



Is Time Ripe for Transitional Justice in Afghanistan?

Monica Wisner, MALD 2008

Background

Since 2001, transitional justice in Afghanistan has endured a precarious progression, with those supporting it forced to fight for each step forward. Despite the efforts of transitional justice proponents, the amnesty bill signed by President Karzai in early 2007 dramatically reversed much of the progress that had been achieved. While the Afghan Independent Human Rights Commission (AIHRC) has made substantial advancement in this field, several major obstacles remain in Afghanistan's political support. This paper will discuss the steps already taken to advance transitional justice, the various elements that obstruct it, and the measures that can realistically be carried out today.

Since 1978, Afghanistan has experienced relentless war, war crimes, crimes against humanity and mass human rights violations. Various external actors, particularly the Soviet Union, the United States, Pakistan and Saudi Arabia, contributed to and at times catalyzed some of the most horrendous events during the last thirty years.¹ Five distinct phases describe the on-going conflict in the country: the communist revolution, the Soviet invasion, the *mujahadeen* civil war, the Taliban regime, and the current post-Taliban period.² Although most Afghans acknowledge that different periods characterize their turbulent recent history, they refer to the conflicts as one long war, as the violence rarely paused and the perpetrators only changed faces.³

These wars produced approximately one million deaths and over seven million refugees, in addition to widespread rape, massacres of different ethnic groups, torture, and disappearances.⁴ For any transitional justice approach to work, it must consider this entire period, rather than just post-2001, and it must also deal with all the parties involved since many victims were also perpetrators of atrocities.

The Bonn Agreement of December 2001 inaugurated the current period and outlined the mandate for the interim government and the international peace operation. The Bonn Agreement was not a peace accord and did not bring together victors and losers; rather it forced a power-sharing agreement upon many 'losers'. Excluding the Taliban, these 'losers' were former members of the *mujahadeen*, particularly the Northern Alliance. These groups viciously fought one another for decades, leaving a trail of mass human rights violations. Given the tenuous nature, therefore, of this power-sharing agreement, political objectives for peace and stability took precedence over justice and disarmament. Though UN mediators strove to include commitments regarding accountability and disarmament, these were aggressively rejected by Afghan leaders and ultimately excluded in the final document.

The failure of the Bonn Agreement to address impunity established an inherently unstable peace process with long-lasting repercussions, effectively allowing for an unrestrained rise in violence and insecurity. Because well-known

perpetrators hold high positions in the current government and enjoy international support, major human rights abuses continue to be tolerated by both the Afghan government and the international community.⁵

ADDRESSING TRANSITIONAL JUSTICE

Although the Bonn Agreement fell short of explicitly addressing justice, it did succeed in establishing commissions responsible for transitional justice and reform of the judicial and civil service systems.⁶ The AIHRC was constituted in June 2002 by presidential decree to address human rights abuses, including those committed before 2001, and to propose a national strategy for transitional justice.⁷ The commission was initially marginalized because its role was deemed too sensitive.⁸ AIHRC and other international supporters, however, have worked to mainstream its role⁹ and have achieved several important accomplishments.

Before AIHRC could develop a transitional justice strategy, it would need to carry out nation-wide consultations to identify people's attitudes towards justice and their preferred mechanisms for achieving it.¹⁰ In 2004, AIHRC began these consultations and published their findings and recommendations in the report *A Call for Justice*.¹¹ The AIHRC then worked closely with the government to design a strategy, entitled *Action Plan for Peace, Reconciliation, and Justice*¹² that would implement its recommendations. The following section discusses both of these reports as well as the measures taken so far in pursuit of transitional justice.

Local Visions for Justice

In light of the fear of discussing past abuses, studies in 2003 showed that a national discourse on these issues was required to encourage Afghans to reflect upon and speak more openly about abuses and justice.¹³ *A Call for Justice*

directly responded to this need and is the most comprehensive study completed to date on local perceptions of transitional justice. Nevertheless, more consultations are needed to determine appropriate mechanisms for Afghanistan and more efforts must be made to alleviate people's fear of disclosure. Despite the necessity for further work, this initial report disclosed much and has contributed greatly to the transitional justice field.

The report disclosed important information including the systematic scale of human rights abuses and the preferred mechanisms for justice. Nearly 70% of respondents identified themselves or immediate family members as victims of a wide variety of abuses and nearly half aspired to obtain justice now rather than later. Most Afghans had not experienced accountability mechanisms other than criminal sanctions and customary justice. Consequently, they had little knowledge of alternative mechanisms.

Nearly 70% of respondents identified themselves or immediate family members as victims of a wide variety of abuses and nearly half aspired to obtain justice now rather than later.

Interestingly, an overwhelming majority of those interviewed (roughly 85%) felt that criminal sanctions would bring reconciliation and increase security. Thus, it became clear that prosecution must be the central pillar to any transitional justice strategy.

Nonetheless, participants of the study understood the challenges inherent in trying an overwhelming number of perpetrators in judicial system lacked the capacity to take on such a large number of cases. The respondents were pragmatic in suggesting that only perpetrators of the most heinous crimes and top commanders be prosecuted.¹⁴ They also felt strongly that Afghans should take a lead role in holding perpetrators accountable for their crimes. Still, approximately 50% of respondents asserted that a hybrid court would be more trustworthy, as long as it operated in Afghanistan so that locals could participate as witnesses and see justice being carried out before them.¹⁵

Once informed of non-judicial mechanisms, Afghans overwhelmingly supported vetting, truth-seeking and reparations. Each garnered more than 80% support among respondents.¹⁶ Vetting was particularly well regarded, as many people felt neither security nor justice was attainable without experienced, qualified leaders with untarnished record. Truth commissions presented a novel concept and 95% of respondents agreed that truth seeking was necessary, although people were uncertain how it should be carried out.¹⁷ Moreover, many people expressed a fear of speaking out even while voicing the need for greater documentation to educate leaders about abuses and to serve justice by exposing the names of criminals.¹⁸ Lastly, people focused on the need for reconciliation measures between state and citizen as well as between perpetrator and victim in order to create national unity and prevent widespread abuses from happening again.¹⁹

National Strategy for Transitional Justice

The conclusions offered in *A Call to Justice* provided a framework for the Afghan transitional justice strategy. Having sought out and compiled the expectations and perceptions of the local population, the report laid out specific recommendations and procedures. For example, it prescribed specific procedures for implementing the vetting of non-military security personnel. Most Afghans expressed the necessity of removing human rights abusers from official positions to increase stability and security, such as in the police force. The report also recommended the creation of a screening process for all civil service positions as well as the immediate removal of perpetrators implicated in its findings that continue to hold cabinet posts and governorships. Cognizant of the importance that respondents placed on prosecution, the report recommended creating a Special Prosecutor's Office to investigate and prosecute suspects of war crimes and crimes against humanity. Finally,

the report cited three specific areas within the judicial system requiring immediate reform in order for prosecutions to proceed: witness protection, defense counsel, and handling of evidence.²⁰

Following the publication of *A Call for Justice*, the President's Office, AIHRC, and the UN Assistance Mission to Afghanistan (UNAMA) drafted the *Action Plan for Peace* as the national strategy for transitional justice. The *Action Plan* aims to deal with the past in a "bold and just way that avoids revenge"²¹ and that builds coexistence based on tolerance, forgiveness, and rule of law.²² The *Action Plan's* strategy is a collection of activities that include symbolic measures, institutional reform, truth-seeking, reconciliation, and accountability measures.²³ The

Importantly, the document states that neither Islam nor international law provides amnesty for war crimes and crimes against humanity.

strategy dictates timelines for each activity and sequences key events in an effort to establish a smoother path toward justice. Importantly, the document states that neither Islam nor international law provides amnesty for war crimes and crimes against humanity. Equally important, the document emphasizes the importance of reconciliation and makes several recommendations. President Karzai the *Action Plan* in June 2005 and the government approved and launched the plan in December 2006.²⁴

While most of the recommendations discussed in *A Call for Justice* were incorporated into the *Action Plan*, the plan neglects to detail the specific actions and procedures of the former report. The *Action Plan* does not clearly state whether it rejects or accepts the detailed measures outlined in *A Call for Justice*. For some of its activities, the *Action Plan* calls only for greater consultations or establishing task forces. Under accountability mechanisms, the plan merely proposes to create a task force to advise the President on international legal obligations. Conversely, *A Call for Justice* explicitly recommended actions to create a prosecutorial body and court, thereby directly responding to local desires. In some activities such as truth-seeking, the *Action Plan* is justified is

recommending greater public consultation and education, considering the lack of popular knowledge about these alternative mechanisms.²⁵

Current Work of the AIHRC

Having created *A Call for Justice* and contributed to the formation of the *Action Plan*, AIHRC began its program to promote transitional justice. The organization found that Afghans overwhelmingly supported the concept of consultations. The process brought together mullahs, civil society, elders, and other activists.²⁶ Consultations triggered a national debate on transitional justice that has been perceived as a major step for regaining trust in public institutions.²⁷ With very little political support, AIHRC works in a dangerous and difficult environment and, consequently, considers their successful lobby to launch the *Action Plan* a major accomplishment. This campaign has made substantial contributions to the country's future transitional justice policies.²⁸ Unfortunately, for reasons that will be discussed below, the *Action*

Plan has not yet been implemented. However, the AIHRC continues to advocate both nationally and internationally for full implementation.

The first pillar of action for AIHRC was to

conduct national consultations in order to create a strategy for transitional justice. The second pillar of action was documentation of past and present human rights abuses, which the organization continues to do. Despite operating under dangerous circumstances, AIHRC continues to develop its investigation and documentation capacity. Additionally, AIHRC released a documentary film on abuses and accountability and it organizes community awareness raising activities for transitional justice, as well as encouraging the formation of victim support groups.²⁹ These activities—particularly

documentation of abuses—help to lay the groundwork for the pursuit of transitional justice on a larger scale, at a later date. However, due to numerous obstacles that will be discussed below, AIHRC has been unable to engage in other activities, demonstrating the current de-prioritization of transitional justice in Afghanistan.

Obstacles to Transitional Justice

Afghanistan's current situation imposes obstacles for achieving transitional justice on several fronts. Deteriorating security poses the most serious and difficult challenge. The precarious security situation is intricately linked to the presence and influence of perpetrators of mass crimes within the Afghan government. Naturally, this reduces domestic political backing for AIHRC's mandate and the transitional justice strategy. Simultaneously, it augments pressure on President Karzai to approve an amnesty bill, which he did in 2006. The international community has also dragged its feet on accountability, fearful that rising instability in the country could spiral into anarchy if it alienates its main allies in the government. Finally, current domestic institutions and capacity levels cannot support a comprehensive transitional justice process. Each of these issues (Afghan political landscape, role of the international community, judicial system, and security) will now be discussed, beginning with the national political environment and the amnesty bill.

The Political Environment in Afghanistan and the Amnesty Controversy

Members of the *mujahadeen*, including those holding government positions, felt threatened by *A Call for Justice* and the *Action Plan for Peace*, especially the emphasis both placed on criminal prosecutions for war crimes and crimes against humanity. They believed that they were national heroes, having fought for the nation, and were insulted by a transitional justice process that might potentially targeted them.³⁰ To aggravate the situation, around the time President Karzai accepted the *Action Plan*, Human Rights Watch released a publication entitled "Blood-Stained

The international community has also dragged its feet on accountability, fearful that rising instability in the country could spiral into anarchy if it alienates its main allies in the government.

Hands" naming violators of human rights from the early part of the *mujahadeen* civil war. Many of those named were and still are serving in various government posts, such as Vice President Karim Khalili who was implicated in taking Pashtun civilians as prisoners.³¹

The reaction to this report was so vitriolic that many have credited it, along with the execution of one-time U.S. ally Saddam Hussein, as the catalyst to the fervent push for an amnesty bill by *mujahadeen* members.³² *Mujahadeen* pressure, which manifest itself in a rally of over 25,000 members including key government officials, ultimately compelled President Karzai to sign the amnesty bill in March 2007 despite his previous assertions that amnesty violated both Islamic and international law. The bill was passed by the Lower House, and then sent to the Upper House, which still has not voted on it. The bill grants sweeping amnesty to "all political parties and belligerent groups" involved in pre-2002 conflicts, protecting them from legal and judicial hearings and retribution.³³ The bill does not, however, grant amnesty to individuals—permitting victims and other individuals to charge individual perpetrators for their abuses.³⁴

This concession appeased the international community's concern over victims' rights. Yet, by placing this responsibility on individuals and victims to bring charges before the courts, it permitted the government to elude its responsibility for investigating and prosecuting perpetrators. However, even if perpetrators can be tried on an individual basis, this small allowance amounts to very little in practical terms. With many of the most serious criminals exercising political and military control, it seems far-fetched that victims will attempt to bring them to court. Thus, perpetrators of war crimes, crimes against humanity, and other major human rights violations remain largely beyond the scope and reach of the judicial system.

Furthermore, though the government has demanded the prosecution of war criminals, it claims that a lack of evidence prevents trials from being carried out. However, seemingly in contradiction to such claims, various human rights organizations and NGOs have submitted

documentation of past abuses. Prosecutors are currently able to access these papers and are permitted to conduct further investigations based upon information gathered from these reports. This disconnect between government statements and third party substance has led to accusations that the current government is unwilling to pursue justice.³⁵

Lack of Domestic and International Political Will for Justice

While the UN, the United States, and other international actors have repeatedly acknowledged the imperative for justice and reconciliation, they have offered little assistance and encouragement. In need of allies to support the "War on Terror", the U.S. has armed and installed most of the leaders in Afghanistan's current government. To ensure their loyalty and cooperation, the international community has also avoided angering these leaders and compromised on major issues. During negotiations for the Bonn Agreement, the UN did not press them to include provisions for justice and disarmament. Though vetting criteria prevented human rights offenders from joining the Emergency Loya Jirga (National Assembly), the Constitutional Jirga, and parliament, the international community barely protested the unsanctioned participation of warlords who are some of the worst human rights abusers. According to some reports, certain countries such as the U.S. were complicit in negotiating the participation of key allies, regardless of their human rights background.³⁶ The international community has contributed to creating a situation in which leaders of different factions occupy high positions in government and enjoy impunity. Former *mujahadeen* members work in all sectors of the government on all levels. Moreover, many continue to operate their own militias. Even where these militias have been absorbed by the Afghan National Army and Police, their loyalty often remains with their original leaders.³⁷ Under such circumstances, it is reasonable to assume that the government might obstruct measures for transitional justice, particularly when government members perceive themselves to be the main targets.

The international community also did not pressure the Afghan government to enforce disarmament of militias and political groups, which is essential for victims to feel secure enough to challenge offenders.³⁸ The government also circumvented vetting procedures during elections. Candidates were required to sign an affidavit avowing they had never committed human rights violations in order to participate in elections. If they did not sign an affidavit, they were effectively admitting to having committed a violation. Hence, it was in each candidate's interest to sign the affidavits. And because little evidence had been prepared, no one could viably (and safely) contest any of the signatures.³⁹ Given absence of sufficient proof and the desire to uncover evidence, Human Rights Watch decided to record human rights abuses of the *mujahadeen* civil war in its report *Blood-stained Hands*. The past abuses and the hollow attempts to address them are obviously disturbing. More troubling still, however, are the mass violations that continue to be committed by those wielding power in and outside of the Afghan government and by international security forces.⁴⁰

Not only does the international community feel that "in Afghanistan, it is still premature to refer to 'transitional justice,'" ⁴¹ but it actively contributes to ongoing human rights violations. Many international security forces commit abuses and violations, particularly in the case of detainees.⁴² The U.S. military was implicated in massacres of Taliban captives in 2001 and continues to be accused of committing abuses, including the hand-over of detainees to the Afghan national intelligence agency—widely known for its torture tactics—in violation of international law.⁴³ These practices, among others, motivated the U.S. to reject a proposal by the UN High Commissioner for Human rights to create an independent enquiry.⁴⁴ According to a source intimately involved in negotiations for justice, the "U.S. strongly opposed any call for [its own] accountability."⁴⁵ The international community's glaring shortage of support for and, at times, their outright rejection of holding human rights

abusers accountable, coupled with domestic resistance, prohibit the realization of transitional justice.

Weak and Malfunctioning Judicial System

Weaknesses in the local judicial system also pose serious obstacles to the pursuit of transitional justice in Afghanistan. Over the last six years, the international community and the Afghan government have worked toward rebuilding a collapsed judicial system. Though much has been accomplished (i.e. the training judges and lawyers⁴⁶ as well as infrastructure building⁴⁷), the overall system lacks the capacity to handle regular criminal cases, much less the specialized cases of transitional justice. Judges and lawyers still lack adequate education and training in both Islamic and secular Afghan law. Some have training in just one type of law and quite a few have training in neither.⁴⁸ In some places, the government and donor community have not provided copies of legal texts and their translations.⁴⁹ Reforming the law and passing new ones has been, and continues to be, a slow process.

With such a weak judicial system, prosecuting major human rights offenders in Afghanistan according to the will of the people is almost impossible. Thus, criminal sanctions against perpetrators, a key component of the transitional justice strategy, must be delayed until the judicial system enjoys the capacity to try specialized crimes. Not only is the Afghan judicial system ill-equipped to handle basic duties and functions but also tensions between divergent legal philosophies have produced a weak and disjointed approach to judicial reform itself.

Not only does the international community feel that "in Afghanistan, it is still premature to refer to 'transitional justice'," but it actively contributes to ongoing human rights violations.

For the system to adequately address issues of transitional justice, these fundamental disagreements over legal philosophy must also be addressed. One tension exists between those who advocate conservative Islamic law and those who promote more progressive, secular law.⁵⁰ The other tension involves judges who uphold different versions of Islamic law. Many judges apply Hanafi jurisprudence, one of five legal schools within the Sunni tradition of Sharia law interpretation. They have little knowledge of Shiite interpretations of Sharia or of secular legal interpretations, which exacerbate already existing religious and ethnic tensions.⁵¹ Contemporary Afghan law recognizes Hanafi jurisprudence for Sunni populations and Shiite jurisprudence for Shiite communities. Both exist alongside but are superior to secular Afghan law.⁵²

Worsening religious and ethnic frictions, some militia commanders control various judges and attorneys in certain areas, particularly during the early years of the present administration. Fazl Hadi Shinwari, a close ally to one of the major *mujahadeen* leaders, headed the Supreme Court during the first years after the Bonn Agreement. He appointed over a hundred judges who were loyal to his faction and who represented a conservative legal viewpoint but were overwhelmingly unqualified for their appointments.⁵³ In 2006, with parliamentary approval, President Karzai appointed eight jurists to replace all of these judges. He also sought to retain Shinwari for political purposes, whose appointment was voided by parliament. Unfortunately, where tribal, religious and political factions are still able to manipulate large segments of the judicial system, the system will continue to lack the credibility needed to lead a fair and impartial transitional justice process. Today, not only are judges and lawyers under-qualified and subject to control by local commanders but insufficient salaries leave them

prone to bribery. Corruption among judges and lawyers, coupled with the perception that their positions have been politicized, has undermined their credibility among the Afghan population.

Today, locals still prefer traditional dispute resolution mechanisms to the judicial system. Thus, the judicial system lacks the ability to prosecute offenders fairly and impartially.⁵⁴ Ultimately, this debilitates one of the central pillars of Afghan transitional justice, criminal prosecutions. To address this credibility issue, many international human rights activists have

emphasized a role for the International Criminal Court (ICC). The Afghan government ratified the ICC in 2003 but has not invited the court to take on crimes committed in the country⁵⁵ and the general consensus among Afghans has been to avoid ICC involvement. Since there is a strong desire among the Afghan population to keep transitional justice an Afghan process, the AIHRC fervently recommends rapidly strengthening the judicial system. This would deflect growing criticism that Afghanistan is incapable of trying crimes and prevent the international community from pushing for greater ICC involvement.⁵⁶ Nonetheless, future ICC involvement should not be ruled out.

Is Transitional Justice Compatible with an On-going War?

International and Afghan forces are fighting two wars, one against Al Qaeda and another against the Taliban. Yet destabilization is not limited to these two fronts. Militias, anti-government forces, the drug mafia, and bandits contribute to and worsen the tenuous security environment that currently exists. One could argue that the forces involved in stabilization and peace-building are so diverse and exhibit such divergent priorities and incentives that their mere presence contributes to the continued destabilization of the country. For example, the

Unfortunately, where tribal, religious and political factions are still able to manipulate large segments of the judicial system, the system will continue to lack the credibility needed to lead a fair and impartial transitional justice process.

large international presence consists of the International Security Assistance Forces, U.S. Operation Enduring Freedom Forces, and hundreds of private security companies. The Afghan National Army (ANA) is equally diverse, having recently absorbed a large number of former *mujahadeen* fighters whose loyalties may actually lie with their former commanders. With so many different actors working to achieve different goals (quelling the counter-insurgency, defeating Al Qaeda, fighting the drug mafia, strengthening the power of local commanders), the on-going war in the country threatens to continue unabated. This of course raises the question as to whether or not transitional justice can or should be pursued.

Debate about the interaction between peace and justice in Afghanistan has grown increasingly louder and more important. Many argue that negative peace (i.e. an end to war) must first be achieved before transitional justice can be pursued, while others advocate that negative and positive peace should and can be pursued simultaneously.⁵⁷ The International Crisis Group (ICG) strongly advocates for more aligned and complementary state-building and counter-insurgency efforts so that Afghans can secure a future based on principles that will secure a positive peace. ICG recommends ending impunity and screening recruits to public institutions.⁵⁸ On its face, such a recommendation appears reasonable. However, while armed conflicts persist across the country, it may be impractical. In order for this to happen, the international community would likely have to find new allies. This is unrealistic, though, considering that they have already invested heavily in their current allies. Moreover, allying with a large number of people with clean records to replace current power-holders is unlikely given that the line separating victim from perpetrator has largely been blurred after nearly 30 years of conflict.⁵⁹

Many successful transitional justice strategies have been conducted in post-conflict societies. Some examples include Argentina, El Salvador, Guatemala, South Africa,⁶⁰ and more recently Sierra Leone.⁶¹ Significantly, transitional justice has been incorporated into the peace agreements

themselves. Although each country faced its own challenges, transitional justice in one form or another was actually achieved. Patricia Gossman suggests that strategies for transition justice are much more likely to be successful if they are implemented at the start of the post-conflict transition.⁶² The dilemma in Afghanistan is that a transitional justice strategy was not included in the Bonn Agreement and on-going conflicts threaten to degenerate into a national war. Unfortunately, the *Action Plan* assumes that the Afghan government commands a post-conflict state, which is a major reason that its implementation has been thwarted. Although some of the activities under the strategy are feasible, overall it is not compatible with the current situation. In Afghanistan's case, a successful strategy depends on both negative peace and international support.

RECOMMENDATIONS

Although execution of a comprehensive strategy for transitional justice in Afghanistan is not viable in the face of continued destabilization, certain measures such as documentation and awareness-raising can be undertaken now initiate this process. These measures may not be focused on prosecutions but they do represent practical alternatives until the country is ready for criminal sanctions. As Louise Arbour of UNHCR has pointed out, transitional justice comprises a multi-faceted process and the current concentration on prosecution hampers the government's ability to pursue other options.⁶³ AIHRC responded with pragmatic activities that seek to begin the process of transitional justice by responding to less difficult issues while striving to create a permissive environment to take on the more sensitive issues.

Specifically, AIHRC has been building its capacity to conduct investigations and documentation. These efforts should continue with moral, technical, and financial support from the international community. The more documentation AIHRC compiles on delicate cases the better prepared they will be in the near future to prosecute current government leaders who are guilty of war crimes and human rights abuses.

Documentation is very dangerous work but the AIHRC should continue its activities in as many places as possible while taking all necessary precautions. Thus far, the organization has weathered severe challenges, including assaults on employees.⁶⁴

In some areas that are too sensitive for locals to investigate abuses, international staff may be an appropriate substitute and an outside storage site for records guarantees their protection against destruction.

Various human rights organizations have spoken about the possibility of establishing a documentation center outside of Afghanistan. This option should be further developed and implemented. However, this center should support AIHRC's efforts and

work closely with Afghan counterparts rather than divert personnel and resources away from AIHRC. In some areas that are too sensitive for locals to investigate abuses, international staff may be an appropriate substitute and an outside storage site for records guarantees their protection against destruction.

AIHRC and the international community should specify a more detailed vetting procedure than what has been proposed in *A Call for Justice*—guaranteeing due process without exception for all individuals undergoing lustration. To aid in organic vetting, records collected in the documentation process can and should be used during the upcoming elections in 2009 as evidence against human rights abusers who seek to run for, or be appointed to, office. In the last elections, some officials cited lack of evidence as reasons proper vetting could not take place. In the next elections, AIHRC must ensure that these same excuses are inadmissible.

While greater documentation and vetting are the major activities that AIHRC should focus on, several other measures deserve some attention. First, the community awareness-raising workshops run by AIHRC have been fairly successful and these should be expanded and streamlined. Where possible, local shuras and

jirgas (village councils) should be integrated and trained to conduct regular workshops. Second, reparations should be made available to the victims that AIHRC has documented. All external actors (U.S., present-day Russia, Pakistan, etc.) who have been integral to Afghanistan's wars should contribute, as a goodwill measure, to a reparations fund so that victims can at least begin to feel that they have received some degree of justice. Finally AIHRC should lobby for international compliance with humanitarian law. With large numbers of foreign forces committing abuses, the international community is left with little credibility to call for rule of law and other reforms.

CONCLUSION

Commendable efforts have been made in Afghanistan towards transitional justice. An enormous nationwide consultation process produced *A Call for Justice*, the first large-scale study to identify local perceptions and desires for justice, leading to the creation of a national strategy in the *Action Plan for Peace, Justice and Reconciliation*. These are significant first steps in the right direction. Unfortunately, they were followed by the amnesty bill, which largely undermined much of what the transitional justice movement had been working to achieve. Given the on-going hostilities and international support for *mujahadeen* leaders, it is not surprising that President Karzai approved the amnesty bill or that the *Action Plan* has not been implemented. More can be done domestically and internationally to strengthen transitional justice in Afghanistan. The consequences of inaction could be severe.

If the Afghan government and international community do not aggressively pursue justice, those enjoying impunity may continue to commit abuses and add to the deteriorating security situation. Donors might be discouraged from funding not only the transitional justice initiative but other government departments. Sectors that need the most help will lose the financial support they currently receive.⁶⁵ The government and the international community will also likely lose credibility in the eyes of local Afghans; first, for

committing atrocities and second, for not delivering on their promises. The more locals lose faith in their new government and international allies, the more they may be inclined to rejoin the Taliban in larger and larger numbers. We have already seen this take place, especially in the southern regions of Afghanistan. If progress toward transitional justice is not made soon, greater insecurity will likely intensify throughout the country.

The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program for Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.

Work Cited

- ¹ *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*, Human Rights Watch, July 2005, <[www.hrw.org/reports/2005/afghanistan0605/afghanistan0605text.pdf](http://hrw.org/reports/2005/afghanistan0605/afghanistan0605text.pdf)> (accessed September 12, 2007).
- ² *Afghanistan: Judicial Reform and Transitional Justice*, International Crisis Group, Kabul/Brussels, January 28, 2003.
- ³ *A Call for Justice*, Afghan Independent Human Rights Commission, 2004, <www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf> (accessed September 15, 2007).
- ⁴ Ahmad Nader Nadery, "Peace or Justice? Transitional Justice in Afghanistan," *The International Journal of Transitional Justice* (2007) 1.
- ⁵ For more information on the Bonn Agreement and its failure to address transitional justice see Barnett Rubin, "Transitional Justice in Afghanistan," *International Affairs* 79 (3) (2003); Rama Mani, "Ending Impunity and Building Justice in Afghanistan," *Afghanistan Research and Evaluation Unit*, 2003; and Nadery.
- ⁶ Rubin.
- ⁷ Mani.
- ⁸ Ibid.
- ⁹ Ibid.
- ¹⁰ Mani. A preliminary study carried out by the Afghanistan Research and Evaluation Unit (AREU) revealed that Afghans held a variety of views about transitional justice and that no one mechanism would satisfy everyone. The AREU strongly recommended national consultations, which the AIHRC followed.
- ¹¹ *A Call for Justice*, Afghan Independent Human Rights Commission, 2004.
- ¹² *Peace, Reconciliation and Justice in Afghanistan: Action Plan of the Government of the Islamic Republic of Afghanistan*. Afghan Independent Human Rights Commission, June 2005, <www.aihrc.org.af/actionplan_af.htm> (accessed September 15, 2007).
- ¹³ Mani, Rama; Rubin, Barnett.
- ¹⁴ All statistics are from *A Call for Justice*, Afghan Independent Human Rights Commission, 2004.
- ¹⁵ Ibid.
- ¹⁶ Ibid.
- ¹⁷ Ibid.
- ¹⁸ Ibid.
- ¹⁹ Ibid.
- ²⁰ Ibid.
- ²¹ Ibid.
- ²² Ibid.
- ²³ Afghan Independent Human Rights Commission, June 2005.
- ²⁴ Ibid.
- ²⁵ Ibid.
- ²⁶ Nadery.
- ²⁷ Ibid.
- ²⁸ *Annual Report 1 January 2006 – 31 December 2006*, Afghan Independent Human Rights Commission, <www.aihrc.org.af/rep_annual_2005_2006_eng.pdf> (accessed September 15, 2007).
- ²⁹ Ibid.
- ³⁰ Nadery.
- ³¹ *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*, Human Rights Watch, July 2005, <hrw.org/reports/2005/afghanistan0605/afghanistan0605text.pdf> (accessed September 18, 2007).
- ³² "Afghan paper says amnesty bill, government reconciliation policy 'same'," British Broadcasting Corporation (BBC), February 17, 2007.
- ³³ National Reconciliation Charter, 2006 (version that passed the Lower House of the National Assembly) <www.aihrc.org.af/charter_national_reconciliation.htm> (accessed September 18, 2007).
- ³⁴ "Press Conference by Under-Secretary General for Peacekeeping Operations, Jean-Marie Guéhenno – Kabul," UN News Centre, March 12, 2007, <www.un.org/apps/news/infocusnewsiraq.asp?NewsID=54&sID=> (accessed September 18, 2007).

- ³⁵ BBC Monitoring South Asia, “Suspected Afghan war criminals not prosecuted for lack of evidence – spokesman,” British Broadcasting Corporation, 21 November 2007.
- ³⁶ Mani. In her paper, she alludes to collusion between the international community (i.e. US) and the *mujahadeen* that permitted their sudden participation in such jirgas. These commanders have been accused of intimidating other attendants and dominating the proceedings in their favor.
- ³⁷ International Crisis Group.
- ³⁸ Mani; and Rubin.
- ³⁹ Mani.
- ⁴⁰ Ibid.
- ⁴¹ Antonell Deledda, “Afghanistan – The End of the Bonn Process,” *Transition Studies Review* 13 (1) (2006).
- ⁴² *Afghanistan: Justice and rule of law key to Afghanistan’s future prosperity*, Amnesty International, AI Index: ASA 11/007/2007 (Public), 29 June 2007, <web.amnesty.org/library/Index/ENGASA110072007?open&of=ENG-2AS> (accessed September 21, 2007); *US: Failure to Provide Justice for Afghan Victims*, Human Rights Watch, February 16, 2007, <hrw.org/english/docs/2007/02/15/usint15351.htm> (accessed September 21, 2007); and *Afghanistan: Slow Progress on Security and Rights Kabul, Donors Should Focus on Accountability and the Rule of Law*, Human Rights Watch, January 30, 2007, <hrw.org/english/docs/2007/01/29/afghan15223.htm> (accessed September 21, 2007).
- ⁴³ Ibid.
- ⁴⁴ Mani, Rama.
- ⁴⁵ Ibid.
- ⁴⁶ During the war years and particularly during the Taliban, scholars of both Islamic and Western law were imprisoned, executed or forced into exile. See also, International Crisis Group.
- ⁴⁷ Laurel Miller and Robert Perito, “Establishing the Rule of Law in Afghanistan,” *United States Institute of Peace*, March 2004, <www.usip.org/pubs/specialreports/sr117.html> (accessed September 20, 2007).
- ⁴⁸ International Crisis Group.
- ⁴⁹ Ibid.
- ⁵⁰ Ibid.
- ⁵¹ Ibid.
- ⁵² Charles Norchi, “Toward the Rule of Law: The Constitutive Process,” in Charles Norchi, John D. Montgomery, and Dennis A. Rondinelli, eds., *Beyond Reconstruction in Afghanistan* (New York: Palgrave, 2004).
- ⁵³ Ibid.; and Mani.
- ⁵⁴ Ibid.
- ⁵⁵ Mani.
- ⁵⁶ *A Call for Justice*, Afghan Independent Human Rights Commission.
- ⁵⁷ Mani.
- ⁵⁸ International Crisis Group; and *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity*, Human Rights Watch. Both strongly advocate for prosecutions and lustration.
- ⁵⁹ Mani; and Rubin.
- ⁶⁰ Priscilla Hayner, “Unspeakable Truths: Facing the Challenge of Truth Commissions,” in Routledge 2002, 24-50.
- ⁶¹ Tom Perriello and Wierda Marieke Wierda, “The Special Court for Sierra Leone Under Scrutiny,” International Center for Transitional Justice, May 2006; and The Fletcher School class notes from November 15, 2007.
- ⁶² Patricia Gossman, “The Past as Present: War Crimes, Impunity and the Rule of Law” London School of Economics Symposium on State Reconstruction and International Engagement on Afghanistan, 2003.
- ⁶³ “AFGHANISTAN: Revitalize transitional justice system - UN human rights commissioner”, IRN News, November, 2007, <www.irnnews.org/Report.aspx?ReportId=75425> (accessed November 15, 2007).
- ⁶⁴ *Annual Report 1 January 2006 – 31 December 2006*, Afghan Independent Human Rights Commission; and *A Call for Justice*, Afghan Independent Human Rights Commission.
- ⁶⁵ International Crisis Group.