra* Part IV.C.

41. See *infra* Part IV.B.

42. LEE, *supra* note 24, at 399.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* See also *infra* Part IV.B.2.b.



ther punishment such as slavery, plunder, and crippling taxes levied exclusively on Hazaras.<sup>47</sup>

The calculated official policies of Abdur Rahman also “resulted in the direct destruction of traditional Hazara social structure.”<sup>48</sup> Moreover, the Afghan government imposed significant restrictions on the religious affairs of Hazaras, including forced conversions to Sunni Islam. In addition to banning public celebration of Shi‘a rituals,<sup>49</sup> the state constructed Sunni mosques in Hazara districts and replaced Shi‘a imams with Sunni ones to pressure the locals to adopt Hanafi beliefs (one of the four orthodox schools of Sunni Islam).<sup>50</sup> Abdur Rahman also appointed Sunni judges to apply Hanafi *fiqh* across Hazarajat.<sup>51</sup> Hazaras were further compelled to pay the *jizya* tax, which was only imposed upon non-Muslims.<sup>52</sup>

Interestingly, beyond Afghanistan, similar persecutory policies were underway in the nearby Ottoman Empire during the same period vis-à-vis other ethnic and religious groups such as the Yezidis.<sup>53</sup> While the atrocities against the Yezidis and Armenians have garnered significantly more attention and have been formally recognized as acts of genocide,<sup>54</sup> the predicament of Hazaras remains unacknowledged, fueling impunity and recurring violence targeting this community.

47. See *infra* Part IV.B.2.

48. MOUSAVI, *supra* note 31, at 132–33 (“After 1893 there were no signs of the previous internal independence and autonomy of the Hazarajat; all matters of leadership and government were now in the hands of government sent or paid officers and rulers. The new representatives, known as the *Arbabs* [and *Maliks* rather than *Mirs*] were chosen from among the local inhabitants, but were paid a regular salary by Kabul. Every locality in Hazarajat was run by a few *Arbabs*, employed to aid the Afghan rulers. . . . Clearly then, it was now the Afghan rulers, Sunni clergy and local *Arbabs* who formed the backbone of the new structure of Hazara society; a society now based on the relationship of victor and victim, with the Afghan victorious and the Hazaras victimized.”).

49. LEE, *supra* note 24, at 399.

50. See, e.g., MOUSAVI, *supra* note 31, at 132 (for example, “[i]n the locality of the Day Zangi Hazaras, several Hanafi (one of four branches of Sunni Islam) mosques were built and led by Qazi Abdul Qayom, while the Hazaras were forced to embrace Hanafi beliefs.”); SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [829].

51. See, e.g., SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [829] (observing that Abdur Rahman appointed judges, court clerks, and muftis in Hazara areas “to implement the ‘commands and prohibitions’ of divine law in accordance with . . . legal doctrine of the great Imam Abu Hanifah . . . among the Hazarah people”). *Hanafi fiqh* refers to the jurisprudence of one school of thought in Sunni Islam.

52. LEE, *supra* note 24, at 399.

53. See, e.g., Six-Hohenbalken, *supra* note 15, at 57 (“At the beginning of the 1890s, the [Ottoman] Empire again attempted to convert the Yezidis to Islam. . . . ‘using quite brutal methods and systematic repression, he succeeded in forcing the conversion of some Yezidis to Hanefi Islam.’ . . . Pasha also had the Yezidi sanctuary in Lalish converted into a Muslim *medrese* (school), and he ordered punitive actions to be taken in the Yezidi settlements in Sheikhan and Sinjar in 1892. This included military campaigns and the looting of the sanctuary in Lalish[.]” quoting Selim Deringil, *The Invention of Tradition as Public Image in the Late Ottoman Empire, 1808 to 1908*, 35 COMP. STUD. IN SOC’Y & HIST. 1, 18 (1993)).

54. See, e.g., *Islamic State committing genocide against Yazidis*, says UN, BBC NEWS (June 16, 2016), <https://www.bbc.co.uk/news/world-middle-east-36547467> [<https://perma.cc/BW85-YVWP>]; *UK recognises ‘acts of genocide’ against Yazidis by ISIL*, AL JAZEERA (Aug. 1, 2023), <https://www.aljazeera.com/news/2023/8/1/uk-government-acknowledges-yazidi-genocide-by-is-fighters> [<https://perma.cc/2Q4J-K8RT>]; Kevin Liptak, *Biden officially recognizes the massacre of Armenians in World War I as a genocide*, CNN (Apr. 24, 2021, 7:39 PM EDT), <https://www.cnn.com/2021/04/24/politics/armenian-genocide-biden-erdogan-turkey/index.html> [<https://perma.cc/TD3S-VGFZ>].



Having provided a brief overview of the context in which the atrocities against Hazaras unfolded, the next Part examines the elements of the crime of genocide under international law.

### III. THE CRIME OF GENOCIDE

The term “genocide” was coined by Raphael Lemkin,<sup>55</sup> a Polish-Jewish jurist who was instrumental in efforts leading to the adoption of the Genocide Convention.<sup>56</sup> According to Lemkin, the first part of the word is derived from the Greek *genos*, meaning race or tribe, and the second part “-cide”, from the Latin *caedere*, to kill.<sup>57</sup> More than 150 states have ratified or acceded to the Genocide Convention, including Afghanistan.<sup>58</sup>

Article II of the Convention defines genocide as, “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”<sup>59</sup>

This definition has also been adopted by various domestic and international criminal statutes such as the Rome Statute of the International Criminal Court (“ICC”) and the statutes of *ad hoc* international criminal tribunals.<sup>60</sup>

Article II thus requires three broad elements to establish genocide: (1) membership in a protected group; (2) the actus reus of the offense, which requires the existence of at least one of the five acts listed in Article II; and (3) the mens rea of the offense, which refers to the mental element of the crime.<sup>61</sup>

55. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeal Judgment, ¶ 10 (I.C.T.Y. Apr. 19, 2004).

56. See, e.g., *Coining a Word and Championing a Cause: The Story of Raphael Lemkin*, U.S. HOLOCAUST MEMORIAL MUSEUM (May 2, 2023), <https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-raphael-lemkin> [https://perma.cc/6EST-UX39].

57. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 193 (Feb. 26) [hereinafter *Bosnia v. Serbia*].

58. *The Genocide Convention*, U.N. OFF. GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Mar. 24, 2024) [https://perma.cc/763C-EQPZ].

59. Genocide Convention, *supra* note 6, Art. II (emphasis added).

60. See, e.g., Rome Statute, *supra* note 2, Art. 6; S.C. Res. 827, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia), Art. 4 (May 25, 1993) (amended July 7, 2009); 18 U.S.C. § 1091.

61. For a comprehensive discussion on the crime of genocide, see generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2d ed. 2009).

### A. Membership in a Protected Group

The Genocide Convention may only be invoked if the “protected group membership” element is satisfied. Article II of the Genocide Convention stipulates that the proscribed acts be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>62</sup> Pursuant to this narrow formulation, only members of a “national, ethnical, racial or religious” group fall within the ambit of Article II. Accordingly, the Convention excludes other classes of individuals such as political or cultural groups.<sup>63</sup>

As the provision makes clear, the “intent to destroy” need not be directed at the “whole” group. It may also be with respect to “part” of the group. Three factors are particularly relevant in interpreting the “in part” element of Article II.

The first factor concerns the requirement of substantiality. “[T]he intent must be to destroy at least a substantial part of the particular group.”<sup>64</sup> In other words, “the part targeted must be significant enough to have an impact on the group as a whole.”<sup>65</sup>

The second factor relates to location. It is not required to establish intent to completely annihilate the group from “every corner of the globe.”<sup>66</sup> Indeed, genocide may well be perpetrated “where the intent is to destroy the group within a *geographically limited area*.”<sup>67</sup> Important considerations in this regard include the “area of the perpetrator’s activity and control” as well as “the opportunity available to the perpetrators.”<sup>68</sup>

The third factor focuses on qualitative considerations. These include the proportion of individuals targeted relative to the overall size of the entire group as well as the prominence of the targeted portion within the group.<sup>69</sup> With respect to the “prominence” consideration, if the targeted part of the group is “emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.”<sup>70</sup>

These criteria are not exhaustive, but the substantiality factor is critical.<sup>71</sup> Furthermore, the factors are interdependent. For instance, the qualitative considerations can impact the substantiality determination.<sup>72</sup>

In examining the Srebrenica massacres of July 1995, the International Court of Justice (“ICJ”) concurred with the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Appeals Chamber’s finding in *Krstić* that

62. Genocide Convention, *supra* note 6, Art. II.

63. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 194. The adoption of such a narrow category reflects the drafters’ focus on “the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.” *Id.*

64. *Id.* ¶ 198.

65. *Id.*

66. *Id.* ¶ 199 (quotation omitted).

67. *Id.* (emphasis added).

68. *Id.*

69. *Krstić* Appeal Judgment, No. IT-98-33-A, ¶ 12.

70. *Id.*

71. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 201.

72. *Id.* ¶ 200.

the killing of seven thousand Bosnian Muslim men met the foregoing criteria.<sup>73</sup> The Appeals Chamber had endorsed the Trial Chamber's conclusion that the "destruction of such a sizeable number of men [one fifth of the overall Srebrenica community] would 'inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.'"<sup>74</sup> According to the Appeals Chamber, "[a]lthough this population constituted *only a small percentage* of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is *not captured solely by its size*."<sup>75</sup>

### B. *Actus Reus*

As noted at the outset of this Part, the *actus reus* of genocide encompasses *any* of the five acts stipulated in Article II of the Genocide Convention. Accordingly, genocidal conduct is not limited to killing members of the group.<sup>76</sup>

Any of the following four acts will also amount to genocide when perpetrated with the requisite *mens rea*: "[c]ausing serious bodily or mental harm to members of the group";<sup>77</sup> "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part";<sup>78</sup> "[i]mposing measures intended to prevent births within the group";<sup>79</sup> and "[f]orcibly transferring children of the group to another group."<sup>80</sup>

Examples of specific conduct that may fall within the meaning of Article II(b) and II(c) include, among other things, forced displacement,<sup>81</sup> deprivation of resources indispensable for survival,<sup>82</sup> sexual violence including rape,<sup>83</sup> persecution,<sup>84</sup> ordeals inflicted upon persons who survive massacres,<sup>85</sup> torture, inhumane or degrading treatment, and death threats.<sup>86</sup>

73. See *id.* ¶¶ 293, 295.

74. Krstić Appeal Judgment, No. IT-98-33-A, ¶ 28.

75. *Id.* ¶ 15 (emphasis added).

76. Genocide Convention, *supra* note 6, Art. II.

77. *Id.* Art. II(b). The harm in Article II(b) "need not be permanent and irremediable." Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, ¶ 516 (I.C.T.Y. Jul. 31, 2003).

78. Genocide Convention, *supra* note 6, Art. II(c).

79. *Id.* Art. II(d).

80. *Id.* Art. II(e).

81. See, e.g., Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, ¶ 545 (I.C.T.Y. Mar. 24, 2016) (noting that forcible transfer "may cause such serious bodily or mental harm as to constitute an act of genocide"). See also Preparatory Comm'n for the Int'l Crim. Court, Rep. of the Preparatory Comm'n for the Int'l Crim. Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes, Art. 6(c) (4) n.4, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes] (stating that "systematic expulsion from homes" may be deemed genocidal conduct).

82. See, e.g., Elements of Crimes, *supra* note 81, Art. 6(c)(4) n.4.

83. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 731 (Sept. 2, 1998) (stating that "rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm") (citation omitted).

84. See, e.g., *id.* ¶¶ 503–04.

85. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 635 (I.C.T.Y. Aug. 2, 2001) (determining that "the ordeal inflicted on the men who survived the massacres may appropriately be characterised as a genocidal act").

86. Stakić Trial Judgment, No. IT-97-24-T, ¶ 516.

With respect to the Srebrenica massacres, the ICJ agreed with the Trial Chambers in the *Krstić* and *Blagojević* cases that the killing of over seven thousand Bosnian Muslim men by Bosnian Serb forces after the takeover of Srebrenica satisfied the actus reus requirement in Article II(a) of the Convention.<sup>87</sup> The killing of Bosnian Muslims, however, was not the only genocidal act committed during the atrocities in Srebrenica.

The ICJ further concurred with the ICTY's findings in *Krstić* and *Blagojević* that the actions of the Bosnian Serb forces also satisfied the actus reus of causing serious bodily or mental harm, as defined in Article II(b), "both to those who [were] about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them."<sup>88</sup> The Court also determined that deportations and expulsions of the protected group were committed.<sup>89</sup>

### C. *Mens Rea*

In addition to the actus reus of the offense—any of the five acts stipulated in Article II—genocide also requires proof of mens rea, namely, the mental element of the crime. The mens rea component of genocide, in turn, has two distinct aspects.

First, each of the five acts in Article II requires a corresponding mental element. For example, "killing"<sup>90</sup> and "causing serious bodily or mental harm"<sup>91</sup> must both be intentional.<sup>92</sup> Moreover, other acts explicitly identify the requisite mental elements, "deliberately" and "intended" in the case of paragraphs (c) and (d).<sup>93</sup> In other words, the Article II acts "are by their very nature conscious, intentional or volitional acts."<sup>94</sup>

Second, genocide requires an additional level of mens rea, apart from the aforementioned mental elements accompanying each of the five acts.<sup>95</sup> It demands evidence of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>96</sup> This is known as a special or specific intent or *dolus specialis*.<sup>97</sup>

Both aspects of mens rea must be established. As such, it will be insufficient to merely prove the discriminatory nature of the act, such as intentional killing of members of the protected group. Rather, it will be necessary to also

87. *Bosnia v. Serbia*, 2007 I.C.J. ¶¶ 290–91.

88. *Id.* ¶ 290.

89. *Id.* ¶ 334.

90. Genocide Convention, *supra* note 6, Art. II(a).

91. *Id.* Art. II(b).

92. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 186.

93. Genocide Convention, *supra* note 6, Art. II(c)–(d). *Bosnia v. Serbia*, 2007 I.C.J. ¶ 186 (holding that the act of "[f]orcibly transferring children" in paragraph (e) also entails "deliberate intentional acts").

94. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 186.

95. *Id.* ¶ 187.

96. Genocide Convention, *supra* note 6, Art. II.

97. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 187.

establish that these intentional killings were committed with a specific intent, i.e., the “intent to destroy, in whole or in part, [the protected] group, as such.”<sup>98</sup>

It is further useful to examine the mens rea of genocide vis-à-vis other related international crimes, particularly persecution. “[T]he mens rea requirement for persecution is higher than for ordinary crimes against humanity.”<sup>99</sup> This elevated mens rea threshold makes persecution similar to genocide. Indeed, persecution “belong[s] to the same genus as genocide.”<sup>100</sup> A central hallmark of both crimes—unlike other grave international violations—is the intent to discriminate.<sup>101</sup> That is, both crimes are perpetrated based on the identity of the victims who are targeted by reason of belonging to a particular protected group.<sup>102</sup>

The key distinction between persecution and genocide, however, is the latter’s *dolus specialis* element: Genocide requires the specific “intent to destroy, in whole or in part, a [protected] group, as such.”<sup>103</sup> Genocide can thus be viewed as “an extreme and most inhuman form of persecution.”<sup>104</sup> In other words, “when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”<sup>105</sup>

Moreover, the “term ‘in whole or in part’ [under Article II] refers to the intent, as opposed to the actual destruction.”<sup>106</sup> Hence, any of the aforementioned five acts will amount to genocide if accompanied with the specific intent to destroy a part of a group.<sup>107</sup> *Dolus specialis*, however, does not demand long-term premeditation.<sup>108</sup> Put differently, the specific intent to destroy a protected group need not arise at the outset of the operation. It could instead be formed in the final phases of the attack.<sup>109</sup>

Another important point bears emphasis: *Dolus specialis* must be distinguished from motive.<sup>110</sup> The perpetrator’s personal motives or reasons for committing genocidal acts should not be conflated with the specific intent to destroy the group. However, “the existence of a personal motive does not exclude the possession of genocidal intent.”<sup>111</sup>

98. *Id.* (“The words ‘as such’ emphasize that intent to destroy the protected group.”).

99. Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Judgment, ¶ 636 (I.C.T.Y. Jan. 14, 2000).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* Genocide Convention, *supra* note 6, Art. II. This of course implies that the mens rea threshold is higher for genocide than for persecution. Kupreškić Trial Judgment, No. IT-95-16-T, ¶ 636.

104. Kupreškić Trial Judgment, No. IT-95-16-T, ¶ 636.

105. *Id.*

106. Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 584 (I.C.T.Y. Aug. 2, 2001).

107. *Id.*

108. *Id.* ¶¶ 572, 584.

109. *Id.* ¶¶ 572, 584.

110. Karadžić Trial Judgment, No. IT-98-33-T, ¶ 554.

111. *Id.*

Mens rea can be established through direct evidence such as the existence of a plan or policy to attack a protected group.<sup>112</sup> Notwithstanding the lack of direct evidence (such as official statements), *dolus specialis* “may still be inferred from the factual circumstances of the crime.”<sup>113</sup>

The specific intent to destroy the group may thus be deduced from “attacks on cultural or religious property or symbols of the group,”<sup>114</sup> forced displacement,<sup>115</sup> transfer of members of the targeted group,<sup>116</sup> and “other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”<sup>117</sup>

In the case of the Srebrenica atrocities, while finding that genocide had been committed, the ICJ nonetheless concluded that the acts of genocide could not be attributed to the Federal Republic of Yugoslavia (“FRY”).<sup>118</sup> Importantly, the Court determined in part that “[Bosnia] has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide, which would have had to be present in order for [Serbia] to be held responsible on this basis.”<sup>119</sup> The ICJ did, however, find that Serbia violated its obligations, under Articles I and VI of the Convention, to prevent and to punish the Srebrenica genocide.<sup>120</sup>

#### D. Genocide and Ethnic Cleansing

Genocide must be distinguished from “ethnic cleansing,” an expression not found in the Genocide Convention. According to the ICJ, ethnic cleansing means “rendering an area ethnically homogeneous by using force or

112. See, e.g., Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgment, ¶ 48 (I.C.T.Y. July 5, 2001); Krstić Appeal Judgment, No. IT-98-33-A, ¶ 225.

113. Krstić Appeal Judgment, No. IT-98-33-A, ¶ 34.

114. Karadžić Trial Judgment, No. IT-98-33-T, ¶ 553; Krstić Trial Judgment, No. IT-98-33-T, ¶ 580; see also Bosnia v. Serbia, 2007 I.C.J. ¶ 344 (“[The ICJ] endorses the observation made in the *Krstić* case that ‘where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.’”).

115. See, e.g., Bosnia v. Serbia, 2007 I.C.J. ¶ 190 (stating that “acts of ‘ethnic cleansing’ [such as displacement or deportation] . . . may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts”).

116. See, e.g., Krstić Appeal Judgment, No. IT-98-33-A, ¶ 33 (holding that “[t]he fact that the forcible transfer does not constitute in and of itself a genocidal act[] does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff.”). Moreover, the ICJ agreed that “evidence of the transfer of the women and children supported [the] finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica.” Bosnia v. Serbia, 2007 I.C.J. ¶ 293.

117. Jelisić Appeal Judgment, No. IT-95-10-A, ¶ 47.

118. Bosnia v. Serbia, 2007 I.C.J. ¶ 415.

119. *Id.* ¶ 413.

120. *Id.* ¶¶ 438, 449–50.

intimidation to remove persons of given groups from the area.”<sup>121</sup> Proposals to incorporate ethnic cleansing into the Genocide Convention were rejected.<sup>122</sup> Forcible deportation, displacement, or expulsion of members of a protected group hence does not per se constitute destruction of the group.<sup>123</sup>

The only way in which ethnic cleansing may amount to genocide is by satisfying the aforementioned elements of the crime stipulated in Article II of the Convention—membership in a protected group, *actus reus*, and *mens rea*.<sup>124</sup>

Accordingly, an “ethnic cleansing” operation—typically forced displacement or deportation—will constitute genocide if it (1) affects a protected group; (2) falls under one of the five acts listed in Article II (such as causing serious bodily or mental harm, deliberately inflicting conditions calculated to bring about physical destruction, or forcibly transferring children of the group to another group);<sup>125</sup> and (3) is accompanied with the *dolus specialis* to destroy the group as such.

Moreover, it is important to highlight the nexus between ethnic cleansing and genocidal intent. While ethnic cleansing, on its own, is insufficient to be characterized as genocide, it may nonetheless evince the requisite *mens rea* under Article II. Given the common features of an ethnic cleansing policy and a genocidal policy,<sup>126</sup> “it is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention.”<sup>127</sup> These parallels, commonalities, and overlaps may, in turn, constitute *indicia* of *dolus specialis* to destroy the group as such.<sup>128</sup>

Having discussed the constituent elements of the crime of genocide, the next Part applies this legal framework to the situation of Hazaras under Abdur Rahman’s reign.

121. *Id.* ¶ 190.

122. *Id.* (observing that “a proposal during the drafting of the Convention to include in the definition ‘measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ was not accepted”).

123. *Id.* As such, the ICJ has held that “in the context of the [Genocide] Convention, the term ‘ethnic cleansing’ has no legal significance of its own.” *Id.*; see also Stakić Trial Judgment, No. IT-97-24-T, ¶ 519 (emphasizing that “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.”).

124. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 190 (clarifying that “whether a particular operation described as ‘ethnic cleansing’ amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such”).

125. Genocide Convention, *supra* note 6, Arts. II(b)–(c), (e).

126. See, e.g., Krstić Trial Judgment, No. IT-98-33-T, ¶ 562; *Bosnia v. Serbia*, 2007 I.C.J. ¶ 190 (observing that “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’”).

127. *Bosnia v. Serbia*, 2007 I.C.J. ¶ 190.

128. *Id.* (stating that “acts of ‘ethnic cleansing’ [. . .] may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts”).



## IV. GENOCIDE AGAINST HAZARAS?: A LEGAL APPRAISAL

A. *Membership in a Protected Group*

The Hazara people form a distinct ethnic and religious group in Afghanistan. Easily distinguishable through their Asiatic appearance, they speak a unique dialect of Farsi, *Hazaragi*, and mainly practice Shi'a Islam.<sup>129</sup> Hazaras live primarily in the central regions of Afghanistan, known as *Hazarajat*, though they also make up significant numbers in key provinces such as Kabul, Balkh, and Herat.<sup>130</sup> The Hazaras thus fall within the ambit of a protected group as defined under Article II of the Genocide Convention.

B. *Actus Reus*1. *Genocide by killing members of the group*

As a protected group, Hazaras were subjected to deliberate, targeted killings by Abdur Rahman's forces. Acts of genocide under Article II of the Convention include killing members of a protected group with the intention to destroy, in whole or in part, the group as such.<sup>131</sup>

Abdur Rahman directed a systematic campaign of killing Hazaras, often deploying gruesome tactics intended to terrorize this community such as decapitating Hazaras,<sup>132</sup> erecting and displaying towers of Hazara skulls in bazaars across the country including in Kandahar and Bamiyan,<sup>133</sup> flaying Hazaras,<sup>134</sup> and tying Hazaras to cannons and blowing them to pieces.<sup>135</sup> The Afghan government also arrested and executed Hazara leaders and other prominent members of the community, along with their families, in a

129. For an in-depth study of the Hazara people, see generally MOUSAVI, *supra* note 31.

130. See, e.g., *Massacres of Hazaras in Afghanistan*, HUM. RTS. WATCH (Feb. 1, 2001), <https://www.hrw.org/report/2001/02/01/massacres-hazaras-afghanistan-2263> [<https://perma.cc/F5KP-RXPP>]; see also *Hazaras in Afghanistan*, MINORITY RTS. GRP., <https://minorityrights.org/communities/hazaras/> [<https://perma.cc/YYJ6-7CEC>] (noting that, besides living in other provinces throughout Afghanistan, "Hazaras are based in substantial numbers in several urban centres of Afghanistan, including Kabul, Mazar-e Sharif and Herat").

131. Genocide Convention, *supra* note 6, Art. II(a).

132. See, e.g., SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [812] (noting that Afghan soldiers "cut off the heads of thirty of the Hazarabs who had been slain . . . and sent them to the army base").

133. See, e.g., *id.* at [806] (observing that Abdur Rahman's forces "cut off the heads of the slain in every encounter, and sent them all to Qandahar . . . [where Afghan officials] displayed the heads in the bazaar and then erected a tower of them"), [898] (noting that Abdur Rahman's commander "cut off the heads of 400 of the fallen Hazarabs and sent them to Bamyān [where] he ordered a tower (of heads) raised").

134. See, e.g., *id.* at [996] (observing that an Afghan "general took the skin from [a Hazara's] head, stuffed it with straw, and took it with him").

135. See, e.g., *id.* at [772] (noting that Abdur Rahman's forces "strapped four of their prisoners to cannons (and blew them to pieces) . . . [thus] spread[ing] terror and panic throughout the mountains of the Hazarajat"), [938] (observing that an Afghan commander "tied [Hazaras] to the muzzle of a cannon and blew them to pieces").

widespread manner.<sup>136</sup> Abdur Rahman's forces regularly killed Hazara prisoners as well.<sup>137</sup>

Although it is impossible to ascertain the number of Hazaras killed or forced into exile during this period, it is estimated that approximately sixty percent of Hazaras were massacred, enslaved, or forcibly displaced from their ancestral homelands under Abdur Rahman's regime.<sup>138</sup>

Many Hazara tribes were substantially destroyed ("some ninety percent destroyed")<sup>139</sup> whereas other Hazara tribes were "seriously reduced" as a result of Abdur Rahman's operations.<sup>140</sup>

Two examples of Abdur Rahman's brutalities, recorded by Sirāj al-Tawārikh, illustrate the extent of destruction in the Hazara districts of Yakah Awlang and Bihsud. With respect to the situation in Yakah Awlang in 1894, Sirāj al-Tawārikh narrates:

'Abd al-Karim Khan, the governor of Yakah Awlang, in accordance with a farman issued in his name, sent to Kabul 100 families of sayyids, Karbala'is, zuwwars, and (other) local leaders, and informed the throne that 1,000 families of sayyids and zuwwars of the people of Yakah Awlang have fled and 2,100 people (from Yakah Awlang) have perished at the hands of government soldiers or because of starvation and extreme hardship. Only 700 families, which are neither sayyids, nor Karbala'is, nor zuwwars (now) remain in their homes.<sup>141</sup>

As for the situation in Bihsud, Sirāj al-Tawārikh observes:

His Majesty learned in a report from Mulla Muhammad Sa'id, the qazi, and Mulla Muhammad Nazif, the mufti, of the Shari'ah court of Hazarah Bihsud, who had conducted a census of the people there

136. See, e.g., SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [862], [867], [876], [919], [934], [935], [988], [788] (noting that "Hazarahs . . . who up to this time had not been the source of disobedience, now were deeply aggrieved . . . because of the arrest (and deaths) of most of their leaders"), [930] (observing that "families, wives, and children [of Hazara leaders] . . . were summoned by farman to Kabul, imprisoned, and most were put to death").

137. See, e.g., *id.* at [904] (observing that Afghan forces "brought the prisoners back to the camp along with 1,000 head of cattle and sheep and there, at the field marshal's order, all the captives were put to the sword"), [919] (noting that Hazara prisoners, including community leaders, were shot at the order of Abdur Rahman), [919–20] (in one case, for instance, out of 619 Hazara men, women, and children "imprisoned in Kandahar, 292 had died").

138. See, e.g., Austl. Gov't Dep't Foreign Aff. & Trade, *DFAT Thematic Report: Hazaras in Afghanistan*, 3–4 (Sept. 18, 2017); see also MOUSAVI, *supra* note 31, at 136 (observing that "it is clearly documented that more than half of the Hazara population was destroyed or forced out"); see also LEE, *supra* note 24, at 399 (noting that, "[a]ccording to some estimates more than 50 per cent of the male Hazara population died as a direct or indirect result of the wars").

139. MOUSAVI, *supra* note 31, at 136. These "mostly destroyed" tribes include: "Day Chopan, Daya, Pulad (Fuladi), Ajristan, Chorah, Orazgan, Zavoli (Zabuli), Pahlawan, Bobash, Bobak, Sultan Ahmad, Shooi, Shirah, and Minishin." *Id.* The Hazaras of Tala and Barfak, Goori, and Kabuli Hazaras also experienced similar devastation at the hands of Abdur Rahman. *Id.*

140. *Id.* (noting that among the "seriously reduced" tribes were Hazaras of "Shaikh Ali, Turkman, Day Kundi, Qarabagh, Jaghouri, and Yakau Lang").

141. SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [1038]. The terms "Sayyids," "Karbala'is," and "Zuwars" refer to relatively prominent members of Hazara society, especially in a religious sense.

at His Majesty's order, that out of 20,000 households, 6,400, whose "feet of flight" had been bound by the shackles of government prevention, remained in their homes. 13,600 families had fled, been captured and killed, and their possessions looted.<sup>142</sup>

In other words, in 1894, nearly seventy percent of Hazaras from Bihsud had been killed, captured, or forcibly displaced. What makes this figure about Bihsud especially alarming is that the Hazaras of Bihsud had little, if any, involvement in the uprisings, regularly paid their taxes to the government, and were "loyal subjects."<sup>143</sup> The mass killings of Hazaras who supported the Afghan government indicate, among other things, Abdur Rahman's *dolus specialis* to destroy this community.<sup>144</sup>

Accordingly, the foregoing demonstrates that Abdur Rahman's forces engaged in "[k]illing members of the group" pursuant to Article II (a) of the Convention.

## 2. Genocide by committing other acts

As discussed in Part III, genocidal conduct is not limited to killing members of the group.<sup>145</sup> The actus reus of genocide also encompasses other acts such as "[c]ausing serious bodily or mental harm to members of the group"<sup>146</sup> and "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."<sup>147</sup> As explained previously, examples of specific conduct that may fall under Articles II(b) and II(c) include, among other things, forced displacement,<sup>148</sup> deprivation of resources indispensable for survival,<sup>149</sup> sexual violence including rape,<sup>150</sup> persecution,<sup>151</sup> surviving massacres,<sup>152</sup> torture, inhumane or degrading treatment, and death threats.<sup>153</sup> The following sections establish that these additional acts of genocide were also committed by Abdur Rahman's forces against Hazaras.

142. *Id.* at [1031].

143. *See, e.g.*, MOUSAVI, *supra* note 31, at 137; SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [862] (observing that "the Hazarahs of Day Zangi, Day Kundi, and Bihsud, who were loyal subjects and had trod and were treading the path of service to the government"), [773] (noting that "[t]he governor of Bihsud, Muhammad Nabi Khan, the son of Muhammad 'Ali Khan Hazarah, was also mortally wounded, gave his life in service to the government").

144. *See infra* Part IV.C.

145. Genocide Convention, *supra* note 6, Art. II(a).

146. *Id.* Art. II(b). The harm in Article II(b) "need not be permanent and irremediable." Stakić Trial Judgment, No. IT-97-24-T, ¶ 516.

147. Genocide Convention, *supra* note 6, Art. II(c).

148. *See, e.g.*, Karadžić Trial Judgment, No. IT-95-5/18-T, ¶ 545 (noting that forcible transfer "may cause such serious bodily or mental harm as to constitute an act of genocide").

149. *See, e.g.*, Elements of Crimes, *supra* note 81, Art. 6(c)(4) n.4.

150. Akayesu Trial Judgment, No. ICTR-96-4-T, ¶ 731 (stating that "rape and sexual violence . . . are . . . one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm").

151. *See, e.g., id.* ¶¶ 503–04.

152. *See, e.g.*, Krstić Trial Judgment, No. IT-98-33-T, ¶ 635 (determining that "the ordeal inflicted on the men who survived the massacres may appropriately be characterised as a genocidal act").

153. Stakić Trial Judgment, No. IT-97-24-T, ¶ 516.

a. *Attacks on property and dispossession of lands*

An important element of Abdur Rahman's calculated strategy to inflict destructive conditions of life on Hazaras entailed systematic attacks on property, dispossession of lands, and elimination of livelihood resources throughout *Hazarajat*. These acts amounted to deprivation of resources indispensable for survival, thus violating Article II of the Convention.<sup>154</sup>

Afghan forces set Hazara homes ablaze and "burned them to the ground."<sup>155</sup> In addition to torching houses, Abdur Rahman's commanders such as Fath Muhammad Khan Panjshayri systematically destroyed the crops of Hazaras,<sup>156</sup> pillaged their wealth, livestock, and other properties,<sup>157</sup> and took their wives and daughters as slaves.<sup>158</sup> In Uruzgan, for example, "all the people . . . had scattered into the surrounding hills and fled their homes [while] [t]heir dwelling places [were] ruined and they ha[d] no place to settle and live."<sup>159</sup>

Owing to the destruction and looting of their properties, many Hazaras perished from starvation.<sup>160</sup> In order to survive, Hazaras were forced to "pick[] seeds from the dung piles of horses"<sup>161</sup> like "pigeons . . . [because n]o one ha[d] the means to plant and cultivate the land."<sup>162</sup> Many Hazaras, who had been rendered homeless by Afghan forces, also died due to difficult weather conditions,<sup>163</sup> whereas hundreds were devoured by wolves and other wild animals.<sup>164</sup>

154. See, e.g., *Elements of Crimes*, *supra* note 81, Art. 6(c)(4) n.4.

155. See, e.g., STRĀJ AL-TAWĀRIKH, *supra* note 32, at [806].

156. See, e.g., *id.* at [818] (observing, for example, that "[p]rior to the advent of the government army [Hajaristan district] had more than two laks [viz., 200,000] of willow and plane trees . . . [b]ut with the invasion of the army all were cut down and other than the stumps no sign remain[ed] of these trees [and] [t]he crops of its extensive fields [were] all destroyed"), [808] (observing that Abdur Rahman's militia "trampled all the plantings and crops of the people of Sar-i Jangal beneath the hooves of their horses, set fires, and burned everything out"), [807] (noting that "[t]he crops of those two [Hazara] districts were either destroyed or fed to the army's animals"), [918].

157. See, e.g., *id.* at [938] (observing that Hazaras "were having their property looted and plundered"), [819] (noting that "most Hazarabs were killed and their property, wealth, forts, gardens, and trees completely pillaged"), [862] (observing that "in accordance with [Abdur Rahman's] farman . . . [Afghan governors] confiscated all their money, belongings, property, and livestock"), [863] (noting that Afghan forces "terrorized the Hazarabs living in Churah and stole money and goods from anyone"), [772] (noting that Abdur Rahman's soldiers "commenced robbing and killing the Hazarabs"), [774] (observing that Afghan forces "attacked, plundered, and made captives of the Hazarabs").

158. See, e.g., *id.* at [853–55]; see also *infra* Part IV.B.2.d.

159. *Id.* at [854].

160. See, e.g., *id.* at [855] (observing that many Hazaras "perished from lack of food").

161. *Id.*

162. *Id.* at [854].

163. See, e.g., *id.* at [863] (noting that, in one incident, "because of heavy snowfall and extreme cold from Uruzgan to Qul Khar, fifty-three Hazarabs perished"), [934] (observing that many Hazara leaders, along with their wives and children, were forcibly displaced pursuant to Abdur Rahman's farmans and "most perished . . . [d]ue to the change in climate").

164. See, e.g., *id.* at [951] (noting that "wolves ate two hundred of the Hazarab . . . who had spent their days and nights in the mountains and wastelands with no goods and none of life's essentials").

Abdur Rahman also deployed his fellow Pashtuns, including Kuchis (Pashtun nomads),<sup>165</sup> as a key instrument for implementing the strategy of seizing Hazara lands and plundering their properties.<sup>166</sup> In 1894, the Afghan government issued orders to “confiscate all grazing land in the Hazarajat, with the stipulation that under no circumstances should the Hazaras be allowed any longer to use these lands for the purpose of grazing their own cattle.”<sup>167</sup>

As one of the main beneficiaries of this policy, Kuchis went even further by “usurp[ing] land actually under cultivation by the Hazaras”<sup>168</sup> and destroying their farms, crops, and livestock.<sup>169</sup> Attempts to protect their property resulted in the “death of several Hazaras each time, and the looting of their property and families, with the local rulers always siding with the [Pashtun] intruders.”<sup>170</sup> Consequently, the Pashtun migrants and nomads gradually gained control over much of the arable land of Hazaras.<sup>171</sup> Hazaras were also prohibited from owning horses or weapons, rendering them acutely vulnerable against armed Kuchis fully backed by the state apparatus.<sup>172</sup>

The repercussions of this policy were calamitous for Hazaras who relied on agriculture as the sole source of their livelihood. The loss of arable land and frequent attacks on their properties dramatically reduced agricultural production and destroyed animal husbandry, further endangering their survival.<sup>173</sup> These governmental measures also adversely impacted Hazara industry, which was “badly destroyed.”<sup>174</sup> Various industrial trades, including ironmongery, were completely abandoned.<sup>175</sup>

165. See, e.g., *id.* at [784] (observing that “the royal farmans . . . [directed] to the five Afghan nomad tribes—Kandi, Mati, Kharuti, Mati Khayl, and Daftani—regarding holy war (ghazā and jihād) against the Hazarabs, along with the proclamations anathematizing the Hazarabs as unbelievers, were delivered to the aforementioned tribes and encouraged them to fight the Hazarabs”).

166. See, e.g., *id.* at [938] (referring to the “lands of . . . Hazarabs which had been confiscated by the state”).

167. MOUSAVI, *supra* note 31, at 133; see also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [986–87].

168. MOUSAVI, *supra* note 31, at 133.

169. SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [925] (observing that Pashtun nomads “ruined the fields and farms of [Hazarabs] . . . [and] it became extremely difficult for the livestock belonging to the subjects to survive and their crops were also destroyed by the herds and flocks of the nomads”).

170. MOUSAVI, *supra* note 31, at 133 (indeed, “[f]ar from any fines being levied on these nomadic intruders for trespassing and damaging Hazara crops, they were easily able to force their animals onto cultivated Hazara lands in return for bribes paid to local Afghan rulers”).

171. *Id.* (noting that “[t]hese areas included Day Zangai, Behsud, Day Kundi, Navor, Malistan, and Jaghouri”). See also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [925–26] (explaining that “[b]ecause the governors . . . turned a blind eye to complaints about them, most of the people, with no other recourse, began abandoning their lands and homes and scattering toward other provinces as refugees”), [931] (noting that Afghan officials “gave the Hazarabs fields and farms to [Pashtun] immigrants and nomads”).

172. MOUSAVI, *supra* note 31, at 134 (noting that, according to Temirkhanov, “[t]he Hazarabs were banned even from owning horses and owning or making weapons”); see also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [925–26].

173. MOUSAVI, *supra* note 31, at 133; see also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [987].

174. MOUSAVI, *supra* note 31, at 134.

175. *Id.*

b. *Forced displacement*

The attacks on property, land confiscations, mass killings, and other persecutory policies of the Afghan government resulted in the large-scale forced displacement and expulsions of Hazaras from their native homelands.

Forced displacement or expulsion of members of a protected group, as discussed earlier, does not per se constitute genocide under the Convention.<sup>176</sup> Such acts, however, will amount to genocide if they meet the elements of the crime under Article II.<sup>177</sup> In the case of the Srebrenica massacres, for instance, the ICJ suggested that the forced deportations or expulsions of Bosnian Muslims would rise to the level of genocide if accompanied with proof of specific intent to destroy the group in whole or in part.<sup>178</sup> As determined in Part IV.C., the forced displacement and expulsions of Hazaras were indeed accompanied with the necessary mens rea under Article II of the Convention.<sup>179</sup>

At the end of the nineteenth century, Hazaras inhabited mainly the central regions of Afghanistan with no considerable presence in Afghanistan's neighboring countries.<sup>180</sup> The Hazara-populated regions at that time covered the "northern and southern plains of the Hindu Kush and Baba mountains, and measured more than three times the area of today's Hazarajat."<sup>181</sup> This "enormous geographic reduction" reflects the "extent of the destruction wrought by Abdur Rahman against the Hazaras."<sup>182</sup>

Abdur Rahman's farmans and policies ensured the forcible transfer of vast swathes of land from indigenous Hazaras to Pashtun migrants as booty and spoils.<sup>183</sup> These included "[s]ome of the most arable areas" which were "completely depopulated of Hazaras and taken over by Pashtun nomads."<sup>184</sup> The Hazaras were forced to flee Afghanistan to neighboring countries.<sup>185</sup> To survive the onslaught, Hazaras sought refuge in three main countries. Those living in northern Hindu Kush emigrated to Czarist Russia, Hazaras in the northwest

176. See *supra* Part III.D. Rather, forcible displacement or deportation of members of a group, on its own, would usually be characterized as an act of "ethnic cleansing." See *supra* Part III.D.

177. See, e.g., *Bosnia v. Serbia*, 2007 I.C.J. ¶ 190 (clarifying that "whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such").

178. *Id.* ¶ 334.

179. See *infra* Part IV.C.

180. MOUSAVI, *supra* note 31, at 136.

181. *Id.*

182. *Id.*

183. *Id.* See also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [890] (observing that Afghan officials "gave all the Hazarabs' lands and estates . . . to Afghan muhajirs and nomads"), [829] (noting that "[Hazarab] properties and lands were given to Afghans"), [855] (observing that "[Hazarab] properties were given by the government to Afghan returnees from India, muhajirs, and other migrants . . . and those Hazarabs were reduced to destitution"), [953–54].

184. MOUSAVI, *supra* note 31, at 136 (among these areas were "Orozgan, Ajaristan, Chorah, and Dehrawood").

185. *Id.*; see also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [829] (noting that Hazaras "emigrated from the kingdom of Afghanistan to foreign lands and there [took] refuge").

Hazarajat moved to Iran, and those inhabiting the southeast of Afghanistan fled to British India, or Pakistan today.<sup>186</sup>

c. *Enslavement*

Abdur Rahman also actively promoted an official policy of enslaving the Hazaras as part of his broader plan to destroy this group, thereby subjecting Hazaras to severe persecution and inhumane or degrading treatment amounting to acts of genocide.

Indeed, in his *farmans* to annihilate Hazaras, the Afghan Amir incentivized his forces, both regular and militia, to plunder Hazara property and take Hazaras, especially women and children, as slaves. Abdur Rahman's *farman* made clear that,

whatever should come into their hands as booty—whether men, women or children, or property and furnishings—they were to understand that one-fifth belongs to the government and should be sent to the throne, in accordance with the rules (ā'in) of the clear religion of the Hazrat, Lord of the Messengers (Prophet Muhammad) and four-fifths could be taken as their own property. Because of the issuance of this order, thousands of [Hazara] men were killed, and their daughters, wives, and young sons became slaves.<sup>187</sup>

Abdur Rahman's calculated policy legalized the enslavement of Hazaras and turned Hazarajat into a center for slave trade.<sup>188</sup> Consequently, tens of thousands of Hazaras, particularly women and children, were bought and sold in domestic markets such as Kabul and Kandahar as well as outside Afghanistan.<sup>189</sup> The considerable volume of trade in Hazara human beings was reflected in part by the cheap price of slaves—a Hazara could be purchased for two seers (fourteen kilograms) of wheat, barley, or corn.<sup>190</sup> The slave trade was “so lucrative that it was recognized as a legal source of income,”<sup>191</sup> prompting the government to introduce special taxes on the sale of slaves.<sup>192</sup>

186. MOUSAVI, *supra* note 31, at 137–38; *see also* SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [855] (stating that “most of the Hazarabs . . . perished from lack of food or fled to Shalkut, Sistan, and Mashhad”), [989] (noting that “most Hazarabs . . . fled in all directions . . . [m]ost went to Iran, Transoxania, and Hindustan”).

187. SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [809].

188. MOUSAVI, *supra* note 31, at 126; *see also* SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [863].

189. MOUSAVI, *supra* note 31, at 126, 135 (noting that “[a]ccording to official government reports, during the late 19th and early 20th centuries, in Qandahar alone, the government earned some 60,000 to 70,000 rupees annually from the trading of slaves. . . . Thus, in just Qandahar, annually, some 7,200 Hazara men and women were sold as slaves.”); *see also* SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [863], [987].

190. *See, e.g.*, SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [863] (observing that “[a] great trade (in slaves) arose and every single soldier who obtained leave to return home brought with him several male and female slaves for sale. Because of this there were few people who did not have at least one or two female and male (Hazarab) slaves.”).

191. MOUSAVI, *supra* note 31, at 135.

192. *See, e.g.*, SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [863] (noting that Abdur Rahman promulgated a *farman* mandating a ten percent tax on the sale of Hazara slaves).



The Afghan government facilitated the enslavement of Hazaras by levying exorbitant taxes exclusively on this community.<sup>193</sup> The penalty for failing to pay such extortionate government taxes included the forced sale of Hazara women and children as slaves.<sup>194</sup> The state-sanctioned policy of Hazara enslavement remained in effect until the reign of Amir Habib Allah Khan, who ruled from 1901 to 1919.<sup>195</sup>

*d. Sexual violence, rape, and forced marriages*

In a bid to further disintegrate the fabric of Hazara families, Abdur Rahman's government facilitated the commission of sexual violence, rape, and forced marriages against Hazara women and children in a systematic and widespread manner, thus inflicting serious bodily and mental harm on this community under Article II of the Genocide Convention.

Hazara women and girls were raped,<sup>196</sup> and they were "forcibly married to Pashtuns in a deliberate attempt to destroy Hazara social and religious hierarchies."<sup>197</sup> Moreover, in accordance with Abdur Rahman's *farmans*, Hazara wives and daughters were distributed to Pashtuns as slaves—including as concubines.<sup>198</sup> Indeed, the Afghan ruler regularly "rewarded" his commanders and other officials with female Hazara slaves.<sup>199</sup> Virgin women along with daughters of Hazara leaders were typically given to high-ranking Pashtun leaders

193. MOUSAVI, *supra* note 31, at 135; see also SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [855] (observing that, due to the government's punitive taxation policy, "[t]he Hazarahs saw no alternative but to hand over their wives and daughters and the market in buying and selling human flesh became active").

194. MOUSAVI, *supra* note 31, at 135.

195. SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [809]; see also LEE, *supra* note 24, at 109.

196. See, e.g., SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [1132] (noting the intrusion of Hazara homes by forces from the Panjshayri Regular Infantry Regiment who raped Hazarah women), [760–61] (describing the invasion of a Hazara home by three Afghan soldiers who then gang raped a Hazara woman in front of her family), [878] (observing that an Afghan governor "had forcibly taken four married Hazarah women to share his bed"), [903–04] (noting that Afghan forces "had taken sixty-five Hazarah girls as captives and had made them . . . concubines"), [919] (stating that an Afghan commander raped and "seiz[ed] Hazara wives and daughters"), [918], [937–38], [987].

197. LEE, *supra* note 24, at 399; see also SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [761] (observing "[Hazara] women who had been forcibly taken to wife" by Abdur Rahman's forces), [863] (noting that "soldiers and other employees of the government took possession of Hazarah women, both virgin girls and married women, in marriage and as concubines"), [867] (stating that the Afghan "governor of Day Zangi, (forcibly) took in marriage a girl from Waras" and engaged in extensive extortion).

198. See, e.g., SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [785–86], [788] (noting that "at the order of His Majesty, [Abdur Rahman's forces] distributed [the] wives, sons, and daughters [of Hazarahs] to Afghans (as slaves)", [761] (noting that "Sardar 'Abd al-Quddus Khan . . . had . . . taken several daughters of Hazarah leaders as concubines and servants. Other officers had also followed his lead, each one taking a concubine and a handmaiden to his own place and giving themselves over to pleasure.").

199. See, e.g., *id.* at [853–54] (observing that "General Mir 'Ata Khan was rewarded with . . . female [Hazara] slaves"), [787] (noting that "[t]he royal order was that their wives and children should be . . . given to servants of the government as slaves"), [937–38].

and “other notables.”<sup>200</sup> To escape their predicament, many Hazara women and girls committed suicide.<sup>201</sup>

The Afghan state’s official policy of Hazara slavery gave rise to a “great trade” whereby countless women and children were treated “as trade goods, both inside and outside the country.”<sup>202</sup> The Afghan government actively promoted the sexual exploitation of Hazara women and children in part because it profited enormously through special taxes levied on the purchase and sale of Hazara slaves.<sup>203</sup> Afghan soldiers forcibly seized Hazara women and children throughout Afghanistan and sold them for fifty to one hundred rupees.<sup>204</sup> Slave traders from various regions “headed for the Hazarahjats and bought girls, married women, and young boys by the thousands.”<sup>205</sup> Defenseless Hazaras who resisted these violations were killed, tortured, pillaged, threatened with death, and had their homes burned to the ground.<sup>206</sup>

The sexual exploitation and enslavement of Hazara women and children became so widespread that, “whether in the cities or the countryside, few were the people who had not taken possession of the wife or daughter of a Hazarah.”<sup>207</sup> Government officials, merchants, and even ordinary Afghans also deployed an array of other oppressive tactics to forcibly seize women and girls from “completely destitute” Hazara families, including through false testimonies,<sup>208</sup> capricious and extremely demanding requisitions, exorbitant fines, and punitive taxation.<sup>209</sup> These attacks on Hazara women and children “went on until most Hazarahs had fled abroad.”<sup>210</sup>

200. See, e.g., *id.* at [863], [806] (observing that “Sardar ‘Abd Allah Khan stayed a day in Gizab . . . and took with him the forty-five daughters of the Hazarah leaders”).

201. See, e.g., *id.* at [867] (noting that Hazara daughters and wives “taken by Colonel Farhad Khan . . . hanged themselves in the night”).

202. *Id.* at [830], [863], [987] (observing that “merchants and nomad Afghans sold thousands of Hazarah married women and girls in Kabul and other towns as well as in the far corners (of the country and beyond”), [989] (noting that “merchants and retailers both Muslim and Hindu” had taken Hazara women and children “to Shalkut, Sind, and Hind as goods to sell”).

203. See, e.g., *id.* at [987] (noting that the sexual exploitation of “Hazara wives and daughters” had become widespread because an “order had been issued concerning the purchase and sale (of Hazarah women) and they were paying the ten percent sales tax to the government”).

204. See, e.g., *id.* at [937].

205. *Id.*

206. See, e.g., *id.* at [938–39] (observing that, after their requests for Hazaras’ daughters were rejected, Afghan soldiers “set fire to the house, burned it to the ground, and made off with all [of the Hazara family’s] money and belongings” and, in another case, tortured a Hazara and threatened him with death).

207. *Id.* at [830], [863] (observing that “[b]ecause of this [policy] there were few people who did not have at least one or two female and male (Hazarah) slaves”).

208. See, e.g., *id.* at [987] (for instance, “[w]hen someone (forcibly) took a [Hazara] woman or girl, if their mother, father, or brother went . . . to seek redress, (the perpetrators) themselves would claim to have bought (the woman) and would get two other soldiers to . . . swear as witnesses that the woman had been purchased”).

209. See, e.g., *id.* at [855] (observing that “[d]espite the fact that those people were completely destitute, [Afghan officials] . . . appointed collectors, thinking that perhaps the Hazarahs, because they had absolutely no means (to provide the requisitioned supplies), would give their wives and daughters to the soldiers in place of what was requisitioned”).

210. *Id.* at [939].

e. *Punitive taxation*

In addition to pervasive and arbitrary extortion,<sup>211</sup> the Afghan government's arsenal of persecutory policies against Hazaras also encompassed imposing several punitive taxes on this community, further exacerbating their extremely impoverished and precarious living conditions. The punitive taxation against Hazaras complemented the Afghan regime's other deliberate and repressive policies designed to destroy this group.

The taxes were crafted to make it prohibitively costly for Hazaras to sustain their livelihoods in Afghanistan, forcing many to abandon the country. Failure to pay these exorbitant taxes had severe consequences. For example, pursuant to a law promulgated by Abdur Rahman in 1894, "[i]n cases of failure to pay all taxes due, the wife and children of the failing Hazara were sold as slaves."<sup>212</sup>

The Afghan government levied a plethora of crippling taxes on Hazaras such as the *nafs* tax which required every Hazara person (or *nafs*), whether adult or child, to pay a fixed amount per head annually.<sup>213</sup> Moreover, the government also instituted the *do puli* tax which obliged every Hazara family to pay a specific annual amount.<sup>214</sup> Hazaras were also forced to pay taxes to the families of dead soldiers, in addition to the "blood tax" (*maliyat-e kbun*), while also covering the various expenses of officers sent to collect these taxes.<sup>215</sup> The Afghan government even targeted the livestock of Hazaras by imposing an animal tax on the community and charging different rates for each type of animal.<sup>216</sup>

Abdur Rahman's regime also introduced a ten percent tax on the sale of Hazara slaves "who had been taken all over the country as trade goods."<sup>217</sup> In Kandahar, for example, the government collected around seventy thousand rupees annually in tax revenues from the purchase and sale of *female* Hazara slaves.<sup>218</sup> Given that the price of female Hazara slaves ranged from 60 to 120 rupees in that province, assuming an average tax rate of nine rupees per

211. See, e.g., *id.* at [937] (noting that Afghan soldiers "at night would enter Hazarah homes and tie up the young children in front of their mothers and fathers and beat them with sticks while telling the parents either to tell them where their money was hidden or they would beat their children to death before their very eyes"), [868] (observing that Afghan officials "cast the eye of avarice on the money and belongings of the helpless [Hazaras], and extended the hand of seizing and confiscating . . . [by] collect[ing] various fees] . . . from every household"), [897] (describing the seizure of significant livestock, crops, foodstuff, and timbers from indigent Hazara communities without any compensation as "requisitions"), [918], [919], [987–88].

212. MOUSAVI, *supra* note 31, at 135; see also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [855].

213. MOUSAVI, *supra* note 31, at 134. The *nafs* tax was increased in subsequent years. *Id.*

214. *Id.* The *do puli* tax, which was also known as the household tax, remained in effect until the 1970's. *Id.*

215. *Id.* at 134–35. The "blood tax" required Hazaras to pay for expenses associated with maintaining the Afghan government's military. *Id.* at 135.

216. *Id.* at 135. For example, Hazaras had to pay higher taxes for their cows and donkeys relative to their sheep and goats. *Id.*

217. See, e.g., SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [863], [969], [1132].

218. *Id.* See also *id.* at [1226] (observing that, in Kandahar, "[a]nnually, some sixty to seventy thousand rupees from the ten percent tax on Hazarah women and girls who are put up for sale is remitted to the treasury").

transaction, approximately 7,800 female Hazara slaves were bought and sold each year in Kandahar alone.<sup>219</sup>

As with the Afghan government's enslavement policy, this extortionate tax regime exclusively targeted Hazaras, thus subjecting them to severe persecution and inhumane or degrading treatment amounting to genocidal conduct under Article II of the Convention.

### C. *Mens Rea*

Having established the elements of membership in a protected group and *actus reus*,<sup>220</sup> the author now turns to the *mens rea* requirement of *dolus specialis*. As discussed in Part III.C., this element requires that the stipulated acts under Article II be committed with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>221</sup>

*Mens rea* can be established through direct evidence such as the existence of a plan or policy to attack a protected group.<sup>222</sup> In the absence of direct evidence such as official statements, *dolus specialis* "may still be inferred from the factual circumstances of the crime."<sup>223</sup>

The specific intent to destroy the group may thus be deduced from "attacks on cultural or religious property or symbols of the group,"<sup>224</sup> forced displacement,<sup>225</sup> transfer of members of the targeted group,<sup>226</sup> and "other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."<sup>227</sup>

The *mens rea* element is also satisfied in the case of the atrocities perpetrated by Abdur Rahman's government against Hazaras. Abdur Rahman's *dolus specialis* can be proven through both direct evidence—revealed by the *fatwa* of *jihad*, numerous *farmans*, providing economic incentives to attack Hazaras, and the demonization of this community—as well as relevant factual circumstances of the crime. This section examines each of these indicia of *mens rea* in turn.

219. *Id.* at [969]; see also MOUSAVI, *supra* note 31, at 135. The price of Hazara slaves and thus the tax revenues collected varied by region. For example, on one occasion, the judge of the Uruzgan court "sent to Kabul 1,940 and one-half rupees for the fees for the sales of 1,293 Hazarah women, girls, and boys where it was turned over to the treasury." SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [1132].

220. See *supra* Part IV.A–B.

221. Genocide Convention, *supra* note 6, Art. II; Krstić Trial Judgment, No. IT-98-33-T, ¶ 571.

222. See, e.g., Jelisić Appeal Judgment, No. IT-95-10-A, ¶ 48; Krstić Appeal Judgment, No. IT-98-33-A, ¶ 225.

223. Krstić Appeal Judgment, No. IT-98-33-A, ¶ 34.

224. Karadžić Trial Judgment, No. IT-95-5/18-T, ¶ 553; Krstić Trial Judgment, No. IT-98-33-T, ¶ 580. See also Bosnia v. Serbia, 2007 I.C.J. ¶ 344.

225. See, e.g., Bosnia v. Serbia, 2007 I.C.J. ¶ 190.

226. See, e.g., Krstić Appeal Judgment, No. IT-98-33-A, ¶ 33; Bosnia v. Serbia, 2007 I.C.J. ¶ 293.

227. Jelisić Appeal Judgment, No. IT-95-10-A, ¶ 47.

1. *The fatwa of jihad against Hazaras*

A central pillar of Abdur Rahman's plan to destroy Hazaras rested on the *fatwa* (religious ruling) of *jihad* (holy war) against this community, demonstrating the Afghan ruler's *dolus specialis*. In a calculated effort to play on sectarian and ethnic prejudice,<sup>228</sup> Abdur Rahman secured a *fatwa* from Afghanistan's Sunni *ulema* (religious leaders or scholars), damning all Shi'as and Isma'ilis as *kafirs* (infidels) and thereby declaring *jihad* against the Hazaras.<sup>229</sup> Following the pronouncement of the *fatwa*, the Afghan ruler methodically "assigned" Sunni clerics to "to incite people to kill and plunder the Hazarachs . . . [i]n accordance with the proclamation of takfir which had been issued against the people of the Hazarahjat."<sup>230</sup>

Two key points should be underlined regarding this *fatwa* of *jihad*. First, the *fatwa* of *jihad* was obligatory upon all Sunnis.<sup>231</sup> Indeed, the mandatory nature of this "holy war" against Hazaras was explicitly emphasized by the Afghan government. For example, in articulating its "policy" in relation to Hazaras following the issuance of the *fatwa*, the Afghan government imposed compulsory conscription on all Sunnis, reasoning as follows:

This is because that evil tribe of infidels (the Hazarachs) is incited by religious solidarity (ham millatī, as Shi'ites) and *plundering and killing them is therefore an obligation* which should also be based on religious solidarity (of the Sunnis). In holy war, repelling and killing infidel evildoers conforms to the Pure Noble Law and *it is incumbent upon every individual Muslim to make it his own duty to fight them*.<sup>232</sup>

Second, and relatedly, the *fatwa* of *jihad* failed to distinguish between those who took part in the resistance and those who did not. Rather, the *fatwa* targeted the religious belief of Hazaras as Shi'as and Isma'ilis—regardless of whether or not they participated in the uprising.<sup>233</sup> Consequently, even Hazaras

228. LEE, *supra* note 24, at 398.

229. See, e.g., *id.* See also SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [807] (referring to "the fatwa of the ulema there which had labeled [the Hazaras] infidels"), [904–05] (observing that Abdur Rahman "always investigated legal (shar'i) cases of this type [regarding whether someone is a true Muslim] and made diligent efforts to scrutinize them carefully . . . [by] conven[ing] learned religious scholars and officials of the Shari'ah court and ask[ing] them for a fatwa").

230. See SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [806]. For example, Abdur Rahman deployed Mulla 'Abd al-Khaliq who "urged the Andari, Taraki, 'Ali Khayl, and Hutaki to attack [Hazaras]" and "[s]imilarly . . . roused the people (against the Hazarachs) in every district that he visited." *Id.*

231. See, e.g., *Understanding Jihad and Jihadism: At a Glance*, EUR. PARL. THINK TANK (May 2015), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557007/EPRS\\_ATA\(2015\)557007\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/557007/EPRS_ATA(2015)557007_EN.pdf) (noting that "many consider [jihad] to be a duty of the Muslim community as a whole").

232. SIRĀJ AL-TAWĀRIKH, *supra* note 32, at [781] (emphasis added). The Afghan government also forbade payment in lieu of conscription and criminalized any attempt to shirk the obligation to join the jihad against Hazaras. See *id.* at [781] (The policy further stipulated that "any person who takes a bribe and then gives special consideration because of it or gives some one more time to comply will be held to the strictest account. Nor should it be allowed to happen in the process of conscription that a person be able to pay money so that someone else is taken in his place.")

233. See, e.g., *id.* at [806] (referring to "the proclamation of takfir which had been issued against the people of the Hazarahjat"), [807] (noting that "[a]s a result of the . . . dissemination of the proclamation of

who supported and served Abdur Rahman's government were killed because of their religious faith.<sup>234</sup> Indeed, Abdur Rahman specifically instructed his forces to arrest all "Hazarah leaders whether they have caused any trouble or not . . . along with their wives and children,"<sup>235</sup> and send them to Kabul, where most of the men were killed.<sup>236</sup> Moreover, in many cases, Hazaras were executed despite pledges of amnesty.<sup>237</sup>

This all-encompassing classification of Hazaras as *kafirs* is further evidenced by Abdur Rahman's own statements pronouncing this community as non-Muslims,<sup>238</sup> his various repressive policies to compel Hazaras to adopt Sunni Islam,<sup>239</sup> and a letter sent by Hazara leaders to Abdur Rahman protesting the injustice against this community:

Meanwhile, the ulema of the nation . . . making *no distinction between the enemies and the supporters (of the government)*, issued a decree (of takfir) that *all* Hazarachs were infidels and circulated proclamations to that effect to every province and so established that the fight against the Hazarachs was a sectarian jihad.<sup>240</sup>

The call for *jihad* against Hazaras is also illustrated through direct correspondence between Abdur Rahman and Pashtun tribal leaders. For example, a letter sent by the Durrani leaders of Kandahar reads, "[a]s soon as we were notified by the arrival of farmans and royal proclamations . . . we . . . young

takfir, . . . [Hazaras] thought to themselves that even if they were loyal and obedient and did not rebel, . . . [they] would certainly be destroyed, young and old alike, being subject to the fatwa of the ulema there which had labeled them infidels. Therefore they had no recourse but to rebel").

234. See, e.g., *id.* at [772] (emphasis added) (observing that Abdur Rahman's forces "commenced robbing and killing the Hazarachs who lived there, making *no distinction between the loyal and the disloyal*. Every day, by the tens and twenties, *deserving and undeserving alike were put to the sword*." Then they decided to attack the Hazarachs . . . [who] were *pishkēhidmats* [viz., servants] at the royal court."), [979] (noting that Afghan forces "rounded up 275 leaders . . . of the Hazarachs of Malistan who had not rebelled but rather had served (the government)"), [868] (noting that the Afghan governor of Bihsud "took several of the [Hazarach] leaders there prisoner, both the innocent and the guilty so that the government would not ask him why he hadn't sent and wasn't sending evildoers to Kabul [where they were later killed]").

235. *Id.* at [862] (emphasis added). According to SIRĀJ AL-TAWĀRĪKH, "[a]s a result of the issuance of this order, since *two-thirds of all Hazarach men* were sayyids, mullas, Karbala'is, zuwwars, mirs and mirzadahs, leaders and the sons of leaders, *seeing themselves facing utter destruction*, the Hazarachs of Day Zangi, Day Kundi, and Bihsud, *who were loyal subjects and had trod and were treading the path of service to the government*, . . . rose up." *Id.* (emphasis added).

236. See, e.g., *id.* at [862], [876] (noting that "manshurs and letters bearing seals (tawqī'āt) arrived in the Hazarachjat calling for the ousting of Hazarach sayyids, Karbala'is, zuwwars, mirzadahs, and mihtars from their homes with their wives and children and their removal to Kabul, regardless of whether they were pious or impious or loyal or rebellious").

237. See, e.g., *id.* at [863] (observing that "[a]fter being reassured and encouraged [to] return[] home . . . a group of [Hazarach] leaders . . . were all arrested and eventually executed"), [822] (noting that Hazaras had "presented themselves before army officers but were nonetheless jailed and killed").

238. See, e.g., *id.* at [980–81] (citing Abdur Rahman's letter which stated that "words of unbelief and tokens of apostasy run rampant [among Hazarachs]", [848] (Abdur Rahman issued a *farman* to his field marshal stating that "[i]t's a [sic] strange that the Shi'ites . . . consider themselves Musulman."), [797] (referencing Abdur Rahman's letter which distinguishes between Shi'as (labeling them as "Shi'ite Refuser[s]") and "true Muslim[s]").

239. See *supra* Part II.

240. SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [891] (emphasis added).



and old alike, implored him to take up *jihad* and embark on the path of holy war. [We] assembl[ed] and turn[ed] our faces towards *destroying the evil tribe of Hazarabs*.”<sup>241</sup>

In response, Abdur Rahman wrote:

If . . . one man from every two [Durrani] households would buckle up the belt of war in aid of the government and this would amount to fifty thousand warriors who would *destroy the wicked Hazarabs and eliminate them entirely from the kingdom of Afghanistan* . . . in the royal mind . . . he *wanted to give the Durrani the lands and properties of the Hazarabs*. This is because the English government . . . has made an incursion on the land of the Achakza’i [tribe of the Durrani] . . . So, if they join in now, they will be secured and protected from (such) ruination by seizing ownership of the Hazarah lands.<sup>242</sup>

Abdur Rahman’s personal communication with his fellow Pashtuns from Kandahar further exposes his *mens rea* in two important respects. First, the Afghan ruler makes his *dolus specialis* explicit: To “destroy the wicked Hazarabs and eliminate them entirely from the kingdom of Afghanistan.”<sup>243</sup> Second, Abdur Rahman’s reply reveals a key objective behind the *fatwa* of *jihad*: To “give the Durrani the lands and properties of the Hazarabs.”<sup>244</sup> In other words, the *fatwa* of *jihad* also served as a convenient pretext for the plunder of Hazara lands and properties by Abdur Rahman’s fellow Pashtuns.<sup>245</sup>

## 2. *Issuing farmans to destroy Hazaras*

Abdur Rahman’s *dolus specialis* is further demonstrated through numerous *farmans* issued by his government to destroy the Hazaras. While securing the *fatwa* of *jihad* from the Sunni *ulema* was a core element of the Afghan ruler’s strategy, the religious ruling needed more teeth to effectively operationalize the Amir’s plan for Hazarajat.

To that end, Abdur Rahman put the state’s full power—both *de jure* authority and *de facto* resources—behind the *fatwa* of the *ulema*. The Afghan government promulgated many *farmans* and proclamations to governors, commanders, and other officials throughout the country, mobilizing the entire state apparatus and tribal forces in this “holy war” against Hazaras.<sup>246</sup> According to Sirāj al-Tawārīkh, “Individual farmans and proclamations were

241. *Id.* at [779] (emphasis added).

242. *Id.* at [779–80] (emphasis added).

243. *Id.* at [779].

244. *Id.* at [779–80].

245. See also *infra* Part IV.C.3.

246. See, e.g., SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [784] (observing that “the royal farmans . . . [directed] to the five Afghan nomad tribes—Kandi, Mati, Kharuti, Mati Khayl, and Daftani—regarding holy war (ghazā and jihād) against the Hazarabs, along with the proclamations anathematizing the Hazarabs as unbelievers, were delivered to the aforementioned tribes and encouraged them to fight the Hazarabs”); *id.* (noting that “3,000 Andari tribesmen assembled because of the proclamation (of holy war against the Hazarabs) given above”).



issued . . . pronouncing the anathema (takfir) of the rebel Hazarahs and declaring jihad against them to the governors (and other officials) of Qataghan, Badakhshan, Turkistan, Maymanah, Herat, Farah, Pushti Rud, Sayqan, Kahmard, Ghaznin and other places.”<sup>247</sup>

The official “policy” objectives of the Afghan government’s operations against Hazaras were expressly enunciated in these individual *farmans* and proclamations:

The unbelief (kufr) of the Hazarahs . . . has reached such a point that . . . *[i]n order to extirpate these irreligious people so that not a trace of them remains* in those places and throughout the mountains and their properties be distributed among the Ghilja’i and Durrani tribes, the royal court has approved as its policy that a triumphant army made up of regular and tribal forces from every part of the kingdom of the God-given government should descend upon the soil of the rebel tribes of the Hazarahjat *so that not a soul of those wayward tribes be safe nor escape and that the boys and girls be taken captive (and made slaves)* by every member of the tribes of the mujahideen of Afghanistan.<sup>248</sup>

According to Sirāj al-Tawārikh, “[a]s a result of this order and proclamation, the reasonable person knows that . . . the wayward Hazarah sect . . . were plundered, killed, and enslaved.”<sup>249</sup> To further promote compliance with these edicts, the Afghan government penalized those who neglected their duty to join the state’s operations against Hazaras.<sup>250</sup>

Abdur Rahman’s mens rea is further revealed through his individual *farmans* to commanders dispatched to Hazarajat. Pursuant to his orders, “[i]t was incumbent and obligatory on the government to wreak destruction on their way of life and . . . [t]herefore, wherever they were, they were to turn the face of destruction-wreaking towards that evil group and give them the punishment they deserve.”<sup>251</sup> Abdur Rahman provided further explicit instructions to his forces on the ground:

[T]hey should consider[] it *impermissible to show any restraint in killing, plundering, and making captives of the Hazarahs*, and not to be misled by these people’s deceptions. They are to seize all the weapons of those who have not rebelled and destroy all their forts. They are *not to leave a single person alive* of those who had mutinied and raised their hands against the government. *Should that prove difficult, they should*

247. *Id.* at [782].

248. *Id.* at [781] (emphasis added). See also *id.* at [782] (observing that “[i]ndividual farmans and proclamations were issued with these very same words . . . to the governors (and other officials)”).

249. *Id.* at [782], [786] (observing that “in accordance with the proclamation that had been published anathematizing the Hazarahs as unbelievers, he put all the men to death and distributed the wives, daughters and young sons to Afghans as slaves”).

250. See, e.g., *id.* at [952] (stating that the government levied “fine[s] on the Afghan nomad leaders who had deserted the militia force during the fighting with the Hazarahs”).

251. *Id.* at [891] (emphasis added).

*so report so that His Mighty Majesty himself will march with victorious banners flying in that direction, bring utter ruin to the affairs of the evildoers and leave no person in that country.* By the issuance of this farman, the wise of the world should know that whatever happens to that *evil tribe*, whatever of the structure of their existence is cast to the wind, and in whosoever's house their widows and orphans wind up, indeed, for whomever opposes the sultan, this is the kind of humiliating dirt that will be heaped on their heads.<sup>252</sup>

Moreover, in response to his militia forces from Panjshayr, Kuhistan, and Ghurband who were stationed in Bamyān, Abdur Rahman issued a *farman*, stating that “[b]ecause the people of those places (Ghurband, Panjshayr, and Kuhistan) have made a good effort to serve the government and . . . the benevolent royal mind is well-satisfied with them . . . [and] *{n}ow that the evil Hazarabs have been eliminated* and the weather has also turned extremely cold, [the responsible colonel] should give them leave to go home.”<sup>253</sup> Additionally, even Prince Habib Allah Khan—Abdur Rahman’s son who succeeded him as Afghanistan’s ruler—professed his desire “to go and sweep away the impure existence of those people.”<sup>254</sup> As with the *fatwa* of *jihad*, Abdur Rahman’s subsequent orders targeted Hazaras regardless of whether or not they were involved in the resistance.<sup>255</sup>

### 3. *Providing economic incentives to attack Hazaras*

In addition to deploying sectarian tactics (e.g., *fatwa* of *jihad*) and the full force of the state apparatus (e.g., *farmans* and military resources) against Hazaras, Abdur Rahman’s specific intent to destroy this community is also evinced through the calibrated provision of economic incentives and other benefits to his forces, in line with the Afghan ruler’s broader ethnocentric policy of enriching his fellow Pashtuns at the expense of Hazaras.<sup>256</sup> The economic incentive scheme formed one component of a multi-faceted plan and pursued the same aim as the *fatwa* of *jihad* and the *farmans*: To ensure maximum participation

252. *Id.* at [812–13] (emphasis added).

253. *Id.* at [852] (emphasis added).

254. *Id.* at [894].

255. *See, e.g., id.* at [920] (Abdur Rahman’s explicit instructions made clear, for example, that Afghan officials “should not have freed anyone [viz., Hazaras] without the permission and the issuance of an order from the throne, *irrespective of whether the person was good or evil*”) (emphasis added).

256. Indeed, a central pillar of Abdur Rahman’s overarching governance agenda focused on expanding the economic and political power of the Pashtun people. *See, e.g., id.* at [914] (observing that “His Majesty, who in all matters had a strong inclination and favoritism for all the Afghan [viz., Pashtun] tribes and in particular the Muhammadza’i clan” whose members received regular financial support from the government in order “to make them more comfortable”), [933] (noting a Pashtun delegation’s “pact” presented to Abdur Rahman which stated in part “Your Majesty has (always) trod the path of solicitude towards your kin, has been a mentor to your tribe (qawm-parwar) . . . and has bestowed kingly favors (on them) such as none of their forebears have ever experienced (seen or heard) . . . Therefore, if they should fail to spend their precious time, night and day, month and year, in support of the government, they are being ungrateful.”).

by Afghan forces in the assaults on Hazaras, thereby inflicting the greatest possible devastation on this community.

At one point during efforts to mobilize Pashtuns in the “holy war” against Hazaras, Abdur Rahman expressed frustration at the slow pace of the military recruitment, stating that “[t]he Durrani presently sleep on the bed of neglectfulness and don’t know what is good or bad, profitable or loss-making, for themselves.”<sup>257</sup>

To further encourage widespread participation in the attacks on Hazarajat, Abdur Rahman issued additional individual *farmans* granting his forces explicit permission to take “whatever should come into their hands as booty—whether men, women or children, or property.”<sup>258</sup> According to Sirāj al-Tawārīkh,

His Majesty . . . sent individual farmans to each of the officers, both regular and militia, who were in the Hazarahjat and had been involved in killing and plundering, telling them that whatever should come into their hands as booty—whether men, women or children, or property and furnishings—they were to understand that one-fifth belongs to the government and should be sent to the throne, in accordance with the rules (ā’in) of the clear religion of the Hazrat, Lord of the Messengers (Prophet Muhammad) and four-fifths could be taken as their own property. Because of the issuance of this order, thousands of {Hazara} men were killed, and their daughters, wives, and young sons became slaves.<sup>259</sup>

As Abdur Rahman’s instructions make clear, the Afghan government also directly profited from the plundering of Hazarajat by receiving one-fifth of “whatever . . . [c]ame into their hands as booty”<sup>260</sup> in addition to collecting revenues through other measures such as the punitive taxation of Hazaras.<sup>261</sup>

Besides enslaving the Hazara people, the seizure of Hazara lands and properties by Pashtuns was a key element of Abdur Rahman’s overt plan to destroy Hazaras. This is further demonstrated through his government’s official policy in relation to Hazaras, which laid out the objectives “to extirpate these irreligious people so that not a trace of them remains . . . and their properties be distributed among the Ghilja’i and Durrani tribes.”<sup>262</sup> Abdur Rahman’s direct communication with his fellow Pashtuns also revealed that the Afghan ruler “wanted to give the Durrani the lands and properties of the Hazarahs.”<sup>263</sup>

In addition to issuing *farmans* to settle Pashtuns across Hazarajat, the Afghan ruler regularly encouraged his fellow tribesmen to occupy Hazara lands, advising them:

257. *Id.* at [780].

258. *Id.* at [809].

259. *Id.* at [809] (emphasis added).

260. *Id.* See also *id.* at [830] (observing that “[o]f the Hazarah women and children taken captive . . . one fifth of the total, the government’s (booty) share, were sent to . . . Kabul”).

261. See *supra* Part IV.B.2.e.

262. SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [781].

263. *Id.* at [779].

Up until now, those attractive money-producing, grain-rich places have been in the hands of enemies of the Pure Religion . . . But once they were snared in the chains and shackles of adversity, the government conferred on you their lands and forts. Now what will you Afghans [viz., Pashtuns] do, and why should you be afraid of seizing the property and land of the Refusers who are the enemies of your religion? (If you don't) your enemies will gradually return to settle . . . Therefore it is essential that the Afghans . . . look upon those lands as theirs to freely take and occupy.<sup>264</sup>

Moreover, Abdur Rahman consciously deployed Kuchis (Pashtun nomads), who had a longstanding dispute with Hazaras over migration routes and pasturage rights, to lead the *jihad*.<sup>265</sup> The Afghan ruler promised his fellow tribesmen that “if they were successful he would allocate them increased grazing in the region and let them loot the Hazaras’ flocks and property.”<sup>266</sup>

Abdur Rahman also regularly bestowed economic privileges and other “honors” upon those who served in his campaigns against Hazaras. For example, General Mir ‘Ata Khan was rewarded with cash, other properties, and “eighteen male and female [Hazara] slaves,”<sup>267</sup> Mirza Muhammad Yusuf Khan, the leader of the Tajik army, “was honored with appointment to the rank of sergeant-major . . . [f]or the services he had performed in the Hazarah fighting,”<sup>268</sup> and the leaders of some Pashtun clans earned “certificate[s] of attestation . . . as a testimonial souvenir for their children and descendants and [were] accorded prestige among their families and tribe.”<sup>269</sup>

#### 4. *The dehumanization and demonization of Hazaras*

Dehumanization and demonization facilitate mass violence by denying the humanity of the targeted group while disengaging moral concern towards the atrocities committed.<sup>270</sup> Abdur Rahman’s *mens rea* is further evinced through his deliberate and methodical propagation of disparaging rhetoric in order to otherize, dehumanize, and demonize Hazaras, and thereby incite genocidal violence against them.

264. *Id.* at [953].

265. LEE, *supra* note 24, at 398. See also SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [784] (observing that “the royal farmans . . . [directed] to the five Afghan nomad tribes—Kandi, Mati, Kharuti, Mati Khayl, and Daftani—regarding holy war (ghazā and jihād) against the Hazarahs . . . were delivered to the aforementioned tribes and encouraged them to fight the Hazarahs”).

266. LEE, *supra* note 24, at 398.

267. SIRĀJ AL-TAWĀRĪKH, *supra* note 32, at [853], [868] (stating that “[s]ince (it was shown that) they had performed services to the government, they were awarded khil’ats and stipends”).

268. *Id.* at [853].

269. *Id.* at [920], [954].

270. For a discussion on the nexus between dehumanization and genocide, see, e.g., Nick Haslam, *The Many Roles of Dehumanization in Genocide*, in *CONFRONTING HUMANITY AT ITS WORST: SOCIAL PSYCHOLOGICAL PERSPECTIVES ON GENOCIDE* 119 (Leonard S. Newman ed., 2019); see also Alexander Landry et al., *Dehumanization and mass violence: A study of mental state language in Nazi propaganda (1927–1945)*, 17 PLOS ONE 1 (2022).

The Afghan ruler, for example, regularly framed his operations against Hazaras as a holy war between good and evil. Official *farmans* and proclamations issued by Abdur Rahman and his government repeatedly vilified this community using denigratory terms such as the “evil tribe of infidels (the Hazarahs),”<sup>271</sup> “the evil infidel Hazarahs,”<sup>272</sup> the “evil tribe,”<sup>273</sup> the “infidel evildoers,”<sup>274</sup> the “evil Hazarahs,”<sup>275</sup> “the evildoers,”<sup>276</sup> “the wicked Hazarahs,”<sup>277</sup> and the “wayward tribes.”<sup>278</sup>

Moreover, Abdur Rahman frequently disparaged Hazaras as subhuman, as indicated in correspondence with his army, “the Hazarah people are the very tribe and people who from (the time of) their fathers and forefathers up to now have been nothing but donkeys bearing the loads of the other people of Afghanistan. It is therefore unworthy to mention their name.”<sup>279</sup>

In addition, in response to reports that hundreds of Hazaras who had fled to the mountains were devoured by wolves, Abdur Rahman stated that “[t]he Lord sent the beasts of the mountains and deserts to punish them and so made them perish and cleansed the earth of the filth of their existence.”<sup>280</sup>

The community was also portrayed, among other depictions, as the “bestial Hazarahs,”<sup>281</sup> the “savage Hazarah[s],”<sup>282</sup> “the beastly and ill-disposed Hazarahs,”<sup>283</sup> “the wicked tribe of the Hazarahs,”<sup>284</sup> “the despicable Hazarahs,”<sup>285</sup> the “barbaric people,”<sup>286</sup> and the “perfidious, evil, beastly, and despicable Hazarahs,”<sup>287</sup> in *Sirāj al-Tawārikh*.

Abdur Rahman’s strategy of dehumanizing and demonizing Hazaras sought to provoke animus against this group, often explicitly calling for violence against them. The Afghan government’s policy in relation to Hazaras, for instance, stated that, “[i]n holy war, repelling and killing infidel evildoers conforms to the Pure Noble Law and it is incumbent upon every individual Muslim to make it his own duty to fight them.”<sup>288</sup> Abdur Rahman’s fellow Pashtuns internalized and echoed this message, expressing a desire for “destroying the evil tribe of Hazarahs” and “embark[ing] on the path of holy war” against this community.<sup>289</sup>

271. *SIRĀJ AL-TAWĀRIKH*, *supra* note 32, at [781].

272. *Id.*

273. *Id.* at [812].

274. *Id.* at [781].

275. *Id.* at [852].

276. *Id.* at [812].

277. *Id.* at [779], [845].

278. *Id.* at [781].

279. *Id.* at [861].

280. *Id.* at [951].

281. *See, e.g., id.* at [802], [908].

282. *See, e.g., id.* at [779], [806].

283. *See, e.g., id.* at [780].

284. *See, e.g., id.* at [779].

285. *See, e.g., id.* at [783].

286. *See, e.g., id.* at [861].

287. *See, e.g., id.* at [898].

288. *Id.* at [781].

289. *Id.* at [779].

### 5. *Inferring dolus specialis from factual circumstances*

In addition to the direct evidence of mens rea, with respect to factual circumstances of the crime warranting inferences as to the specific intent, the *dolus specialis* to destroy Hazaras can be deduced from the large-scale forced displacement or transfer of members of this group,<sup>290</sup> attacks on cultural or religious property or symbols,<sup>291</sup> as well as other culpable acts systematically directed against Hazaras.<sup>292</sup>

In short, the totality of direct evidence—as exhibited by the *fatwa* of *jihad*, numerous *farmans*, providing economic incentives to attack Hazaras, and the demonization of this community—along with relevant factual circumstances of the crime establishes the mens rea of genocide under Article II of the Convention.

## CONCLUSION

Approximately 130 years after the state-sanctioned mass violence against Hazaras in Afghanistan, the community continues to suffer recurring massacres and acute repression. Indeed, in many respects, the mass atrocities committed by the Afghan state against Hazaras in the late nineteenth century not only emboldened other perpetrators but also served as blueprints for terrorizing this community in subsequent periods.<sup>293</sup> Properly comprehending the ongoing predicament of Hazaras thus necessitates scrutinizing the centuries-long persecution of Hazaras, particularly the incidents during Abdur Rahman's reign.

In undertaking this inquiry, the Article demonstrated a reasonable basis to believe that the Afghan state's operations and policies against Hazaras during the 1890s satisfied the elements of genocide under international law. Bona fide endeavors to curb the longstanding culture of impunity and cycles of bloodshed in Afghanistan require reckoning with the darkest episodes of Afghan history, whose shadow continues to loom large over the present. It is long past time to officially recognize the Hazara genocide.

---

290. See *supra* Part IV.B.2.b–c.

291. See, e.g., LEE, *supra* note 24, at 398 (explaining that “[t]he *fatwa* led to a nationwide persecution of Shi’as and Isma’ilis” and the replacement of Shi’a imams by Sunni imams in mosques and shrines). See also SIRAJ AL-TAWARIKH, *supra* note 32, at [1036] (observing that the Afghan government “absolutely outlawed the undesirable innovations which the Twelver (Shi’ite) tribe had introduced to Afghanistan,” shut down the Hazaras’ places of worship, such as imambarahs and husayniyahs, and “appointed Sunni imam[s] and muezzin[s] for each of their mosques”), [1065] (describing the replacement of Hazara places of worship with new mosques in order to “compel the Hazarah people to become adherents of [Sunni Islam], [and] substitute it for their mazhab which is Twelver Imamism”), [847] (noting that Shi’as were intimidated by the “vengeance and hatred of the Sunnis towards them[,] (the Sunnis) cursing and insulting them,” and “the appointment of Sunni mullas in their mosques,” forcing many to consider leaving the country).

292. See *supra* Part IV.B.2.

293. For an in-depth study of the atrocities against Hazaras in recent periods, see generally Hakimi, *supra* note 3.

