



INVISIBLE VIOLENCE, LEGAL IMPUTY: DECREE NO.12 & THE EROSION OF WOMEN'S AND CHILDREN'S RIGHTS IN AFGHANISTAN

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ABSTRACT

The 2026 promulgation of De Mahakummu Jazaai Osulnama (Decree No.12) marks a striking regression in Afghanistan's legal protections for women and children. This essay presents a primary textual analysis of Decree No.12 which is translated and read alongside contemporaneous UN and civil-society findings to demonstrate how the Code's "visible injury" threshold, procedural guardianship requirements, and re-institutionalization of corporal punishment (ta'zir) effectively legalize a wide range of gendered violence and child harm. By punishing domestic violence only when it produces fractures or other overt physical marks, and by conditioning women's access to justice on male guardianship and stringent procedural norms, the Code entrenches impunity and undermines victims' agency. These provisions place Afghanistan's domestic framework in direct conflict with core international obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture (CAT), and they echo urgent concerns raised by OHCHR, UN Women and civil-society bodies. The essay argues that the formalization of such norms exposes a structural accountability gap, when domestic law expressly contradicts jus cogens human-rights protections, international instruments risk being reduced to aspirational standards unless accountability architecture is recalibrated. The paper concludes with targeted recommendations for international monitoring, strategic litigation pathways, and civil-society capacity building to prevent CEDAW and CRC from becoming unenforceable relics.

KEYWORDS: *De Mahakumu Jazaai Osulnama (Decree No.12), International Human Rights Accountability, CEDAW & CRC Compliance, Geopolitical Friction, Gender Apartheid.*

1. INTRODUCTION

The landscape of international human rights law currently navigates a period of profound geopolitical friction, where the shield of state sovereignty is increasingly

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used to bypass the universal mandates of human dignity. At the heart of this friction lies the 2026 promulgation of the *De Mahakumu Jazaai Osulnama* (Criminal Procedure for Courts), or Decree No.12, in Afghanistan. The structure of the Code, as outlined in its first article, consists of an introduction (*Muqadima*), three-parts (*Babs*), ten-sections (*Fasls*) and 119 articles, this regulatory framework represents a decisive transformation from fragmented administrative edicts to a comprehensive, formalized penal system that institutionalizes social stratification. By integrating theological justifications with a rigid hierarchical social order, the code effectively dismantles the principle of equality before the law which is a foundational tenet of both the previous 2004 Afghan Constitution and the international treaties to which Afghanistan remains a signatory. Decree No. 12 does not merely update procedural norms, but it establishes a “status-based” legal paradigm where legal protection is a function of social rank rather than universal citizenship. Through the introduction of a “*visible injury*” threshold for domestic violence and the re-institutionalization of corporal punishment (*ta'zir*), the framework formalizes a system of structural inequality that places the state's domestic law in irreconcilable conflict with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). To understand the gravity of these developments, this essay evaluates Decree No.12 through the lens of international jurisprudence, drawing critical parallels with landmark International Criminal Court (ICC) cases such as *The Prosecutor vs. Al Hassan* and *The Prosecutor vs. Dominic Ongwen*. Ultimately, this paper contends that the formalization of such norms exposes a structural accountability gap. In an era of shifting geopolitical alliances, international rights instruments risk being reduced to mere aspirational relics unless the global accountability architecture is recalibrated to address domestic frameworks that expressly legalize gendered violence and child harm.

2. DECREE NO.12: CODIFYING INVISIBLE VIOLENCE

A. The “*Visible Injury*” Threshold & Legalization of Domestic Harm

Under Article 32(*Dwa-dershama Madu*), the Code establishes a threshold for domestic violence that effectively legalizes the battery of wives and children (Decree No. 12, 2026). According to this article, physical assault is only recognized as a criminal offense if it results in:

1. *Zahiri Nakhi* (visible injuries)
2. *Shakastagi* (broken bones)
3. *Maftuha* (open wounds)

By codifying a “license to demand domestic labor and sex” through the threat of moderate physical harm, the Code entrenches a regime of male supremacy within the household. Jurisprudentially, this reduces the victim’s body to a mechanical object where injury is only recognized if the exterior is breached, effectively creating a legal blackout for the psychological and economic coercion that defines domestic harm. This isolation is fortified by Article 34(*Salurdershama Madu*), which criminalizes a woman’s movement outside the home without her husband’s permission (punishable by three months’ imprisonment) (Decree No. 12, 2026). Together, these provisions construct a closed loop of domestic captivity, where the state acts not as a protector but as the ultimate enforcer of the patriarchal authority, placing the framework in direct violation of international standards of human rights.

B. Procedural Guardianship as Jurisdictional Barrier

The Code’s integration of *Mahram* (male guardian) requirements into the criminal procedure found in the systematic application of Article 4 (*Salurama Madu*) which functions as a procedural nullification of legal agency (Decree No. 12, 2026). When the law mandates a woman’s interaction with the court whether as a witness, complainant, or defendant, it is contingent upon the presence of a *Mahram* which creates a jurisdictional occlusion. If the male guardian is himself the primary aggressor, the victim is faced with legal impossibility where she cannot seek remedy against the very person required to grant her entry into the courtroom. This transforms the “Right to Remedy” (a *jus cogens* norm) into a legal fiction. By tethering a woman’s legal personality to a male relative, the Code annihilates her status as an independent legal subject and reduces her to a dependent object of the state’s patriarchal order.

C. The *Haqq Allah* vs. *Haqq al-Abd* Dichotomy

The Code’s foundational definitions found in the *Muqadima* in Article 9 distinguishes between two types of rights (Decree No. 12, 2026):

1. *Haqq Allah*” (Rights of God) - rights benefitting the public generally, used by the state to justify absolute moral policing of private conduct.
2. *Haqq al-Abd* (Rights of Servants) - rights pertaining to individual interests, such as physical injury.

By categorizing gender-based violence under *Haqq al-Abd*, the Code permits private settlements and forced reconciliation. This removes the state’s duty to prosecute, leaving women vulnerable to community pressure to forgive their abusers in exchange for avoiding a “public” scandal.

3. THE ICC JURISPRUDENCE

The legal isolation of Decree No.12 does not exist in a vacuum rather, it stands in direct normative collision with the evolving standards of international criminal law. While the Decree formalizes a “status-based” paradigm that strips individuals of agency, the jurisprudence of the International Criminal Court (ICC) has increasingly moved towards protecting the inner sphere of human autonomy. By evaluating the provisions of the *De Mahakumu Jazaai Osulnama* against the landmark rulings in *The Prosecutor v. Al Hassan* (Al Hassan, 2024) and *The Prosecutor v. Dominic Ongwen* (Ongwen, 2022), a profound structural divergence emerges where one that transforms domestic Afghan law into a potential instrument of international criminality.

A. Case Jurisprudence: The *Al Hassan & Ongwen* Nexus

The institutionalization of social stratification in Decree No.12 finds a chilling contemporary mirror in the case of *Al Hassan*, where the ICC interrogated the mechanics of a *police des mœurs* (morality police) that utilized local edicts to enforce a discriminatory social order (Al Hassan, 2024). By utilizing *Haqq Allah* (Rights of God) under Article 9 as a statutory justification for absolute moral policing, the Decree replicates this architecture of Gender Persecution. As established in the *Al Hassan* sentencing judgment, when a legal system is designed to target and subordinate a specific group based on gender, it ceases to be a mere exercise of state sovereignty and becomes a constituent element of a crime against humanity. This paper argues that the formalization of discrimination through movement restrictions (Art.34) and moral policing is not an exercise in law making, but rather the statutory scripting of subjugation. This systematic oppression manifests physically through the “visible injury” threshold established in Article 32 (Decree No. 12, 2026). By only recognizing domestic harm when the exterior is breached ie. *Zahiri Nakhi* (visible injuries), *Shakastagi* (broken bones), or *Maftuha* (open wounds), the Code adopts a *Cartesian* view of the victim. This directly contradicts the ICC’s landmark findings in the *Dominic Ongwen*, which expanded the legal understanding of gender-based harms to protect the inner sphere of personal and reproductive autonomy (Ongwen, 2022). While *Ongwen* established that a human being possesses a protected interest in their own self-determination, Decree No.12 attempts to forcibly shrink this sphere through jurisdictional occlusion. The *Mahram* (male guardian) requirement in Article 4, which tethers a woman’s legal personality to a male relative, functions as the final lock on this “closed loop of domestic captivity”. It effectively annihilates the woman as an independent legal subject, mirroring the systematic domination described in *Ongwen* and ensuring that international rights instruments such as

CEDAW (CEDAW, 1979) are reduced to mere aspirational relics in the face of codified impunity.

B. Structural Accountability Gap

These cases reveal that Decree No.12 is not an evolution of law, but a deliberate deconstruction of the rule of law. When domestic frameworks such as the *De Mahakumu Jazaai Osulnama* expressly legalize gendered violence and child harm, they create a structural accountability gap. If the international community fails to recalibrate its architecture to address these codified violations, treaties such as CEDAW (CEDAW, 1979) and CRC (CRC, 1989) risk being reduced to aspirational relics. The irony here is that the Decree uses the “form” of a modern penal code to execute the “substance” of a medieval hierarchy. This institutionalization of inequality represents a profound threat to the universal mandates of human dignity, suggesting that the pursuit of accountability must look beyond the borders of the state to the higher mandates of international jurisprudence.

4. GEOPOLITICAL FRICTION & LEGAL COMPLIANCE

A. The Erosion of Peremptory Norms: CEDAW & CRC

The Decree No.12 places Afghanistan in irreconcilable conflict with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Specifically, Article 2 of CEDAW mandates that states “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation”. By contrast, the status-based hierarchy of Decree No.12 which subordinates women to a *Mahram* (Art.4) and limits their movement (Art.34) does not merely ignore CEDAW but also actively legislates its opposite. The “visible injury” threshold in Article 32 further violates Article 19 of the CRC, which requires states to protect children from “all forms of physical or mental violence”. By narrowing the definition of harm to “broken bones” or “open wounds”, the Decree creates a statutory safe harbor for what international law defines as child abuse. The essay argues that this is a profound failure of the *parens patriae* doctrine, where the state, instead of acting as the ultimate protector of the vulnerable, becomes the architect of their legal invisibility. This is the “geopolitical friction” as the friction between a state’s claim to cultural sovereignty and its non-derogable duty to protect children from torture and ill-treatment under the Convention against Torture (CAT) (CAT, 1984).

B. Sovereignty as Shield: The Geopolitical Blackout

The formalization of Decree No.12 reveals a strategic use of sovereignty as a “shield” against international oversight. In the current geopolitical landscape, there

is an increasing trend of normative decoupling, where states utilize the language of a modern penal code to execute a medieval social hierarchy. This essay contends that the international community's treatment of the Decree as a "domestic sovereign matter" is a dangerous concession. When domestic law expressly contradicts *jus cogens* (peremptory) norms, such as the prohibition of gender-based persecution, it ceases to be a domestic matter and becomes a concern for the *erga omnes* (towards all) obligations of the global legal order. If the global accountability architecture remains silent observer to this formalization, we risk normalization of apartheid. The Decree is not merely a local regulation but a test case for whether international human rights instruments like the ICCPR (ICCPR, 1966) can survive in an era of shifting geopolitical alliances. Without a recalibrated architecture of enforcement, these treaties are, as the paper argues, transitioning from binding law to unenforceable relics.

C. Codification of Gender Apartheid

The evidence presented in this analysis suggest that the term "Gender Persecution" may no longer be sufficient to describe the Afghan reality under Decree No.12. The systematic, institutionalized, and formalized nature of the subordination where every stage of a woman's life is governed by male permission and where her physical safety is contingent upon "visible injury" points towards the necessity of recognizing gender apartheid as a distinct crime against humanity. This is the ultimate structural accountability gap which the current Rome Statute captures individual acts of persecution, but it struggles to address a "Totalizing State Apparatus" that uses the judiciary as an instrument of gendered erasure.

5. CONCLUSION & STRATEGIC REFORMS

The 2026 promulgation of the *De Mahakumu Jazaai Osulnama* represents a seminal moment of legal regression. This analysis has demonstrated that Decree No.12 is not an organic evolution of domestic law, but a systematic deconstruction of the rule of law. By codifying the "visible injury" threshold in Article 32 and procedural guardianship in Article 4, the de facto authorities have effectively scripted a regime of legal impunity. These norms do not merely ignore international standards, but they actively dismantle the legal personality of women and children, transforming the home into a site of jurisdictional occlusion where the state's primary function is the enforcement of a gendered hierarchy. If the global legal order remains a silent observer to this formalization, instruments such as CEDAW and the CRC risk being reduced to aspirational relics which are symbols of universalism that failed to adapt to the friction of modern geopolitics. To prevent this, the international accountability architecture must be recalibrated through the following strategic pathways:

1. Doctrinal Reframing: Recognizing Gender Apartheid as *Jus Cogens* Violation-

- a. The current international legal framework inadequately captures the systematic and totalizing nature of the Afghan legal order under Decree No.12. While gender persecution is recognized under Article 7 of the Rome Statute, it fails to encapsulate a regime where discrimination is not incidental but foundational and codified. Accordingly, international legal bodies and advocacy groups must actively push for the recognition of gender apartheid as an autonomous crime against humanity, either through:
- b. an interpretive expansion of existing provisions under the Rome Statute, or
- c. The development of a standalone international convention.
- d. This doctrinal shift would elevate the Afghan situation from a human rights concern to a peremptory norm violation, trigger *erga omnes* obligations, compelling all states not just the affected ones to respond and delegitimize sovereignty-based defenses in cases of systematic gender subjugation.

2. Leveraging ICC Jurisprudence through Structural Criminality-

- a. The international community must abandon the fiction that Decree No.12 is a neutral domestic instrument. Instead, it should be framed as an instrumentality of international crimes, particularly gender persecution and inhumane acts under Article 7 of the Rome Statute. Strategic litigation efforts should:
- b. Compile pattern-based evidence demonstrating how Articles 4, 32, and 34 function collectively to produce systematic subordination.
- c. Utilize precedents from the Prosecutor v. Al Hassan and The Prosecutor v. Dominic Ongwen to establish that legal systems themselves can constitute mechanisms of criminality,
- d. And pursue accountability not only for direct perpetrators, but for architects and enforcers of the legal framework under the doctrine of indirect co-perpetration.
- e. Even in the absence of formal jurisdiction, such efforts can catalyze UN Security Council referrals or the exercise of universal jurisdiction by national courts.

3. Evidence: From Reporting to Litigation-Ready Documentation-

Existing international monitoring mechanisms remain largely descriptive and lack prosecutorial utility. This must shift towards building a litigation-grade evidentiary infrastructure. This includes:

- a. Systematic documentation of judicial decisions applying the “visible injury” threshold,

- b. Anonymized victim testimonies demonstrating procedural exclusion due to *Mahram* requirements,
- c. And the creation of a centralized, open source “Afghan Gender Justice Dossier” accessible to international prosecutors and human rights bodies.
- d. The objective is clear that is to transform lives experiences into courtroom-admissible evidence, capable of sustaining international prosecutions.

4. Decentralized Justice Mechanisms-

- a. Where state institutions are structurally complicit, just must be re-routed, not awaited. Building on initiatives like the *Madrid People's Tribunal*, the international community should:
- b. Institutionalize transnational, quasi-judicial forums to document, adjudicate, and publicize violations,
- c. Integrate findings from these bodies into UN reporting and ICC preliminary examinations,
- d. And support underground legal networks that provide shadow access to justice for Afghan women.

This creates a system of parallel legality, ensuring that even where domestic law annihilates legal personality, international law continues to recognize and record it.

5. Targeted Sanctions & Legal Counter Measures-

- a. Current sanctions regimes focus predominantly on political leadership, leaving the judicial machinery untouched. A recalibrated approach must:
- b. Impose targeted sanctions on judges, prosecutors, and enforcement authorities directly applying Decree No.12,
- c. Restrict international legal recognition of rulings derived from discriminatory provisions,
- d. And condition accountability from abstract condemnation to personal legal risk, thereby disrupting the operational continuity of the regime.

6. Reasserting Primacy of *Jus Cogens* over Sovereignty-

- a. Finally, the international community must decisively reject the classification of Decree No.12 as a purely “domestic matter”. Where domestic law codifies violations of peremptory norms including torture, gender-based persecution, and denial of legal personhood which loses its protectice shield under sovereignty. State and international organizations must:
- b. Explicitly invoke *jus cogens* hierarchy in diplomatic and legal disclosure.
- c. Treat violations arising from the Decree as breaches of *erga omnes* obligations.

- d. And pursue coordinated multilateral responses that transcend traditional non-intervention principles.
- e. The challenge posed by Decree No.12 is not merely humanitarian but is jurisprudential. It tests whether international law can confront a regime where injustice is not aberrational, but legally engineered. If the global legal order fails to respond with equal structural precision, it risks conceding that the language of rights can be systematically rewritten into the language of control without consequence.

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