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TELL US HOW THIS ENDS

Transitional Justice and Prospects for Peace in Afghanistan

The most effective way to destroy people is to deny and obliterate
their own understanding of their history.

– George Orwell

History does not repeat itself, but it does rhyme.

– Mark Twain

Sada-e qurbaniyan sarkub namisha

The voice of the victims cannot be silenced.

1 INTRODUCTION

1.1 Introduction and Aim

What determines whether a nation is ready to confront its violent past? Is such a coming to terms necessary for peace and, if so, what should it entail and when in the recovery from conflict should it happen? These questions lie at the heart of efforts to address legacies of past human rights violations and war crimes – i.e., transitional justice – in a peace-building process. The answers have particular relevance in Afghanistan, which has

been at war for 35 years and whose record of past human rights violations and war crimes include atrocities on an enormous scale.

A related and even more pressing question is whether, in a situation of continuing conflict like Afghanistan, transitional justice impedes a peace process or represents a vital component. The evidence from other post-conflict transitions in the past several decades provides no clear answers about the relationship between truth-telling, accountability and reconciliation and a nation's prospects for avoiding renewed conflict. Advocates for transitional justice argue that the failure to

The title of the report paraphrases that of Linda Robinson's book, *Tell Me How This Ends: General David Petraeus and the Search for a Way Out of Iraq*, US: Perseus Books Group 2008.

The authors wish to thank Kate Clark, Dallas Mazoori, Michael Semple and Emily Winterbotham for their comments to earlier versions of this report. We also wish to thank colleagues at the Afghanistan Analysts Network for research support and last minute commenting and editing. Sari Kouvo also wishes to thank the Transitional Justice Institute (Ulster University).

promote justice has contributed to Afghanistan's ongoing instability, but while there is evidence that government abuses have helped fuel the insurgency, many factors have been at play. To begin with, in 2001, one party to the conflict 'won'; thus its narrative of war crimes and heroics became the official account. History provides few examples of instances in which victims get justice when the guilty are still in power. Whether international support could have shaped a different outcome remains an open question.

For most of the post-2001 period, neither the Afghan government nor its US ally displayed any interest to grapple with concerns about justice or invest in reforms to address the justice deficit. Instead, from the beginning of Afghanistan's state-building effort at the end of 2001, the principal stakeholders – the Afghan government, the United Nations (UN) and the United States (US) – argued that stability took precedence and that transitional justice must wait.

In the years that followed, a politics of accommodation and a focus on short-term security took priority; even the least contentious transitional justice measures drew the ire of powerful political figures and ultimately achieved little. The greatest successes came in 2004–05 when the Afghanistan Independent Human Rights Commission (AIHRC) completed its national consultation and published the results in a report, *A Call for Justice*. Together with the UN and the Government of Afghanistan, the AIHRC drafted a government action plan focusing on transitional justice. Although the Karzai administration formally adopted the plan, it implemented little and finally shelved it for all intents and purposes. The AIHRC and a few NGOs started serious documentation, but much of that work remains unpublished. The climate of intimidation has been important in the dearth of good research by Afghan organizations on past abuses and war crimes. The few erected memorials are largely local attractions with little national audience. By 2013 a greater body of information and evidence about past abuses existed, compared with any that had been amassed in the preceding decades, due in large part to the efforts of Afghan human rights activists; however, impunity remains as firmly entrenched as ever.

The consequences of the emphasis on short-term security are clear. At this writing, Afghanistan has neither stability nor justice. Would a more robust approach to transitional justice have achieved a different end? As we approach 2014, it is worth looking back to the beginning of the Bonn process to ask whether, given the nature of that transition, there was any possibility of achieving progress on transitional justice. This report does not pretend to have a definitive answer, but we believe that an analysis of the efforts made to promote transitional justice in Afghanistan could point to a possible way forward as Afghanistan confronts its next transition in 2014.

1.2 Transitional Justice and Conflict Prevention

Transitional justice is an umbrella term for the often temporary judicial and non-judicial mechanisms used to address legacies of war crimes and human rights violations after major regime changes or prolonged conflict. While not limited to the framework of international law, these mechanisms derive from government obligations based on international law. These include obligations arising from specific treaties, but also customary law norms binding on all states. Transitional justice processes can be described as having four inter-linked aims:

- recognizing the suffering of victims through documentation, truth-seeking and symbolic measures;
- holding perpetrators accountable and ending impunity through retributive and restorative justice methods (these can include prosecutions and reparations);
- laying the ground for institutional reform through disarmament, security sector reform and vetting; and
- reconciling through all the above and additional measures.

Almost by definition, transitional justice processes are crafted in situations where peace is fragile, the stakes are high, compromises inevitable and results uncertain. When it is negotiated as part of a deal to avert further conflict by persuading a ruling party to step down, or is part of a package to persuade insurgents to lay down arms and agree on an interim government pending elections, some

transitional justice measures are usually deemed obligatory by at least one side. For example, in El Salvador and South Africa, the peace agreements forged between the warring parties specified certain transitional justice measures, such as a truth commission or other truth-telling measures. In both cases, the UN, which brokered the peace agreements, pushed for and ultimately helped implement transitional justice procedures that were ultimately adopted.

In cases in which all parties are implicated in abuses, it is far less likely that former commanders or combatants will acknowledge any need for specific accountability, though the parties may well accept the need for governmental reforms. In the case of a victor's peace, where one side in a conflict triumphs at the expense of another, the danger is that accounting for past wrongs might sow the seeds for further cycles of retribution. Alternatively, the new authorities may opt for amnesties, absolving themselves and allies, and even former rivals, in the name of reconciliation. Afghanistan represents an example of a victor's peace. The Bonn Agreement was not a peace agreement among the parties to the conflict; its signatories did not include the Taliban. None of its principal signatory parties had any interest in pressing for transitional justice. Nor did their principal sponsor, the United States, support any such measures. Although it did not include an amnesty, one has since been adopted (see below, Section 3.5).

For those promoting transitional justice, amnesties are often viewed with suspicion, as they hinge on forgiving or ignoring at least some of the war's atrocities while getting little in exchange.¹ By

contrast, politicians and others negotiating peace pacts generally opt to lure former combatants away from conflict by co-opting them into the government rather than pursuing judicial measures or vetting to exclude such leaders. Encouraging former combatants to work out their differences in the sphere of politics rather than on the battlefield is long-accepted wisdom, but its success depends on some measure of institutional checks on the power of those accommodated in this way. Where state institutions are weak, as in Afghanistan, accommodation has bought a partial peace but has cemented structural violence in the form of corruption, violence against rivals, repressive measures and abuses of power, and land grabs – all of which undermine progress in building the state. Lessons from other post-authoritarian and post-conflict transitions also suggest that by addressing legacies of past violations, accountability and truth-seeking mechanisms can help heal wounds that could otherwise fuel further conflict,² and prevent the hatred and violence of the past from being handed down as a 'phantom pain' from one generation to the next.

Transitional justice is not about ticking boxes for upholding commitments under international law. Instead, its goal is acknowledging past wrongs and, through that, preventing the recurrence of violence. Transitional justice is thus intimately linked to democratization and to institution- and peace-building processes. It bears repeating that one of the foremost aims of transitional justice is

¹ 'Transitional societies emerging from armed conflict or authoritarian rule often adopt amnesty laws to consolidate fragile peace or fledgling democracy. In these volatile contexts, amnesty is sought to guarantee that acts committed under duress of war or political tensions will not be prosecuted. Amnesty laws should be adopted only along with transitional justice measures that promote truth-seeking, criminal accountability, institutional reform, and reparations to promote peace and reconciliation effectively. International treaties and customary law require states to prosecute certain serious international crimes – such as genocide, war crimes, and crimes against humanity. Amnesties must therefore not extend to such crimes' (International

Center for Transitional Justice, 'Amnesty Must Not Equal Impunity', 2009). For a discussion about amnesties, see Mark Freeman, *Necessary Evils. Amnesties and the Search for Justice*, New York: Cambridge University Press 2009; Helena Cobban, *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*, London: Paradigm Publishers 2007. For a discussion about amnesties in relation to disarmament and reintegration processes, see Ana Patel, Pablo de Greiff and Lars Waldorf, eds., *Disarming the Past. Transitional Justice and Ex-Combatants, Advancing Transitional Justice*, New York: Social Science Research Council 2009.

² See Alex Boraine, 'Transitional Justice as an Emerging Field', paper presented at the symposium 'Repairing the Past: Reparations and Transitions to Democracy' in Ottawa, Canada on 11 March 2004; Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', *Human Rights Quarterly* 32 (4) (November 2010): 980–1007.

to prevent a recurrence of the atrocities associated with past conflicts or the repressive policies of former regimes. Too often obscured by heated debate over the value of truth commissions and criminal prosecutions, this particular objective – to provide guidance on avoiding a repetition of past abuses – stands out as perhaps the most important contribution the field of transitional justice can make in a country which threatens to erupt in renewed large-scale conflict.

1.3 Previous Research, Methodological Considerations and Outline

Much of the research on transitional justice in Afghanistan has focused on the failure by the Afghan government and its international backers to promote accountability in the post-2001 transition.³ Published case studies have focused largely on how impunity and lack of accountability have undermined specific processes such as disarmament and electoral vetting.⁴ Perhaps the most important research on transitional justice – certainly the one having the clearest link to peace-building – is that which has sought to document Afghan opinions about legacies of war crimes, their impact on the current political and security situation and possible ways forward.⁵ Much of this

research has focused on the conflict from 1978 to 2001; less has been done on the current post-2001 phase of the conflict. This research also tends to look back to the 2001 transition, rather than forward to what the 2014 transition impends for the prospects for peace in Afghanistan.

Nevertheless, Afghan human rights groups, as well as international organizations and the UN, have documented human rights violations and war crimes committed over the past decade. These include violations committed by state and non-state actors, as well as war crimes committed by different parties to the conflict. Reports published in the past decade provide recommendations to the Afghan government, the international community and the warring parties about concrete actions for fighting impunity (further discussed in Section 2).

Contemporary studies in peace-building divide between ‘minimalist’ and ‘maximalist’ approaches, ‘negative’ and ‘positive’ peace, ‘stabilization’ and ‘transformation’, the need for ‘broad’ or ‘targeted’ agendas and the need to accommodate leaders and possible spoilers or ensure well-consulted, broad-based popular support.⁶ Setting aside the complexities of these debates, it is fair to argue that even the most hard-line, *realpolitik* peace-builders recognize that peace-building involves not only a strategy for ending conflict but also a focus on structures that can support what is often a fragile and messy peace. That is, to move toward ‘peace’ it is necessary to ‘remove the causes of wars and offer alternatives to war in situations

³ See, for example, ‘Afghanistan: Judicial Reform and Transitional Justice’, *Asia Report No. 4528*, International Crisis Group, January 2003 (<http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/045-afghanistan-judicial-reform-and-transitional-justice.aspx>) and Rama Mani, *Ending Impunity and Building Justice in Afghanistan*, Afghanistan Research and Evaluation Unit, December 2003 (<http://www.areu.org.af/EditionDetails.aspx?EditionId=44&ContentId=7&ParentId=7>). Ahmad Nader Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’, *International Journal of Transitional Justice* 1 (2007). Patricia Gossman, ‘Truth, Justice and Stability in Afghanistan’, in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena, Cambridge University Press 2006.

⁴ Patricia Gossman, ‘Transitional Justice and DDR: The Case of Afghanistan’, New York: International Center for Transitional Justice 2009. Fatima Ayub, Antonella Deledda and Patricia Gossman, ‘Vetting Lessons for the 2009–10 Elections in Afghanistan’, International Centre for Transitional Justice, New York, 1 January 2009.

⁵ AIHRC, *A Call for Justice – A National Consultation on Past Human Rights Violations in Afghanistan*, Kabul: Afghanistan Independent Human Rights Commission

(AIHRC), 2005; Emily Winterbotham, *The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges*, Kabul: Afghanistan Research and Evaluation Unit, 2010. See also, other reports as part of the AREU *Legacies of Conflict* series at <http://www.areu.org.af/ResearchProjectDetails.aspx?contentid=2&ParentId=2&ResearchProjectId=27>.

⁶ For an overview of conflict resolution and peace-building theories in relation to Afghanistan, see Matt Waldman and Thomas Ruttig, ‘Peace Offerings: Theories of Conflict Resolution and Their Applicability to Afghanistan’, *AAN Discussion Paper*, Kabul: Afghanistan Analysts Network, 2011. For more general overviews, see Bruce W Dayton and Louis Kriesberg, eds., *Conflict Transformation and Peacebuilding. Moving from Violence to Sustainable Peace*, UK: Routledge 2009; Charles Webel and Johan Galtung, *Handbook of Peace and Conflict Studies*, New York: Routledge 2007.

where wars might occur'.⁷ Peace building is then about managing a shift between "ending" something that is not desired . . . toward the building of relationships that in their totality form new patterns, processes and structures' in order to create 'a sustainable transformation'.⁸ Early analyses about peace-building in Afghanistan focused on community-level peace building and challenges to stability posed by weak disarmament and reintegration programs.⁹ Over the past few years, research into this field has boomed, focusing on reconciliation with the Taleban, as well as more broad-based discussions about how to bring peace to Afghanistan.¹⁰

This report focuses on transitional justice, but also seeks to discuss transitional justice in relation to peace-building efforts in Afghanistan. It draws on previous research and work of the two authors, who have been participant-observers of the transitional justice and broader political processes

in Afghanistan for years.¹¹ The research for this report was done during several trips to Afghanistan during 2012, when the authors held open-ended discussions with a variety of political actors regarding transitional justice and reconciliation. It also draws on a broad literary review of relevant transitional justice and other literature relevant for Afghanistan. The report has also benefited from research assistance from Afghanistan Analysts Network.¹²

The outline of this report is as follows: Section 2 provides an overview of the patterns of violations in Afghanistan from the 1978 coup to today. Section 3 discusses transitional justice in relation to the early stabilisation and state-building agenda, focusing on how efforts to promote accountability have been challenged for short-term political gains. Section 4 looks at the different efforts to promote transitional justice, including efforts to promote accountability by trial inside and outside Afghanistan. Section 5 focuses on reintegration and reconciliation programs in Afghanistan and the extent that justice and accountability have been elements in these programs. Section 6 provides concluding analysis and recommendations.

⁷ In Johan Galtung, 'Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding', in *Peace, War and Defense: Essays in Peace Research*, Vol. II, Copenhagen: Christian Ejlers, 1976, 297–8.

⁸ John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington, DC: US Institute of Peace Press, 1997, 20, 75 and 84–5.

⁹ Examples of early research reports focusing on community-level peace-building and disarmament and reintegration are Waldman, *Community Peace-Building in Afghanistan: The Case for a National Strategy*, Oxfam International Research Report, February 2008; and reports by the International Crisis Group, such as, 'Peacebuilding in Afghanistan', *Asia Report No 64*, 29 September 2003, 'Disarmament and Reintegration in Afghanistan', *Asia Report No 65*, 30 September 2003, and 'Afghanistan: Getting Disarmament Back on Track', *Asia Briefing No 35*, 23 February 2005.

¹⁰ Examples of later research reports that focus on reconciliation with the Taleban and macro-level challenges to the peace process are those by the Afghanistan Analysts Network such as Ruttig and Waldman, *Peace Offerings* (see FN6); and Thomas Ruttig, *The Other Side. Dimensions of the Afghan Insurgency: Causes, Actors – and Approaches to Talks*, Thematic Report 01/2009, Afghanistan Analysts Network, 14 July 2009; reports by the United States Institute for Peace such as Michael Semple, *Reconciliation in Afghanistan*, Washington DC: United States Institute for Peace, September 2009; and Hamish Nixon and Caroline Hartzell, *Beyond Power-sharing: Institutional Options for an Afghan Peace Process*, Peaceworks, USIP/CMI/PRI/O, December 2011.

¹¹ See, for example, Sari Kouvo, *State-Building and Rule of Law: Lessons from Afghanistan*, NDC forum paper, Rome: NATO Defense College, Research Division, 2009; Sari Kouvo and Dallas Mazoori, 'Reconciliation, Justice and Mobilization of War Victims in Afghanistan', *International Journal for Transitional Justice* 5(3) (2011): 492–503; Gossman, 'Truth, Justice and Stability' (see FN3).

¹² Zuhra Esar Melek provided background research on how Afghanistan's conflict history is taught in schools; Ehsan Qaane also contributed to research about how Afghanistan's conflict history is taught in schools, provided background research on transitional justice initiatives by civil society and media and about memorialisation efforts in Herat; Fabrizio Foschini provided background research on the memorial in Badakhshan and Obaid Ali and Gran Hewad contributed to research about the ongoing reintegration and reconciliation efforts.

2 WAR CRIMES AND HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN

2.1 Past War Crimes in Afghanistan

Afghanistan has been at war for 35 years.¹³ The different layers to the war complicate the prospects for addressing past abuses. This was not one war, but a series of conflicts with changing sets of political actors alternately in power or in opposition. The ongoing struggle between Afghan and international forces and the Taliban is only the latest phase (along with continuing outbreaks of hostilities among competing factions in other parts of the country). Some of the patterns of violation established in different phases of the war continue today – particularly the arrests and torture by intelligence agencies and the lack of effective command and discipline over militia forces.

The putsch of April 1978 brought to power the factionalized Marxist-Leninist People's Democratic Party of Afghanistan (PDPA), whose radical reform measures and brutal crackdown on popular uprisings left hundreds of thousands dead or disappeared. The Soviet invasion and occupation that began in December 1979 launched the next phase of the war, introducing a new bureaucracy of repression along with massive aerial bombardments in the countryside that drove hundreds of thousands of refugees into Pakistan and Iran.

After the Soviets withdrew in 1989, their former ally held on to power until April 1992, when the collapse of the Najibullah government signalled the next phase. For the next four years, former mujahedin (resistance) and militia forces fought each other in a bloody conflict in which all major factions engaged in widespread atrocities against civilians. The Taliban emerged from this chaos, swiftly attracting military support from Pakistan and initially welcomed by parts of the population

as 'liberators' from the factional fighting. They took control of Kabul in 1996 and most of the country by late 2001. The US-led intervention in late 2001 toppled the Taliban regime and paved the way for the Bonn Agreement and a massive international effort to rebuild the country. Former mujahedin and militia faction leaders assumed powerful positions in the new dispensation. In 2004 Hamid Karzai, who had been appointed interim leader in 2001, became president following the country's first democratic elections, but by then the Taliban were beginning to re-emerge as a formidable force. Human rights abuses, particularly arbitrary detention and torture by Afghan as well as international security forces, together with rampant government corruption and a new round of rearming militias, continue to undermine the legitimacy of the Karzai administration as the Taliban continue to battle Afghan and international forces.

All sides through the various phases of the war have committed war crimes and egregious human rights violations. The character of these crimes changed as the war evolved. The first phase, from April 1978 to December 1979, is the most poorly documented. The PDPA under Nur Muhammad Taraki and Hafizullah Amin tried to re-engineer Afghan society by decree by radically transforming land tenure and laws governing education, marriage and inheritance. These measures sparked widespread popular resistance which increasingly attracted foreign support and which were put down by force. During operations in the countryside, PDPA forces retaliated by killing civilians, including the massacre of nearly 1,000 villagers in Kerala in Kunar province in March and April 1979. The defining war crimes of this period were the executions, torture and enforced disappearances of intellectuals, competing leftists, royalists, religious elites, landowners and anyone else perceived to be a potential opponent of the new regime. As many as 100,000 people disappeared in the 20 months under Taraki and Amin – one of the largest instances of forced disappearance in the twentieth century.¹⁴ The vast majority of the victims are believed to have been

¹³ This section builds on documentation reports by the Afghanistan Justice Project (see <http://afghanistanjusticeproject.org/>) and the leaked conflict-mapping report by the Office of the UN High Commissioner for Human Rights (see <http://www.flagrancy.net/salvage/UNMappingReportAfghanistan.pdf>).

¹⁴ Olivier Roy, *Islam and Resistance*, Cambridge: Cambridge University Press 1990, 95–7.

summarily executed and buried in mass graves. In his 1986 report, UN Special Rapporteur Felix Ermacora detailed the information he had received on disappearances:

[The Special Rapporteur] received information concerning the disappearance of persons prior to 27 December 1978. It was alleged that some 9,000 persons had been killed, although Amnesty International refers to a list of 4,845 [actually 4,854] killed. As stated in his report to the General Assembly (A/40/843, para. 50), the Special Rapporteur was informed that the number of persons considered to have disappeared before the amnesty in 1980 is, in fact, much higher than that previously announced. Recently the Special Rapporteur heard the testimony of a former member of the Ministry of Planning in Afghanistan, who was authorized in February 1980 to register all missing persons on the basis of information received from their relatives and friends. In three weeks over 25,000 persons between the ages of 18 and 60 had been registered. The missing persons were well educated and included medical doctors, government officials, military or religious people. An analysis was ordered by the minister in charge. In the view of the witness, well over 27,000 persons would have been registered missing if the registration procedure had not been stopped when it was discovered that the number of missing persons was much higher than foreseen.¹⁵

As of 2012, no effort has been made to account for these, although some preliminary work has been done by Physicians for Human Rights, the Afghanistan Forensic Science Organization, the Afghanistan Independent Human Rights

Commission and UNAMA to identify mass grave sites.

The Soviet occupation brought a shift in tactics. Soviet forces arrived in Kabul on December 24, 1979. They assassinated Amin and installed Babrak Karmal, from the rival Parcham wing of the PDPA, in his place. Aware of the need to build support for the party, the Soviets ended the mass slaughter of intellectuals, religious leaders and others and instead adopted more systematic means of intelligence gathering and more selective targets of repression. The secret police, re-named the Khidamat-e Ittila'at-e Dawlati (State Information Services), or KhAD, was modelled on the Soviet KGB. It engaged in widespread summary executions, detentions and torture of suspected mujahedin supporters and cracked down on rival leftist groups that participated in the resistance. Even a number of Khalq leaders were jailed without trial for years; some were executed, also without trial.¹⁶

In the countryside, aerial bombardments became routine and indiscriminate, killing countless civilians; in the early 1980s most refugees arriving in Pakistan reported they fled because of the bombing. The indiscriminate bombing constituted a grave breach of international humanitarian law. Other war crimes and human rights violations characterizing the period were the systematic use of torture, principally by KhAD agents, and reprisals against civilians. Several former KhAD officials have been prosecuted outside Afghanistan for their roles in ordering or condoning torture.

The only former PDPA official to be tried under the Karzai administration in Afghanistan was Assadullah Sarwary, the head of intelligence under Taraki. Sarwary oversaw the intelligence agency during part of the time it carried out thousands of disappearances in the 1978–79 period. In a step taken completely outside the discussions of transitional justice, the Afghan government initiated proceedings against Sarwary in late 2005; that trial is discussed in detail in Section 4 of this

¹⁵ UN Commission on Human Rights, 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories', Report on the Situation of Human Rights in Afghanistan Prepared by the Special Rapporteur, Felix Ermacora, in Accordance with Commission on Human Rights Resolution 1985/38, 17 February 1986, E/CN.4/1986/24 (<http://www.refworld.org/docid/482996d02.html>).

¹⁶ Niamatullah Ibrahim, *Ideology without Leadership: The Rise and Decline of Maoism in Afghanistan*, Thematic Report 03/2012, Afghanistan Analysts Network.

paper. No other PDPA officials have been brought to justice in Afghanistan. Within a month of Sarwary's conviction, the Afghan Parliament introduced the National Reconciliation, General Amnesty and National Stability Law (or Amnesty Law), which provides a blanket amnesty to all former fighters for acts committed during the war between 1978 and 2001. Early versions of the law included exceptions for individuals currently under investigation by the Afghan intelligence services.

The period between the withdrawal of Soviet forces in 1988–89 and the collapse of Najibullah's government in 1992 saw several significant changes in the patterns of abuse by parties to the conflict. The government invoked an Islamic identity for the state and adopted some reforms to relax the absolute control of the state. The reforms were largely cosmetic, however. Arrests decreased but did not cease. Bombings of resistance strongholds in the countryside, while less frequent, continued, killing many civilians. By the late 1980s, Najibullah had expanded the militias, first as part of his military strategy, later as part of its reconciliation policy, to absorb former mujahedin willing to change sides. The militias, which operated with virtual autonomy, were notoriously undisciplined and frequently engaged in looting and violence against civilians. By 1991, when financial assistance from the Soviet Union ended, the militias became *de facto* authorities in the areas they operated, undermining the authority of any government in Kabul. The pattern holds true today.

Throughout the years of the Soviet occupation and until the collapse of the Najibullah government, mujahedin groups also committed war crimes. Many of those based in Pakistan, with the support of Pakistani military and intelligence agencies, operated with impunity and had considerable control over the Afghan refugee population. Some of these mujahedin maintained secret detention facilities in Pakistan; persons detained there included Afghan refugees who opposed the mujahedin leaders, or who worked for foreign NGOs. Some groups also carried out assassinations or enforced disappearances of political opponents, including among the refugees. Mujahedin forces inside Afghanistan maintained detention facilities where torture was used systematically. They

methodically targeted teachers and civilian government and party officials.

Within a few months of the collapse of the government of President Najibullah in April 1992, Kabul was engulfed in civil war. During this phase of the conflict, the multiple factions that had participated in the struggle against the PDPA regime and the Soviet occupation, along with the militias, fought for control of territory within and around the capital, as well as elsewhere in the country.¹⁷ Despite intermittent efforts by the UN and some neighbouring countries to mediate, winning sufficient support for any political agreements on power-sharing to achieve stability proved impossible. The bombardment of Kabul during the factional conflict of 1992–96 is frequently cited as one of the most serious violations of international humanitarian law in the entire war. At least 50,000 people are believed to have died in four years of rocketing and shelling in Kabul. This phase of the conflict was notable for the emergence of mass rape as a tactic used by some factions.

All of the factions battling each other for control of different parts of the country engaged in summary executions; however, two massacres stand out for sheer magnitude. In February 1993, Shura-ye Nazar and Ittihad-e Islami forces attacked West Kabul in an attempt to drive out the forces of Hezb-e Wahdat. During that offensive, many local Hazara civilians were summarily executed; others were detained and used as slave labour, tortured or raped. In May 1997, after the Taleban failed in their first attempt to take control of Mazar-e Sharif, some 3,000 were taken prisoner and summarily executed by Jombesh soldiers under the command of General Malik Pahlawan. For more on this incident, see Section 3.2.

As of this writing, prominent leaders and commanders from the factions involved in the fighting are ministers or governors or hold other posts in the Karzai administration, or are members of parliament. The only person to have been tried

¹⁷ See for example, Nils Wörmer, *The Networks of Kunduz: A History of Conflict and Their Actors, from 1992 to 2001*, Afghanistan Analysts Network, August 2012 (http://aan-afghanistan.com/uploads/20120801Woermer-The_Networks_of_Kunduz_FINAL.pdf).

for war crimes committed in this period was Commander Faryadi Zardad, a former Hezb-e Islami commander who obtained asylum in Britain under a false name. Commander Zardad, as he was known in Afghanistan, was tried in London on charges of torture and hostage taking. He was convicted in July 2005 and sentenced to 20 years' imprisonment. For more on the case, see Section 4.42.

The Taleban emerged in 1994 in reaction to the anarchy of this period. After taking control of Kabul in September 1996, they instituted a highly repressive administration based primarily on the intelligence agency which operated out of the former office of KhAD in Sedarat, in the heart of Kabul, and their religious police (*amr bilma'ruf wa 'an al-makar*). In October 1997, the leader of the Taleban, Mullah Muhammad Omar, renamed the Islamic State of Afghanistan the Islamic Emirate of Afghanistan. The Taleban were also known for their repressive restrictions on women and girls. The major war crimes of the Taleban era took place between 1996 and 2001 as they encountered resistance in their efforts to consolidate control, and responded by indiscriminately shelling, as they did in Kabul in 1996, massacring local civilians and other non-combatants, burning down villages, orchards and otherwise rendering uninhabitable rural locales. The massacre in Mazar-e Sharif in August 1998, in which over 2,000 civilians, most of them Hazara, were summarily executed, ranks as one of the largest mass killings of the entire war. The destruction of the 1,500-year-old statues of the Bamiyan Buddhas and other historical artefacts as well as the burning and destruction of the Shamali Plain also stand out as egregious crimes of the Taleban era. No effort has been made to bring any Taleban commanders to justice for these war crimes, although some Taleban officials responsible for documented incidents have been detained in Guantanamo.

2.2 Post-9/11 Intervention: Human Rights Violations and War Crimes

The defeat of the Taleban in 2001 did not bring peace, nor did it signal an end to grave human rights violations and war crimes. In this latest phase of the war, serious human right violations – including arbitrary arrests, deaths in custody,

torture, and summary executions – continued. Those responsible have included agents of the Afghan intelligence service (NDS), militia groups (some allied with the US) and US forces. The fact that Afghans continue to use the acronym for the NDS's predecessor, the KhAD, to refer to the new agency speaks volumes about perceptions that it is no break with the past. In replicating the patterns of abuse that have marked the phases of the conflict in Afghanistan, and allying themselves – for the sake of political expediency – with local commanders who have done the same, US forces have jeopardized prospects for establishing stable and accountable institutions in Afghanistan. For its part, the Afghan government has undermined the security of the Afghan people (as well as its own), and has reinforced a pattern of impunity that undermines its own legitimacy. The continuous disregard for civilian lives by the Taleban and other insurgent groups remains one of the most egregious aspects of the current conflict.

2.2.1 Abuses by Northern Alliance Forces in 2001

In the last months of 2001 and first months of 2002, as Northern Alliance factions¹⁸ reasserted control over parts of northern Afghanistan, they committed abuses against civilians and other non-combatants. Troops associated with Jombesh, Jamiat-e Islami and Hezb-e Wahdat carried out violent attacks against Pashtun villagers, where they engaged in beatings, rape and other assaults. In some cases, they summarily executed villagers. They also looted livestock and other valuables and destroyed homes. In the village of Bargah-e Afghani, located in the Chintal district of Balkh province, Hazara gunmen killed 37 Pashtun men after tying most of them up, beating them in front

¹⁸ The 'Northern Alliance' as such was something of a misnomer, and the extent to which it was an alliance had only to do with the factions' united opposition to the Taleban. All of the factions had fought against each other, in varying combinations, in the period after the fall of the Soviet-backed government of Najibullah in 1992. As the Taleban grew in strength between 1996 and 2000, taking control of almost all of Afghanistan, the opposition forces were severely weakened; only Ahmad Shah Massud's forces continued to control any significant territory, the Panjshir valley and the far north-eastern province of Badakhshan.

of their families, and demanding money.¹⁹ While the attacks eventually subsided, hundreds of Pashtuns fled the area; many remain displaced. The incidents left many Pashtuns bitter toward the new government.

The death in custody of 2,000 or more Taleban prisoners constitutes one of the most serious war crimes of this phase of the war.²⁰ In November 2001, an unknown number of Taleban fighters who had surrendered in Kunduz – estimates range from several hundred to two thousand²¹ – were crammed into containers and transported west to Jawzjan; most died from asphyxiation and thirst; others were shot from outside and some were reportedly executed after the containers reached Shibergan.²² The prisoners were under the control of Jombesh forces. General Dostum has denied that any massacre took place, while conceding that some 200 prisoners may have died from injuries or disease.²³ US Special Forces were reportedly in the area when the prisoners surrendered and were loaded into the containers. After the gravesite was discovered and reports of the killings surfaced in the media, the Bush administration categorically refused to initiate any investigations into what actually happened on the road between Kunduz and Shibergan and in the Shibergan desert. In 2009, the Obama administration issued a statement saying that it would order an

investigation into the incident. No details of any official investigation have been made public. An investigation by Physicians for Human Rights in 2009 showed that the mass graves that held the bodies of the Taleban fighters had been tampered with; the site has been destroyed by bulldozers.²⁴ This destruction of evidence may in itself constitute a war crime. It remains unclear whether US forces were involved or were aware of the fate of the surrendered Taleban fighters.

2.2.2 *Arbitrary Arrest and Torture: The NDS*

In the last several years, the Afghan intelligence agency, the National Directorate for Security (NDS), has come under increased scrutiny by the UN and Afghan and international human rights bodies for its practice of arbitrary detention and systematic torture of detainees suspected of being involved in the insurgency. The behaviour of the NDS follows a long-established pattern in Afghanistan. From the beginning of the war, arbitrary arrest – often ending in forced disappearance or summary execution – and torture characterized the repressive tactics of the Taraki-Amin period, repression under the Soviet-PDPA government, and the tactics of mujahedin militia forces fighting each other in the 1990s. The persistence of this particular form of abuse indicates that, many Afghans have little security from the abusive power of the state.

UNAMA's investigation, based on observations between October 2010 and August 2011, found that detainees in NDS facilities experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in some NDS detention facilities throughout Afghanistan.²⁵

Methods of torture included forced prolonged standing, suspension and beatings with various instruments, including cables. In some cases detainees have been subjected to electric shock.

¹⁹ See Human Rights Watch, *Paying for the Taliban's Crimes: Abuses against Ethnic Pashtuns in Northern Afghanistan*, April 2002.

²⁰ For detailed information, see the Physicians for Human Rights (PHR) investigation at <http://physiciansforhumanrights.org/issues/mass-atrocities/afghanistan-war-crime/>.

²¹ A US State Department memo, obtained by ProPublica under FOIA, notes that the number may be as high as 2,000. See Cora Currier, 'Four Years Ago Obama Promised to Investigate Afghan Massacre. Has Anything Happened Since?' ProPublica, 4 June 2013 (<http://www.propublica.org/article/four-years-ago-obama-promised-to-investigate-afghan-massacre-has-anything> #comments).

²² For more information see Sayed Yaqub Ibrahim, 'Afghanistan Tries to Hide Troubled Past', IWPR, 15 February 2010 (<http://iwpr.net/report-news/afghanistan-tries-hide-troubled-past>); Ron Synovitz, 'Obama Calls for Facts on Mass Killing of Taliban at Sheberghan', Radio Free Europe/Radio Liberty 7 July 2009 (http://www.rferl.org/content/Obama_Calls_For_Facts_On_Mass_Killing_Of_Taliban_At_Sheberghan/1776726.html).

²³ Synovitz, 'Obama Calls for Facts' (see FN22).

²⁴ <http://physiciansforhumanrights.org/issues/mass-atrocities/afghanistan-war-crime/timeline-of-the-investigation.html>.

²⁵ United Nations Assistance Mission in Afghanistan, 'Treatment of Conflict-Related Detainees in Afghan Custody', October 2011.

UNAMA also concluded that 'ANP and NDS officials also disregard procedural time limits and legal prescriptions for where detainees are held, raising questions about the lawfulness of detentions and giving rise to conditions in which the use of force to obtain confessions are far more prevalent'.²⁶

UNAMA conducted a follow-up investigation from October 2011 to October 2012. Again it found 'compelling evidence that . . . detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan'.²⁷ UNAMA noted that

While NDS and ANP acknowledged problems in their facilities, they stopped short of recognizing that their officials were responsible for torture. To UNAMA's knowledge, these internal investigations have not resulted in the prosecution or loss of jobs of NDS officials for involvement in torturing detainees or for having failed to prevent the use of torture. UNAMA is not aware of any instance in which an ANP officer has been prosecuted in recent months for abusing detainees.²⁸

Militias and some units of the new US-backed Afghan Local Police have also committed serious human rights abuses, including killings, rape, arbitrary detention, abductions, forcible land grabs and illegal raids. In most cases, no action is taken against those responsible, often because the militia commanders are connected to powerful strongmen or local officials.²⁹

2.2.3 Targeted Killings and Indiscriminate Attacks by Insurgent Groups

A resurgent Taliban began attacking aid groups in 2003; a notable case was the murder of an ICRC engineer in March 2003. Beginning in 2006, the Taliban began carrying out large-scale attacks that included more than 80 suicide bombings that year. An increase in such attacks killed 374 civilians in 2007 and more than 500 in 2008. Anti-government forces also carried out hundreds of attacks against teachers, students and schools; in 2009 alone 102 schools were attacked using explosives or arson, and 105 students and teachers were killed. The Taliban also publicly beheaded suspected collaborators and attacked foreign aid workers.³⁰

No group has claimed responsibility for several particularly lethal attacks that have killed large numbers of civilians. These have included the 6 December 2011 attacks which killed more than 50 people in Kabul and Mazar-e Sharif, mostly Shia Muslims commemorating the holy day of Ashura; the 7 July 2008 suicide bombing at the Indian embassy in Kabul that killed more than 50 people; and an 8 October 2009 attack again at the Indian embassy that killed at least 17 people. In 2011, UNAMA reported a 108 per cent increase in civilian casualties. Civilian casualties from targeted killings by anti-government entities (AGEs) increased by 108 per cent compared with 2011, and killing of civilian government employees rose 700 per cent.³¹

The surge in the insurgency in the first half of 2013 led to a sharp increase in civilian deaths. As AAN analyst Kate Clark has noted, the Taliban's use of indiscriminate attacks break the laws of armed conflict and may amount to war crimes. They also

²⁶ UNAMA, 'Treatment of Conflict-Related Detainees in Afghan Custody' (see FN25).

²⁷ UN News Centre, 'Systematic torture in Afghan detention facilities – UN report', 10 October 2011 (<http://www.un.org/apps/news/story.asp?NewsID=39985#.Ubkzud18TY>).

²⁸ United Nations Assistance Mission in Afghanistan, 'Treatment of Conflict-Related Detainees in Afghan Custody, One Year On', 6 January 2013 (http://reliefweb.int/sites/reliefweb.int/files/resources/UNAMA%20Detention%20report%2020%20Jan%202013_Final.pdf).

²⁹ Human Rights Watch, 'Just Don't Call It a Militia: Impunity, Militias, and the "Afghan Local Police"', 11 September 2012.

³⁰ Several reports by Human Rights Watch: *World Report 2007: Events of 2006* (<http://www.hrw.org/legacy/wr2k7/wr2007master.pdf>); *World Report 2008: Events of 2007* (<http://www.hrw.org/legacy/englishwr2k8/docs/2008/01/31/afghan17600.htm>); *World Report 2009: Events of 2008*; *World Report 2010: Events of 2009* (<http://www.hrw.org/sites/default/files/reports/wr2010.pdf>).

³¹ UN News Centre, 'Afghan Civilian Deaths Drop but Attacks on Women, Children and Political Targets Rise – UN', 19 February 2013 (<http://www.un.org/apps/news/story.asp?NewsID=44170#.Ubo1F-d18TY>).

breach the Taliban's own code of conduct.³² UNAMA condemned these attacks as causing 'a high number of civilian casualties, with minimal impact on their purported military targets – any such violence is unacceptable', adding that 'the use of suicide attacks and improvised explosive devices . . . is in contravention of humanitarian law and may amount to war crimes'.³³

The 29 May 2013 suicide attack on the office of the International Committee of the Red Cross (ICRC) in Jalalabad signalled an escalation in violence and disregard for international law, a development Kate Clark has characterized as 'crossing a red line' in the conflict.³⁴ At this writing, it was not clear who carried out the attack; as the ICRC noted in its recent statement, the 'proliferation and fragmentation of armed actors' in Afghanistan poses increased risks for the civilian population.³⁵

2.2.4 *Detentions, Torture and Deaths in Custody by US Forces*

US and coalition forces active in Afghanistan since November 2001 also engaged in abuses against detainees. According to human rights organizations, US forces committed grave abuses, including methods of torture that have sometimes led to death, and the use of secret detention facilities that facilitated torture. Most serious of these has been the deaths in custody of Afghan detainees held by US forces. According to Human Rights Watch (HRW), 'at least six detainees in US custody in Afghanistan have been killed since 2002, including one man held by the CIA. More than two years later, no US personnel have been charged with homicide in these deaths, although US Department of Defense documents show that five

of the six deaths were clear homicides'.³⁶ The International Committee of the Red Cross (ICRC) has told the US government in confidential reports that its treatment of detainees has involved psychological and physical coercion that is 'tantamount to torture'.³⁷

The US has maintained an unknown number of secret detention facilities in Afghanistan (and other countries). During Cherif Bassiouni's tenure as UN Independent Expert on human rights in Afghanistan, the US blocked his efforts to inspect US detention facilities. Bassiouni had particularly condemned the US's use of 'firebases' to hold detainees – facilities not accessible to the ICRC, in violation of the Geneva Conventions.³⁸ According to Human Rights First, 'since President Obama took office, the number of prisoners held by the US in Afghanistan . . . almost tripled – from 600 in 2008 to 1,700 in 2011. The US Prison at Bagram . . . holds almost ten times as many detainees as are being held at Guantanamo Bay', as of 2011.³⁹ While detainee conditions have improved since the completely secret process under the Bush administration – human rights organizations are allowed to observe detainee hearings and evidence obtained through torture is excluded – Afghan detainees still have little opportunity to defend themselves against charges that they are collaborating with insurgents and presenting a threat to the US. According to Human Rights First, many detainees believe they have been 'wrongly imprisoned based on false information provided to US forces by personal, family or tribal enemies'.⁴⁰ Some detainees at Bagram have been imprisoned for eight years or more without charge or trial, based largely on evidence they have never seen

³² Kate Clark, *Spring Offensive 2: Civilian casualties*, Afghanistan Analysts Network, 4 June 2013 (<http://www.aan-afghanistan.org/index.asp?id=3438>).

³³ 'UNAMA Strongly Condemns Deadly Attacks in Eastern Afghanistan', United Nations Assistance Mission in Afghanistan, 3 June 2013.

³⁴ Kate Clark, *Attack on the ICRC: Crossing a Red Line*, Afghanistan Analysts Network, 5 June 2013 (<http://aan-afghanistan.com/index.asp?id=3424>).

³⁵ Emma Graham-Harrison, 'Afghan Violence Cutting More Civilians off from Healthcare, Warns Red Cross', *Guardian*, 18 April 2013 (<http://www.guardian.co.uk/world/2013/apr/18/afghanistan-red-cross-violence-healthcare-warning>).

³⁶ Human Rights Watch, 'Afghanistan: Killing and Torture by US predate Abu Ghraib', press release, 20 May 2005.

³⁷ Human Rights Watch, 'US: Abu Ghraib Only the "Tip of the Iceberg"', press release, 27 April 2005.

³⁸ James Rupert, 'After US Complaints, U.N. Cuts a Human-Rights Job', *Newsday*, 22 April 2005.

³⁹ Human Rights First, 'Detained and Denied in Afghanistan: How to Make US Detention Comply with the Law', May 2011 (<http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf>).

⁴⁰ Human Rights First, 'Detained and Denied', 2 (see FN39).

and with no meaningful opportunity to defend themselves.⁴¹

2.2.5 Prosecutions/ Disciplinary Action Taken against US Personnel for Executions and other Abuses

The US military seldom publicizes the results of investigations into specific abuses, including torture, deaths in detention and indiscriminate or disproportionate use of force during ground operations. In the majority of cases, there is little indication that anyone has been held accountable for these abuses. The few widely publicized cases of summary execution that have been prosecuted are listed below.

In January 2006, the US Army dropped its case against the only officer to face criminal charges in connection with the December 2002 beating deaths of two prisoners held at Bagram. The officer was the third member of a military police unit to be charged in the incident; four enlisted soldiers in the unit were acquitted, two others pleaded guilty to assault and one was convicted of assault, maiming and other charges.⁴²

In 2010, US Army soldiers based in Maiwand, Kandahar province, who called themselves the 'Kill Team', were charged with murder for the killings of at three Afghan civilians. The soldiers had killed the Afghans, then staged the murders to resemble combat situations. Five of the soldiers were sentenced to terms ranging from five years to life in prison.⁴³

The case of Robert Bales, which was *sub judice* as this report went to press, represents the most prominent case of a member of the American military tried for crimes committed in Afghanistan. According to his own statement, in March 2012, Bales entered two villages near his base in Kandahar with the intent of killing. He ultimately shot to death 16 Afghan civilians, including nine children. He stated that he could provide no

explanation for his actions. Bales is expected to be sentenced to life in prison, as part of a plea bargain he negotiated with the prosecution in which he agreed to testify in exchange for avoiding the death penalty.

2.2.6 Indiscriminate Use of Force by US/NATO Forces

Civilian deaths from US/NATO forces have been a cause for concern since the war began in late 2001. In addition to aerial bombardments, cluster bomb strikes in populated areas have killed and injured civilians, including two incidents near Herat in 2002 that killed at least 25 civilians and injured many more.⁴⁴ Civilian casualties are generally the result of misinformation and human error; of particular concern is how a target is determined to be military. The reliance on certain kinds of intelligence has led to fatal errors.⁴⁵

Among the many incidents of civilian casualties, in July 2008, a mistaken US bombing of a wedding party in Deh Bala, Nangahar, province, killed 47 civilians. In August 2008, US forces bombed the village of Azizabad; the UN, the government, and the Afghan Independent Human Rights Commission said more than 90 civilians were killed. The US initially denied that many had been killed, but later acknowledged the deaths of 33. Local Afghans have claimed that 140 were killed in a sustained US bombardment in Farah in 2009; US officials claim that the number of civilians was between 20 and 30, and that the rest were insurgents.⁴⁶ In 2012, civilian casualties fell but targeted killings increased exponentially. Between 1 January and 31 December 2012, UNAMA documented a 42 per cent decrease from 2011. At the same time, incidents of civilian deaths raised questions about ISAF's (the UN's International

⁴¹ Human Rights First, 'Detained and Denied', 4 (see FN39).

⁴² Tim Golden, 'Case Dropped against US Officer in Beating Deaths of Afghan Inmates', *New York Times*, 8 January 2006.

⁴³ William Yardley, 'Soldier Is Convicted of Killing Afghan Civilians for Sport', *New York Times*, 10 November 2011.

⁴⁴ Human Rights Watch, *World Report 2003: Events of 2002* (<http://www.hrw.org/legacy/wr2k3/asia1.html>).

⁴⁵ See Kate Clark, *Fewer Deaths, But . . . : UNAMA's 2012 Civilian Casualties Report*, (amended) Afghanistan Analysts Network, 19 February 2013.

⁴⁶ Laura King, 'Afghan Civilian Deaths: Who is to Blame?' *Los Angeles Times*, 17 May 2009 (<http://articles.latimes.com/2009/may/17/world/fg-afghan-deaths17>); Sabrina Tavernise, 'US Rejects Afghan Civilian Death Estimate', *New York Times*, 21 May 2009 (<http://www.nytimes.com/2009/05/21/world/asia/21afghan.html>).

Security Assistance Force) targeting criteria; on 16 September 2012, four women and four children in Alingar district, Laghman province, were killed by an ISAF airstrike intended for insurgents who reportedly were in the area. According to UNAMA, 'pre-approval of the initial strike that mistakenly killed civilians in the Alingar situation demonstrates an urgent need for further review of pre-engagement considerations particularly in circumstances where there is no immediate threat and the opportunity is available to exercise tactical patience, consider tactical alternatives and take additional time to confirm positive identification and situational awareness'.⁴⁷

3 THE POLITICS OF TRANSITIONAL JUSTICE, PEACE AND SECURITY

3.1 Problematic Legacies of the Bonn Agreement

How societies emerging from extended periods of conflict or repression deal with the legacy of past abuses depends greatly on the nature of the transition. Whether the change comes about because of a negotiated settlement, a popular revolution or a foreign intervention, and how the new authorities manage threats of renewed conflict inevitably determine the course the country takes. Continuing conflict from those not party to a transitional agreement represents the most dangerous threat to the sustainability of a peace process. Less well recognized risks are the very measures taken by transitional authorities and their international partners to prevent or quash resistance to the new order. How the new authorities deal with dissent and with ongoing armed resistance also plays a critical role in determining the ultimate success or failure of the transition.⁴⁸ This link between state action and the

causes of conflict is particularly significant in Afghanistan's transition after 2001, which came about because the US, and its Northern Alliance, defeated the Taliban, not because the parties negotiated a peace settlement with their opponents. The US's preoccupation with the 'war on terror' together with its under-investment in institution-building and its coalition with still-armed warlords significantly subverted the stated aims of the state-building process in the years immediately following the 2001 transition.

Dealing with spoilers – those who believe 'that peace threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it'⁴⁹ – generally involves either defeating them, or co-opting them to bring them into the political process. At the time of the Bonn conference, these potential spoilers included the major warlords⁵⁰ of the Northern Alliance, or those belonging to other armed factions and tribal alliances, some of whom had first risen to power in the fight against the PDPA and Soviets in the 1980s. The Bonn process aimed to bring them into the political process as legitimate political actors. In the event, many of these figures assumed new

causes of conflict. See Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'Justice Discourses in Transition', *Social Legal Studies*, 13 (3) (September 2004): 310 (<http://sls.sagepub.com.proxy3.library.jhu.edu/content/13/3/305.full.pdf+html>).

⁴⁹ Stephen John Stedman, 'Spoiler Problems in Peace Processes', *International Security*, 22 (2) (Fall 1997): 5.

⁵⁰ The term 'warlord' is loaded, but the definition used in this essay is taken from Giustozzi: A warlord is a recognized military leader who has full control over a military force; can provide important services to subordinate commanders; exercises political power over part of the territory of a state but with little institutionalization; uses violence to maintain his power, and as a result, has little or no political legitimacy; and is primarily concerned with his own benefit and does not fight for a 'superior' cause, although he might claim to represent regional or sectarian interests. Warlords are then 'military leaders who emerge to play a de facto political role, despite their lack of full legitimacy'. Antonio Giustozzi, "'Good State" vs. "Bad Warlords"? A Critique of State-Building Strategies in Afghanistan', *Working Paper No. 51*, London: LSE Crisis States Programme 2004. However, as Cyrus Hodes and Mark Sedra point out, 'one person's warlord is another person's legitimate political leader'. Cyrus Hodes and Mark Sedra, 'The Search for Security in Post-Taliban Afghanistan', *Adelphi Papers* 391 (2007): 10.

⁴⁷ UNAMA, 'Afghanistan Annual Report 2012: Protection of Civilians in Armed Conflict', February 2013, 32 (<http://unama.unmissions.org/LinkClick.aspx?fileticket=KOB5RL2XYcU%3d&tabid=12254&language=en-US>).

⁴⁸ As Bell, Colm and Aoláin have shown in the case of Northern Ireland, security responses taken to address the threat of political violence can undermine the effort to construct legitimate legal institutions and laws that would ideally provide a mechanism for addressing the

political roles but continued to operate much as they did before, reaping 'the benefits that suit them in the process of their country's reconstruction, such as national title and financial rewards, but fail[ing] to fully contribute to the achievement of lasting peace'.⁵¹ Since 2002 they have become part of a web of political and economic interests that include narcotics.⁵² As Citha Maass has observed, these 'war entrepreneurs . . . integrated themselves into the emerging political system' as legitimized politicians who maintained their involvement in the illicit drug economy that thrives in an insecure environment. These warlord politicians . . . in turn consolidate[d] their patronage system within state institutions and in the social power structures of their regional strongholds'.⁵³

These figures came to play such powerful roles in the new political order because the 2001 transition was a product of outside intervention. If the 11 September attacks had not happened, it is unlikely any foreign power would have become directly involved in the conflict between the Taliban and the largely former mujahedin forces of the United Front or Northern Alliance. Over the past decade, many more have benefited from the state of impunity in Afghanistan: not only those who committed crimes during the different phases of conflict, but also returnee Afghans and international contractors benefiting from lack of rule of law and the many grey zones of the Afghan economy. The corruption scandal surrounding Kabul Bank is an instructive example of this, as is

some of the contracting around Afghanistan's mining sector.⁵⁴

Of course, Afghanistan has a history of foreign involvement in its wars. In the years preceding 2001, the UN was involved in a protracted effort to encourage the parties to the conflict to negotiate a peace settlement, all of which ended in frustration.⁵⁵ In July 1997, Lakhdar Brahimi was named the UN Secretary General's Special Envoy for Afghanistan and given the task of consulting with the Afghan parties and the Six-plus-Two (Afghanistan's neighbours – China, Iran, Pakistan, Tajikistan, Turkmenistan and Uzbekistan – plus the US and Russia) to bring the parties together for formal peace talks. Brahimi resigned in 1999, citing exasperation with the Afghan parties for not engaging seriously in negotiations. By that year, the Taliban had gained control of the central highlands and were fighting for the last areas outside their control north and northeast of Kabul. Another attempt to start a political solution came through contacts between the two major warring sides under the UN Secretary-General's Personal Representative, Francesc Vendrell. In 2000 and 2001, initial efforts were made to promote negotiations between the sides,⁵⁶ but these efforts fell victim to unilateral UN sanctions against the Taliban and an escalation of intra-Afghan violence. As of early September 2001, the Taliban were fighting hard to control the remaining areas of the country and may have done so if the 9/11 attacks had not occurred.

By toppling the Taliban and presiding over the state-building process that followed, the US and its allies abruptly set Afghanistan on a new course.⁵⁷

⁵¹ Cathy Gormley-Heenan, Gordon Peake and Mari Fitzduff, 'From Warlords to Peacelords: Local leadership Capacity in Peace Processes', Incore, 2004 (<http://www.incore.ulst.ac.uk/research/projects/wlpl/WlplFull.pdf>).

⁵² See Citha D. Maass, *Afghanistan's Drug Career: From War to Drug Economy*, Afghanistan Analysts Network, March 2011 (http://aan-afghanistan.com/uploads/20110401citham-afghanistans_drug_career--final.pdf); Sarah Chayes, 'Government by Crime Syndicate', *Los Angeles Times*, 25 September 2011 (<http://articles.latimes.com/2011/sep/25/opinion/la-oe-chayes-corruption-20110925>).

⁵³ Maass, *Afghanistan's Drug Career*, 18–9 (see FN52).

⁵⁴ For discussion, see, for example, <http://www.aan-afghanistan.org/index.asp?id=3293> and http://www.globalwitness.org/copper_bottomed/index.html.

⁵⁵ In December 1993, at the request of the General Assembly, the Secretary-General established the United Nations Special Mission to Afghanistan (UNSMA) to initiate negotiations among the various Afghan parties. On 22 October, the Security Council adopted Resolution 1076 (1996), calling on all Afghan parties to end hostilities and engage in a political dialogue aimed at achieving national reconciliation (see <http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml>).

⁵⁶ UN Security Council Resolution 1333 (2000).

⁵⁷ Some saw this as a 'historic opportunity for long-term peace and stability'. Mark Sedra, 'Challenging the

The way the Taliban regime fell was crucial for setting the stage for the post-2001 order. Before the Taliban fell, the Northern Alliance commanders had little power left among them. As Barnett Rubin noted in 2003:

The commanders of the Northern Alliance and others who returned with US and coalition assistance have established themselves in their areas again and are engaging in the same brutality in some areas as in the early 1990s. Hazara and Uzbek militias have expelled Pashtun communities in northern Afghanistan, killing and raping the inhabitants, and violence and extortion prevail in much of the country. At least one prisoner has died under torture in government custody, and two members of the cabinet have been assassinated, with no one charged or held accountable.⁵⁸

The way the Northern Alliance reassumed power distinguishes the 2001 transition from what many have come to expect in a transitional justice process, namely a popularly-backed resistance force bringing down an unpopular regime and then holding it to account for its past crimes. Afghanistan's Northern Alliance forces were not in a position to play that role. Their own bloody reign in Kabul from 1992 to 1996 left them with few supporters in the city; their culpability for atrocities committed – and their reluctance to reflect on their own role – during that time left them unwilling to pursue justice once the Taliban were gone. They retook Kabul in 2001 despite public guarantees that they would not do so,⁵⁹ by the time the Bonn Conference took place, they were already well entrenched.

The Bonn Conference represented the first set piece in the transitional process. It brought

together the major military factions that had allied themselves with the US-led coalition in ousting the Taliban, along with other prominent Afghan political groups – most notably supporters of the former king, Muhammad Zahir Shah, who was deposed in a coup in 1973. Conspicuous by their absence were the Taliban, who had not been asked to participate. As the negotiators in Bonn hammered out an agreement, the US-led coalition forces continued to arm, fund and train forces associated with the factional leaders meeting in Bonn, as well as more autonomous armed groups, to fight the Taliban and al-Qaeda.⁶⁰ What came out of the negotiations was not a peace accord, but a power-sharing agreement limited to the factions that had fought the Taliban, plus a few others.⁶¹ Thus, from the outset, the Bonn Agreement left many Afghans dissatisfied with what they saw as an unrepresentative administration. Ambassador Francesc Vendrell, who was head of UNSMA (UN Special Mission in Afghanistan) from January 2000 until the Bonn Conference argues that Bonn happened too late, and that an earlier decision had been needed to ensure that an interim administration and peace-keeping force was ready to be deployed as soon as the Taliban fell.

It was not a peace conference. The thought was that we needed an emergency conference of Afghans who – either because they support a figure like the King who had some legitimacy and popular support, or because they had weapons or had been resisting the Taliban, particularly like the Massud group – they were the ones that should determine the kind of road map. So the meeting in Bonn had this purpose. . . . But by the time we got to Bonn, we were faced with a fait accompli. Two-thirds

Warlord Culture: Security Sector Reform in Post-Taliban Afghanistan', Bonn International Centre for Conversion, Paper 25 (2002), 1.

⁵⁸ Barnett R Rubin, 'Transitional Justice and Human Rights in Afghanistan', *International Affairs* 79 (3) (2003): 570.

⁵⁹ Observers believe they did so with the tacit approval of then US Secretary of Defense Donald Rumsfeld, who wanted to avoid a power vacuum in Kabul. Asia Society, 'Barnett Rubin: In Afghanistan a "Vicious Cycle"', undated (<http://asiasociety.org/policy/strategic-challenges/us-asia/barnett-rubin-afghanistan-vicious-cycle>).

⁶⁰ J. Alexander Thier, 'The Politics of Peace-Building', in *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, eds., Antonio Donini, Norah Niland, and Karin Wermester, Bloomfield, CT: Kumarian Press 2004, 39.

⁶¹ These included the so-called Peshawar and Cyprus groups, led by Pir Sayed Ahmad Gailani (leader of a smaller mujahedin faction) and Humayun Jarir, son-in-law of Hezb-e Islami leader Gulbuddin Hekmatyar. A fifth delegation, composed of unarmed pro-democratic and underground and exile groups and tribal networks, had been invited to Bonn but was excluded from directly participating in the conference at the eleventh hour.

of the country was in the hands of the Northern Alliance commanders and warlords. They were already in place.⁶²

International actors involved in the process – principally senior officials with the UN Assistance Mission in Afghanistan (UNAMA) and with the US – have publicly argued that they could not have prevented these factional leaders from claiming positions of power once the Taliban fell.⁶³ Off the record, others have acknowledged that these factional leaders became entrenched due to US pressure to include them.⁶⁴ This resonates with the ‘big tent approach’ that Thomas Ruttig, who worked for the UN during the Bonn Conference and both Loya Jirgas, argues was developed and implemented during the 2002 Emergency Loya Jirga (ELJ) by then US Special Representative Zalmay Khalilzad who sought to ‘integrate all the faction leaders into the new political set-up so that they would not disturb it from outside’.⁶⁵ Ruttig speaks of ‘democratic deficits – or better: manipulations mainly by the US’ that ‘continued to taint the post-Bonn political process during its far-from-perfect implementation’. As a result, ‘the warlords – now referring to themselves as “Jihadi leaders” – were allowed to take over not only the “new” democratic institutions but virtually everything else that mattered in the country’. Ruttig sees the unconditional political integration of the warlords and the failure to disarm their militias as ‘the possibly single most important point that prevented Afghanistan from moving towards democracy and put it on course into the current quagmire’.

⁶² Interview with one of the authors, March 2011.

⁶³ Human Rights Watch cautioned against providing arms to the Northern Alliance, noting that ‘assistance to units of foreign security forces that have committed gross violations of human rights is expressly prohibited by [US] law’. ‘Military Assistance to the Afghan Opposition’, Human Rights Watch Backgrounder, 5 October 2001.

⁶⁴ Interview with former UN official and with NGO representative, Kabul, 2003.

⁶⁵ Email conversation, 14 May 2013. See also Thomas Ruttig, ‘The Failure of Airborne Democracy: The Bonn Agreement and Afghanistan’s Stagnating Democratisation’, in *Snapshots of an Intervention. The Unlearned Lessons of Afghanistan’s Decade of Assistance (2001–11)*, eds., Sari Kouvo and Martine van Bijlert, AAN E-Book, 2012.

The question of justice for past war crimes came up only once in the Bonn negotiations. During closed sessions, a heated discussion took place over the idea of an amnesty for those who had committed war crimes. The original draft of the agreement – written by the UN – stated that the interim administration could not decree an amnesty for war crimes or crimes against humanity. This paragraph nearly caused the talks to break down after a number of powerful faction leaders told their supporters that the paragraph was discrediting all Afghans who took up arms and that foreigners would use the agreement to disarm them.⁶⁶

Principal among those making this argument was a representative of the faction of Abdul Rasul Sayyaf, the former professor of Islamic law at Kabul University and powerful leader of the Islamist Ittihad-e Islami (Islamic Union) (one of the parties responsible for much of the devastation of Kabul in 1992–96).⁶⁷ In the end, the paragraph was removed, opening the way for an eventual amnesty. The passions stirred by the Bonn debate about the legacy of past abuses were revived during the Constitutional Loya Jirga in December 2003. After Sayyaf had manoeuvred to ensure that mujahedin headed all the important working committees, one delegate, Malalai Joya, called the faction leaders who were present ‘criminals’ and called for them to be tried in national or international courts. Her remarks caused an uproar and the Loya Jirga chairman and former mujahedin leader, Sebghatullah Mojaddedi, managed to have the delegate ousted from the proceedings for criticizing the mujahedin.⁶⁸

The six months between the Bonn Conference and the first political benchmark, the Emergency Loya Jirga (ELJ), were critical in cementing the hands-off approach of the US and UN toward the warlords. The ELJ marked the second lost opportunity to broaden the political process in the post-Taliban

⁶⁶ Rubin, ‘Transitional Justice’, 571–2 (see FN58).

⁶⁷ See Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity: 1978–200, Documentation and Analysis of Major Patterns of Abuse in the War in Afghanistan*, 2005, 82–8.

⁶⁸ ‘UN Guarding Loya Jirga Delegate’, BBC News, 18 December 2003.

period. Following on the heels of the Bonn Conference, which was widely criticized for appointing the Transitional Administration in a rushed and undemocratic way, the ELJ was heralded as an opportunity to ensure that democratic processes would be honoured. Expectations were high in the months preceding the conference, as organizers fanned out across the country to oversee the selection of delegates – itself an extraordinary achievement as ultimately some 1,500 delegates arrived in Kabul for the ELJ's opening in June 2002. Behind the scenes, however, the principal international players – the US, through Ambassador Zalmay Khalizad, and the UN, through Lakhdar Brahimi, ensured that all the key decisions – the move by former king, Zahir Shah, to remove himself as a candidate for head of state; the composition of the interim administration, and the selection of Hamid Karzai as head of state – had been orchestrated in advance to preclude any genuine debate or controversy.

To many delegates, who had come great distances from inside and outside the country to participate in the selection of their government for the first time in decades, the last-minute deal making outside the tent was disappointing. There were no illusions inside the tent that this was to be a fully democratic process. Compromise between and with those still prepared to use force to achieve their political ends remains unavoidable in today's Afghanistan.⁶⁹

Unavoidable, perhaps, but the nature of US and UN support sent a clear signal that the warlords, and the new order they now oversaw, had international backing and that the US would not intervene to rein them in.

In addition, changes to the governing rules for the ELJ sent a chilling message to delegates. The rules for selecting delegates from the districts stipulated that persons against whom serious allegations of war crimes or other abuses existed could not be

⁶⁹ International Crisis Group, 'The Afghan Transitional Administration: Prospects and Perils', Kabul/Brussels, 30 July 2002 (<http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/The%20Afghan%20Transitional%20Administration%20Prospects%20and%20Perils>).

delegates. Candidates for the ELJ were asked to sign an affidavit declaring that:

Before Almighty God, and in the presence of all those people here, I declare that I am fully cognizant of the electoral procedures for the Emergency Loya Jirga, that I subscribe to the values and principles of the Bonn Agreement, that I have no links to terrorist groups, that I am not involved in the spreading and smuggling of narcotics, abuse of human rights, war crimes, plunder of public property, smuggling of archaeological and cultural heritage, that I have not been directly or indirectly involved in the murder of innocent people. Therefore I consider myself to be entitled and deserving to be a candidate for the Emergency Loya Jirga. In case of any breach of this declaration I am responsible for giving an account of myself.⁷⁰

In the run-up to the ELJ, the demand that candidates sign the affidavit made some reluctant to stand as delegates. However, under pressure from the US, the UN special envoy and the interim administration chairman (Hamid Karzai), the new UN mission for Afghanistan (UNAMA) was unable to challenge the power of influential commanders.⁷¹ In addition, contrary to the rules governing the selection of delegates, several dozen political delegates nominated by Karzai were added at the last minute; among them were commanders accused of war crimes and commanders-turned-governors who threatened their local delegates.⁷² The ELJ is widely seen as a watershed moment in post-2001 Afghanistan, one squandered by the US and UN who lost an opportunity to circumvent the warlords by yielding

⁷⁰ 'Procedures for Afghanistan's Emergency Loya Jirga' ReliefWeb, 1 April 2002 (<http://reliefweb.int/report/afghanistan/procedures-afghanistans-emergency-loya-jirga>).

⁷¹ Some UNAMA staff responsible for overseeing the process in the districts managed to exclude some would-be delegates on these grounds, even without support from senior UNAMA officials. Ruttig, 'The Failure of Airborne Democracy' (see FN65).

⁷² Ruttig, 'The Failure of Airborne Democracy' (see FN65).

instead to an 'all-consuming concern for short-term stability'.⁷³

At this time, major international actors steering the state-building process saw the pursuit of transitional justice as potentially destabilizing, and they spurned robust interventions on human rights for the same reason. A signal development in this period was the revelation that hundreds of Taliban prisoners had been massacred after they surrendered in Kunduz in November 2001. Calls for further investigation following early reports of the discovery of mass graves in the desert of Dasht-e Laili near Shiberghan elicited a negative response from UN Special Representative Brahimi:

There is no judicial system that we can really expect to face up to a situation like this. We certainly owe it to the people who were killed, their relatives . . . but our responsibility to the living has to take precedence.⁷⁴

The argument that accountability would undermine stability is not unique to Afghanistan. Such claims are common in post-conflict situations, though the risks of pursuing accountability are often exaggerated to suit political ends.⁷⁵ In Afghanistan, side-lining accountability undermined key elements of security-sector and wider institutional reform in the years following the Bonn Conference, including disarmament and efforts to vet candidates for the elections and key government positions.

3.2 Wartime Narratives and Documentation: Determining Who Did What to Whom and Why It Matters

Virtually every transitional justice mechanism does rest on a foundation of methodologically sound documentation. Truth commissions painstakingly reconstruct the past through the testimonies of witnesses with first-hand knowledge of events.

⁷³ Crisis Group, 'The Afghan Transitional Administration: Prospects and Perils', *Asia Briefing No. 19*, 30 July 2002.

⁷⁴ 'UN Warns against Afghan Grave Probe', BBC News, 27 August 2002 (http://news.bbc.co.uk/2/hi/south_asia/2219415.stm).

⁷⁵ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford: Oxford University Press 2001, 156–7.

Trials do the same using a different methodology and approach. Educators revising history textbooks to include contested histories, electoral complaints boards reviewing candidate qualifications – all rely on, and add to, a body of documentation to uncover the truth about a period in the past characterized by both violence and secrecy.⁷⁶

One of the obstacles to transitional justice in Afghanistan has been the lack of documentation of alleged war crimes. Unlike Cambodia, Guatemala and other countries that have addressed a legacy of mass atrocities, little exists of a historical record of Afghanistan's early war years, and nothing has been discovered to date of any substantial archive of official police or military records. In the first period of the PDPA, when Taraki and Amin held power – a period which appears to have been the most violent in terms of numbers of people tortured, summarily executed and forcibly disappeared – written evidence of these crimes is scant. Although the atrocities occurred more than thirty years ago, little systematic documentation has been done. What we have to rely on in many cases is the oral testimony of relatives and others, some based on eye witness accounts and others based on hearsay.

It is not much better for the next period, after the Soviet invasion. It seems likely that during the Soviet occupation, officials kept records of the many arrests and summary trials, the names and sentences of those imprisoned, and the military campaigns in the countryside that targeted mujahedin insurgents and the civilians who supported them. But for the most part, these records have not surfaced. Departing Soviet officials may have taken documents with them when all Soviet forces withdrew from Afghanistan following the Geneva Accord of 1988. If so, some documents possibly remain classified as part of the former KGB archive or Soviet military records in Russia. Other documents may be part of the personal archives of former officials who resettled in Europe, or the US documents left behind in Afghanistan may have been destroyed during the early 1990s when mujahedin and militia forces

⁷⁶ Louis Bickford, 'Unofficial Truth Projects', *Human Rights Quarterly* 29 (2007): 1033.

fought each other for control of the country. Whatever documents survived the fighting of this period may have been destroyed, removed or lost when the Taliban came to power.

Better documentation efforts began after the mid-1980s. In 1985, the UN General Assembly appointed a special rapporteur on human rights in Afghanistan who submitted periodic reports describing patterns of human rights violations.⁷⁷ Small human rights groups operated out of Pakistan during the 1980s, publishing accounts of bombings, reprisals and other abuses. International human rights organizations issued reports through the 1980s and mid-1990s, but had little access to most of the country, relying instead on reports from refugees. During the Taliban period, considerably more reporting on human rights concerns was done by groups operating both in and outside the country. However, conducting field investigations of any incidents remained difficult.

Efforts to document the series of massacres in and around Mazar-e Sharif in 1997–98 illustrate how difficult it has been to secure international support for such investigations. In late 1997, the UN Office of the High Commissioner for Human Rights (UNHCHR) took steps to investigate the deaths of at least 3,000 Taliban prisoners by forces allied with the United Front during fighting in May of that year. The men had been taken prisoner by troops under the command of General Malik Pahlawan, a former deputy under Dostum who had switched loyalties and allowed the Taliban into Mazar-e Sharif, only to turn against them shortly thereafter. The Taliban tried to retreat, but Malik's forces captured some 3,000 as prisoners. Malik ignored pleas from the International Committee of the Red Cross to gain access to the prisoners. The captured prisoners were summarily executed in remote desert locations or thrown into vast wells and killed with hand grenades.

The Taliban demanded the UN investigate, as did the then head of the UN Special Mission to

⁷⁷ For an overview of the mandate and the reports of the UN Special Rapporteur, see <http://www2.ohchr.org/english/countries/af/mandate/index.htm>. The mandate was abolished in 2005.

Afghanistan, Lakhdar Brahimi. Calls for an investigation increased after November 1997 when Dostum returned to power in Mazar and announced that his forces had discovered hundreds of mass graves. The UNHCHR sent two preliminary field teams to assess what would be required for a full investigation, but did not move forward with it despite substantial forensic evidence and full access to the area. The first mission took place after Malik had fled the area, in December 1997, when Dr Mark Skinner, a forensic expert provided by the non-governmental organization Physicians for Human Rights, inspected sites containing the remains of the executed Taliban prisoners, as well as sites that apparently contained the remains of combatants who died in battle. At one site, known as the 'nine wells' site, Skinner determined that at least several hundred prisoners had been forced down the wells, where they died from suffocation or as a result of wounds suffered when grenades were thrown into the wells. Skinner recommended a full investigation. In May 1998, the OHCHR (UN Office of the High Commissioner for Human Rights) sent a second human rights expert, William O'Neill, to those grave sites and to sites where Hazara civilians had been massacred by the Taliban as they retreated from the north in 1997. O'Neill recommended a full investigation of all incidents.⁷⁸ But the UN dragged its feet. Brahimi's efforts notwithstanding, there was simply no support for such an investigation.⁷⁹

In 1998, the Taliban succeeded in capturing Mazar, and carried out a massacre on a similar scale, targeting Hazaras in apparent reprisal for the deaths of the Taliban prisoners the previous year. The OHCHR finally investigated both massacres in 1999.⁸⁰ However, the report of that investigation

⁷⁸ The various attempts by the UN to investigate these massacres are described in the AJP report *Casting Shadows*, 227–8 (see FN67). See also United Nations Economic and Social Council, Commission on Human Rights, 'Report on the Situation of Human Rights in Afghanistan' (E/CN.4/1998/71), para. 3.

⁷⁹ See Roy Gutman, *How We Lost the Story*, Washington: USIP 2008, 119.

⁸⁰ Pursuant to General Assembly Resolution 211B, Security Council Presidential Statement S/PRST/1997/55, and Resolution 1193 of 28 August 1998. The Commission on Human Rights' Resolution 1999/9 'strongly condemned

failed to use existing evidence to identify perpetrators and describe chains of command. Authored by a Swiss lawyer, Andreas Schiess, the report merely recapitulated the major events of the battles for control of Mazar, Bamian and surrounding areas between May 1997 and early 1999 without attempting to ascribe responsibility for the war crimes. Reed Brody, then advocacy director at HRW, noted at the time that 'the Schiess Report showed the UN at its cautious worst. It didn't take risks and it didn't go beyond the obvious. Schiess was not willing to draw inferences or to stick out his neck. . . . It absolutely is the job of the UN to bring to light the worst atrocities and to do something about them. But in this case, they utterly failed Afghanistan.'⁸¹

Partially in response to pressure from human rights organizations disappointed with the UN's failure to carry out investigations of these two large-scale massacres, in mid-2001 UNHCHR launched its first attempt to 'map' human rights violations in Afghanistan over the course of the war. The September 11 attacks and subsequent US intervention in Afghanistan altered the plans somewhat, but in December 2001 two researchers travelled to the region to assess what would be required for a thorough mapping exercise.⁸²

At around this time, news of another mass killing surfaced. It was of Taliban prisoners again. During the US-led intervention in November 2001, hundreds of Taliban fighters who had surrendered to Dostum's forces at Kunduz died while being transported in shipping containers west to Shiberghan. Most died from asphyxiation inside

the crowded, closed containers. Lakhdar Brahimi was by then head of UNAMA. Burned by the UN's failure to deliver on his promise to investigate the 1997 mass killings of Taliban prisoners, he was wary that an investigation without the means to bring the perpetrators to justice would endanger witnesses while achieving nothing. There were credible allegations that US special operations forces had been at the scene, and were at least aware of the treatment of the prisoners, so there was no appetite in Washington for any investigation.⁸³ The UN, together with Physicians for Human Rights, carried out two assessments of the site that indicated an unknown number of bodies had been buried there; autopsies on fifteen of the exhumed bodies revealed that the likely cause of death was suffocation.⁸⁴

In October 2002, then Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Asma Jahangir carried out a mission to Afghanistan and in her report, called for a commission of inquiry 'to undertake an initial mapping-out and stocktaking of grave human rights violations of the past, which could well constitute a catalogue of crimes against humanity'.⁸⁵

As with the Dasht-e Laili investigation, Brahimi opposed this commission of inquiry. Ultimately the Office of the High Commissioner decided to conduct a limited mapping exercise, using only previously published reports to catalogue the

the mass killings and systematic human rights violations against civilians and prisoners of war and expressed its gravest concern at numerous reports of mass killings in the area of Mazar-e Sharif and Bamian. The Commission invited the Secretary-General to implement promptly, security conditions permitting, the decision to investigate fully reports of mass killings of prisoners of war and civilians, rape and other cruel treatment in Afghanistan, and called upon the United Front and the Taliban to fulfil their stated commitment with respect to such investigations' (<http://www.unhchr.ch/huricane/hurricane.nsf/view01/EEC41650926FB7AF802567690031AAC7?opendocument>).

⁸¹ Paul McGeough, 'UN to Face Flak over Massacres', *The Age*, 3 March 2002.

⁸² Patricia Gossman was one of them.

⁸³ 'There is no evidence that Dostum ordered the killing, although at the least, he may well have been guilty of command responsibility by omission (ie, failing to prevent subordinates from carrying out war crimes or failing to discipline them afterwards). The accusation that he later ordered the destruction of the site and the evidence they contained is much firmer.' AAN analyst Kate Clark's blog, 'Correcting Details: More on the NYT Reporting the Human Rights Mapping', AAN blog posted 30 July 2012.

⁸⁴ Physicians for Human Rights, 'President Obama Called to Act on Promise to Investigate Dasht-e-Leili Massacre' (<http://physiciansforhumanrights.org/press/press-releases/president-obama-called-to-act-on-promise-to-investigate-dasht-e-leili-massacre.html>).

⁸⁵ 'Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Extrajudicial, Summary or Arbitrary Executions', Report of the Special Rapporteur, Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 2002/36, E/CN.4/2003/3/Add.4, 3 February 2003 ([www.unhchr.ch/Huridocda/Huridoca.nsf/0/.../\\$FILE/G0310747.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/.../$FILE/G0310747.doc)).

major patterns of violations over the course of the war. That report was to be released with the findings of an AIHRC public opinion survey on whether to bring to justice persons responsible for the most serious crimes of the past.⁸⁶ In the weeks before the scheduled release of the two reports, UN officials pressed the High Commissioner, Louise Arbour, not to make the OHCHR report public. UNAMA officials argued that a public release would endanger UN staff, and complicate negotiations surrounding the planned demobilization of several powerful militias.⁸⁷ They also argued that as a 'shaming exercise', the report raised expectations that neither the UN nor the Afghan government could meet: namely, that something would be done about the individuals named in the report.

The UN mapping report did, most likely by accident, find its way onto the UNAMA website and from there was picked up by HRW and other human rights organisations. While the report was quickly taken off the UNAMA website, it had already been 'officially' published and could legitimately then be disseminated by others.⁸⁸ Discussions about the failed release of the mapping report have flared up regularly: In autumn 2010, the delayed release and subsequent leaking of a similar but much larger documentation exercise by the UN in the Democratic Republic of the Congo (DRC) resulted in a debate about who had suppressed the public release of the UN's conflict-mapping report in Afghanistan. One of the authors of this report was quoted in the Swiss newspaper *Le Temps* saying that the non-release was largely due to the tense political climate and the UN's concern for its own staff.⁸⁹ In the same article, Barnett Rubin, another of the consultants responsible for compiling the report, suggested that the decision not to publish it was made after a request by President Karzai, as some of the

persons mentioned in the report were in his government. In an email to AFP (Agence France-Presse), Rubin clarified that no information has been suppressed, as the UN mapping was based on open-source material.⁹⁰ In his response to the discussion, President Karzai's previous spokesperson, Waheed Omeer, stated that the UN never contacted the President's Office about the report, and that in any case, the Afghan government did not have the authority to force the UN not to release such a report.⁹¹ Another similar discussion flared up summer 2012 around the debates about the release of the AIHRC's conflict-mapping report discussed below.

The most comprehensive efforts to document war crimes to date have been undertaken by the AIHRC. Besides its ongoing documentation of human rights violations and war crimes in the post-2001 era, in a response to the Government Action Plan for Peace, Justice and Reconciliation (popularly called the transitional justice action plan), the AIHRC shifted its focus to pre-2001 violations.⁹² In 2006, the AIHRC initiated an ambitious exercise to document the major patterns and incidents of war crimes in Afghanistan during 1978–2001. The transitional justice teams in the AIHRC's regional offices carried out the research, and over the course of four years of field work, teams visited all provinces and most districts in Afghanistan. Although the documentation continued for almost four years and in almost all provinces, information from the report was impressively never leaked. Only in July 2012 did a controversial article in *New York Times* (further discussed below) explain that the report '... details the locations and details of 180 mass graves of civilians or prisoners, many of the sites secret

⁸⁶ Sari Kouvo closely followed the process around the release of the two reports in Kabul.

⁸⁷ Discussions with UN officials around the time of the release.

⁸⁸ For the report, see www.flagrancy.net/salvage/UNMappingReportAfghanistan.pdf.

⁸⁹ 'Le "Mapping Report" sur l'Afghanistan: Histoire d'un Dossier Escamoté' (aan-afghanistan.com/index.asp?id=528&j=2010&m=10).

⁹⁰ Agence France Presse, 'UN Suppressed Report on Afghan Rights Violations: Report', 2 October 2010 (<http://www.google.com/hostednews/afp/article/ALeqM5jFmWZjBBDLMcsHQoXcllkZGxTp8g?docId=CNG.269d5b4d24611193b334b94159602133.1381>).

⁹¹ Agence France Presse, 'Afghanistan Denies Asking UN Not to Publish Rights Report', 3 October 2010 (www.zimbio.com/President+Hamid+Karzai/articles/56Wi06ZUaeT/Afghanistan+denies+asking+UN+not+publish+rights).

⁹² For an overview of the AIHRC's reporting on human rights and war crimes in the post-2001 period, see www.aihrc.org.af/en.

and none of them yet excavated properly. It compiles testimony from survivors and witnesses to the mass interments, and details other war crimes as well', the report was also described as tallying '... more than a million people killed in the conflict and 1.3 million disabled, although not all of those are necessarily victims of war crimes'.⁹³ While Commissioner Nader Nadery, who has been the focal point the report within the AIHRC, has refused to provide detailed information about the report, he told the *New York Times* that when 'you open the map in the report, you see there are dots everywhere', emphasising that 'everyone should know that what they suffered was not unique. We should be able to tell our people, 'This is our past, this is our history. It's ugly, it's bad, but we should be able to face it.'⁹⁴ After the publication of an article about the report in *New York Times* in July 2012,⁹⁵ the AIHRC came under fierce criticism in Afghanistan. Samar herself has consistently argued that the only reason for not releasing the report is the lack of support by President Karzai.⁹⁶

As the report neared completion, the AIHRC faced increased pressure from various power-holders over its plans for publication. In December 2011, President Karzai did not reappoint three of the nine commissioners of the AIHRC. While changes in the composition of the commission had been expected, the way in which the commissioners were removed suggested political motivations: the removals were communicated to the media before they were communicated to Sima Samar, the head of the commission, or to the removed commissioners themselves. The removals of the commissioners were also done when Samar was out of the country, although President Karzai only

a few months earlier had, said Samar, promised he would consult her before making any changes in the commission.⁹⁷ International and Afghan media linked the removal of commissioner Nader Nadery to his work with the AIHRC's documentation of pre-2001 war crimes.⁹⁸ Whether the removals were linked to the AIHRC's documentation efforts or not, they did publicize the controversies around the release of the report. The debates also showed to what extent Afghanistan's conflict history remains contested and how efforts to document this history tend to be politically manipulated.

Over the past few years, interest in documentation has grown among Afghan civil society organisations working on transitional justice issues, spurred in part by frustration about the non-release of the OHCHR documentation report and the delays with the release of the AIHRC's documentation report. Examples of documentation-type activities by Afghan and international civil society organisations include the initiative by USIP (United States Institute of Peace) to establish a documentation centre for war crimes in Afghanistan at the American University in Washington DC, the efforts to establish a national directory of mass graves by Physicians for Human Rights and its Afghan offspring, the Afghanistan Forensic Science Organisation (AFSO), and the series of documentaries about conflict and war crimes by the Institute for War and Peace Reporting (IWPR).⁹⁹ These projects are worth mentioning specifically because they receive US funding, although US policy in general has not been supportive of transitional justice in Afghanistan. Other documentation exercises were undertaken, during the early years, by the Afghanistan Justice Project, whose publication *Casting Shadows* is still the most comprehensive published report of the war crimes of 1978–2002 to date and more

⁹³ Rob Nordland, 'Top Afghans Tied to '90s Carnage, Researchers Say', *New York Times*, 22 July 2012 (www.nytimes.com/2012/07/23/world/asia/key-afghans-tied-to-mass-killings-in-90s-civil-war.html?pagewanted=all).

⁹⁴ Nordland, 'Top Afghans Tied' (see FN93).

⁹⁵ Nordland, 'Top Afghans Tied' (see FN93). See also, Kate Clark's blog correcting factual mistakes in the *New York Times* article, at <http://www.aan-afghanistan.org/index.asp?id=2891>.

⁹⁶ 'Samar: Karzai's Opposition "Only Reason" Major Rights Report Isn't Published', Tolo News, 15 December 2012 (<http://tolonews.com/en/afghanistan/8726-samar-karzais-opposition-only-reason-major-rights-report-isnt-published>).

⁹⁷ Matthew Rosenberg, 'Outspoken Afghan Rights Official Ousted', *New York Times*, 22 December 2011

(http://www.nytimes.com/2011/12/23/world/asia/afghan-rights-activist-nadery-ousted-from-panel.html?_r=0).

⁹⁸ Rosenberg, 'Outspoken Afghan Rights Official Ousted' (see FN97).

⁹⁹ See <http://www.afghandocproject.org/>, <http://physiciansforhumanrights.org/issues/mass-atrocities/afghanistan-transitional-justice/> and watch one of the IWPR documentaries at http://www.youtube.com/watch?v=Nw_3NpJHGNo&list=PL104FC5D4C903B758.

recently by the Afghan Civil Society Forum Organisation and Afghanistan Watch.¹⁰⁰ Several Afghan media outlets have also published oral history and testimonial type documents; an example is the daily victims' stories published in *Hasht-e Sobh*. The role of Afghan media in outreach will be further discussed in Section 4.3 As a result, today much information is available about war crimes and human rights violations committed in Afghanistan. Section 2 of this report provided a snapshot of violations documented by the UNHCHR in its 'officially leaked' mapping exercise, UN and AIHRC reports about violations of the post-2001 era and in reports by Afghan and international non-governmental organisations. However, although documentation is today available, no effort has been made to tie it to any form of official truth-seeking exercise or to recognise the importance of this information in the ongoing national reconciliation process.

3.3 Disarmament and Reintegration of Former Combatants

Disarmament, demobilization and reintegration (DDR) is recognized as being vital to post-conflict stabilization. It entails disbanding and disarming former combatants and reintegrating them into society as part of peacebuilding. For disarmament and demobilization to work, the processes are usually linked to offers of some level of amnesty and alternative livelihoods.¹⁰¹ Next to documentation, DDR is one of the first steps in a transitional justice process: without disarmament, efforts to ensure a new government's monopoly on violence and security sector reform are likely not to succeed. In Afghanistan, the transition from the wars of the past to the establishment of the current government shaped the perception of these complementary objectives. Afghanistan's DDR was delayed for more than two years after the

fall of the Taliban and never fully carried out.¹⁰² While disarmament had widespread support among Afghans immediately following the initial defeat of the Taliban, the way anti-Taliban forces within the country came to hold new positions of power after 2001, and the continuing relationship between US forces on the ground and the Afghan militias working with them, derailed real progress on disarmament.

Just as the Bonn Agreement was silent on justice, it was also silent on how to deal with the many arms and former combatants remaining after the fall of the Taliban. Concern that pursuing disarmament could drive some factions from the table meant that the actual language of the agreement was vague on the question of disarmament. The closest the Bonn Agreement came was the provision that, 'upon the official transfer of power, all mujahedin, Afghan armed forces and armed groups in the country shall come under the command and control of the Interim Authority, and be reorganized according to the requirements of the new Afghan security and armed forces'.¹⁰³ In Annex III, the Agreement urges the UN and the international community, 'in recognition of the heroic role played by the mujahedin in protecting the independence of Afghanistan and the dignity of its people, . . . take the necessary measures, in coordination with the Interim Authority, to assist in the reintegration of the mujahedin into the new Afghan security and armed forces'. The Bonn Agreement designated existing militias as Afghan Militia Forces (AMF) under the authority of the Ministry of Defence (MoD) which was controlled by one of the armed factions of the UF – Shura-ye Nizar. AMF was the target of the DDR program. The AMF construct was not inclusive; many factions – most notably the Taliban – were not included. The country's most powerful leaders continued to resist disarmament.

The delay in DDR should be understood in conjunction with the delayed deployment of an international security force. In the first few years of the transition, the US and its allies supported only

¹⁰⁰ See <http://www.watchafghanistan.org/> and <http://afghanistanjusticeproject.org/>. See also, 'A First Step on a Long Journey: How People Define Violence and Justice in Afghanistan (1958–2008)', Afghan Civil Society Forum Organization, Kabul, 2011.

¹⁰¹ For a discussion of the role of amnesties in DDR programs, see Mark Freeman, 'Amnesties and DDR Programs' International Centre for Transitional Justice, research brief, New York, 2010.

¹⁰² Gossman, 'Transitional Justice and DDR' (see FN4).

¹⁰³ See <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>.

a very limited international security force. Although the UN began calling for an expanded role for ISAF in 2003, it did not happen until 2005. During this time, little was achieved on security sector reform (SSR); instead, commanders and factional leaders assumed new positions in the emerging government administration and power structure and former militia units were incorporated into the new security forces, leaving the leader-client relationships and loyalty between their commanders and fighters untouched. Those involved in the process proceeded selectively to avoid confrontation with the most powerful players, who resisted such efforts through threats of violence. For example, in late 2004, former mujahedin blocked the roads in Panjshir to halt the scheduled hand-over of heavy weaponry, and *Payam-e Mujahed*, the organ of the Jamiat-e Islami party of former president Burhanuddin Rabbani, claimed that the US and UN were planning to use human rights and narcotics charges to prevent mujahedin from running as candidates for parliament after disarming them so they could not resist.¹⁰⁴

The main phase of the UNDP-administered disarmament effort, the Afghan New Beginnings Programme (ANBP), began in May 2004. It had a three-year mandate to target 100,000 officers and soldiers for DDR. Its initial objective was to demobilize 60,000 Afghan fighters before the national elections. By the time the elections were held, the numbers were far short of that goal. The main objective of DDR was to reduce the power of commanders at the middle level by depriving them of a ready supply of soldiers who could be mobilized and deployed at will. The reintegration phase involved merging selected ex-combatants into the Afghan army or police, and directing others to vocational training programmes. This process did not include any vetting on human rights grounds, with the result that former fighters responsible for past abuses or war crimes were reappointed to security posts. Senior commanders from the major anti-Taleban forces were targeted for the DDR program. To ensure their compliance, the program compensated these potential spoilers

with government posts in exchange for relinquishing their military operations.

Former defence minister in the transitional government, Muhammad Qasem Fahim, resisted efforts to demobilize his own militia and instead tried to incorporate most of it into the new national army. Not surprisingly, other commanders and faction leaders saw a Panjshiri Tajik-based national army as a threat to their security, and consequently were reluctant to demobilize their own troops. Some of Abdul Rasul Sayyaf's 10th Division were incorporated into Kabul's security forces.¹⁰⁵ Since late 2003 Defence Minister Fahim came under increased pressure both from the US and UNAMA to follow through with reforms; however, progress to create a more ethnically-balanced and professional army has been slow. Second Vice President Abdul Karim Khalili, as chairman of the DIAG commission, refused to handed back US weapons distributed in late 2001.

Leading up to the 2005 National Assembly elections, 'illegal armed groups' were recognized as representing a serious security threat. These groups fell under a later phase of DDR called Disbandment of Illegal Armed Groups (DIAG). In its first phase, 2005–07, DIAG targeted 1,800 irregular armed groups with electoral vetting (see Section 3.4). Although DIAG ostensibly continued from 2006 to 2008, the growing Taleban insurgency and the call to fund new militias stymied efforts to rein in these groups, particularly as powerful commanders – even those operating as government officials – had their own militias.

Disarming Afghanistan's many armed factions was widely recognized early on as integral to the process of reconstructing and stabilizing the state. In post-conflict transitions, it is generally linked to other security-sector reform (SSR) processes necessary for building a professional police force and criminal justice system. In Afghanistan, that

¹⁰⁴ Personal email communication with expert involved in the transition.

¹⁰⁵ Under the PDPA government up to 1992, the 10th Division was a regular unit of the Afghan army headquartered in the Bagh-e-Daoud area of Paghman district, on the western outskirts of Kabul. After the collapse of the central government in 1992, the division was taken over by mujahedin loyal to Abdul Rab Sayyaf, under Commander Sher Alam. In the Taleban period, Mullah Dadullah controlled it.

link was largely abandoned to accommodate former combatants and ensure their support in the ongoing campaign against the Taliban. In Afghanistan, the disarmament effort was conducted separately from other SSR initiatives, and also from wider justice sector and institutional reforms.¹⁰⁶ The failure on the part of the international community to adopt an integrated approach to institutional reform stymied efforts to build a competent police force, reform government ministries, disarm militia forces and establish a functioning judicial system.

Although the DDR program succeeded in the handover of heavy weaponry from militias, this was largely due to the engagement of NATO and US forces in the country, a presence that precluded the resumption of major conflict between rival factions. Currently, the more likely threat to the fragile stability is posed by the proliferation of small arms. Thus far, the disarmament process has not touched this concern. With the escalation of the conflict it is unlikely that disarmament will make any further progress in the coming years.

The escalation of the insurgency and counter-insurgency coupled with slow progress in the formal security sector reform has, however, resulted in the adoption of programs with disarmament components, but also with clearer reintegration and reconciliation components. The latest of these is the Afghanistan Peace and Reconciliation Program (APRP) which will be further discussed in Section 5.2. The escalation of the conflict has also resulted in the adoption of several short-term security sector initiatives, such as the Afghan National Auxiliary Police (ANAP) in 2006 and the Afghan Local Police (ALP) in 2010. While the ad hoc security sector initiatives may serve a legitimate, immediate need for uniformed, armed men at least on paper, when not coordinated with disarmament processes, security sector reform and some form of political or democratic accountability, such initiatives may actually undermine stability. Here below, we will

discuss the link between documentation, disarmament and elections, and, in particular, electoral vetting.

3.4 Vetting Initiatives, Especially for Political Candidates

Vetting, i.e., the process of assessing an individual's integrity as a means of determining whether the person is suitable for public employment, has become a focus when linking transitional justice with post-conflict or post-transition institutional reforms.¹⁰⁷ Vetting initiatives in relation to legacies of past violations can be described as justice *light*: If it is not possible to prosecute those responsible for past violations, they should at least be removed from public office. In the national consultation conducted by the AIHRC in 2004 that sought to identify how Afghans wanted to deal with the past, a majority of those consulted wanted war criminals prosecuted or, if this was not possible, removed from public positions.¹⁰⁸ Vetting initiatives in Afghanistan have included the one-off vetting of provincial police chiefs in 2005, the vetting of political candidates adopted through the Electoral Law and the establishment of the advisory panel for senior political appointments (the advisory panel will be discussed in Section 4.1). We will here particularly focus on vetting of political candidates, partly because it is a controversial tool and partly because the failure of this vetting process has concretely undermined the legitimacy of Afghanistan's political institutions.

Vetting, particularly electoral vetting, poses challenges when part of a transitional justice strategy. Disqualifying candidates on the grounds of criminal conviction for serious offenses is widely accepted. Where trials or indictments have taken place, the criteria are clear: Genocide, war crimes, crimes against humanity, extrajudicial execution, torture (and similar cruel, inhuman and degrading treatment), enforced disappearance and slavery

¹⁰⁶ This report does not in any extent discuss rule of law and justice reform. For an overview of this topic, also in relation to transitional justice, see Sari Kouvo, *Rule of Law and State-Building: Lessons from Afghanistan?* Forum Series, NATO Defence College Publication 2009.

¹⁰⁷ Roger Duthie, 'Introduction', in *Justice as Prevention. Vetting Public Employees in Transitional Societies*, eds., Alexander Mayer-Rieckh and Pablo de Greiff, New York: Social Science Research Council 2007.

¹⁰⁸ AIHRC, *A Call for Justice*, (see FN5).

are serious crimes that indicate a lack of integrity at a level that affects a person's credibility to hold public office.¹⁰⁹ Where no such trials are possible, accusations of serious abuse are not sufficient to disqualify any candidate, and care must be taken before excluding anyone, lest the effort violate the political rights of both candidate and electorate.

Afghanistan's DDR program ended in 2005. As noted, in the months leading up to the first national parliamentary elections, an estimated 1,800 illegal armed groups (IAGs) were believed to be operating in some capacity throughout the country. In a transitional political culture where some level of intimidation by candidates – if not out-and-out violence – was virtually guaranteed, the concern was that such groups could pose a security threat to the 2005 elections. In response election organizers instituted a system to screen potential candidates for links to IAGs and other criteria constituting violations of the electoral law and the Afghan Constitution.¹¹⁰

In the 2005 parliamentary elections in Afghanistan, the decision to qualify candidates based on their compliance with disarming and disbanding IAGs was taken with the understanding that success in this area had some bearing on human rights protection. Because the Afghan constitution stipulates that only those *convicted* of a crime against humanity or other crime can be prohibited from running for election, there were no restrictions on candidates' participation based on their human rights records or involvement in other criminal activity. However, since many illegal armed groups were suspected of human rights abuses, it was hoped that by using disarmament as the criterion, at least two birds might be killed with the same stone.

The vetting process was based on data collected through the Disbandment of Illegal Armed Groups, a project of the UN's Afghanistan New Beginnings Program. The joint secretariat of the Disarmament and Reintegration Commission identified 'high-threat' groups and targeted them for

disarmament. After candidates were nominated for the parliamentary elections, the Electoral Complaints Commission (ECC) heard challenges and investigated eligibility claims.

In the end the ECC disqualified 17 candidates during the candidate challenge period, and 37 who appeared on the ballots. Of all of these, 34 were disqualified for having links to illegal armed groups, 12 for holding a prohibited government position, five for having insufficient valid signatures, and three for violating the Code of Conduct or electoral law.¹¹¹ The real failure was not just that too few were disqualified, but that the criteria were manipulated for political purposes.

The vetting of candidates was not always a transparent process or one that was uniformly applied. In Ghor Province, for example, considerable evidence existed to disqualify a candidate with well-known ongoing links to an illegal armed group. However, the name of the candidate was reportedly not submitted to the ECC as there were concerns that his disqualification would be 'destabilising'. These political considerations help explain why, according to one election official's estimate, 207 candidates with links to illegal armed groups made it through the vetting process.¹¹²

In the end, the vetting effort

failed for three reasons. First, the legal framework established to disqualify candidates on the basis of links to armed groups was incomplete and poorly defined. Second, the institutions charged with running the process did not have the resources or the capacity. Third, the Afghan government and the international community lacked the political will to make sure that people were vetted fairly. These weaknesses resulted in a highly selective process that left many armed commanders to run for office.¹¹³

¹⁰⁹ Ayub, Deledda and Gossman, 'Vetting Lessons', 13–4 (see FN4).

¹¹⁰ Ayub, Deledda and Gossman, 'Vetting Lessons' (see FN4).

¹¹¹ Andrew Wilder, 'A House Divided? Analysing the 2005 Afghan Elections', Afghanistan Research and Evaluation Unit, December 2005, 15.

¹¹² Wilder, 'A House Divided?' (see FN111).

¹¹³ Ayub, Deledda and Gossman, 'Vetting Lessons', 3 (see FN4).

The procedures for verifying who was a member of an illegal armed group were easily manipulated for political purposes, with no system for distinguishing reliable from fabricated reports. The only candidates eventually disqualified were those who had no powerful supporters in the institutions overseeing the vetting. The law was not enforced against prominent candidates who were known to have their own private militias, undermining the entire process.

The election of so many warlords, commanders and others with verifiable or suspected links to illegal militias, involvement in organized crime or responsibility for human rights violations was widely criticized by Afghan and international NGOs. It was seen as contributing to the erosion of public faith in the institutions of electoral politics and the parliament itself.

Parliament has been the preferred institutional home for the commanders or military-political leaders who had dominated Afghanistan in 2001/02. They successfully translated their old military status into a position in the new legislature. . . . In a sense what the commanders did was co-opt the parliament into itself becoming a sort of DIAG process. The commanders' role was already in transition as it became more difficult to maintain parallel security structures and as many of them found themselves squeezed out of their original post-2001 homes in the Ministry of Defence and Ministry of Interior. So they chose parliament as their rehabilitation option.¹¹⁴

The failure of the vetting process in the 2005 parliamentary elections, and especially the cost of that failure – the public's trust in elections in Afghanistan – did not prevent a repeat performance in 2010. Despite complaints against candidate nominees linked to illegal armed groups, a more limited Electoral Complaints Commission (ECC) disqualified only 38 candidates, of whom only 36 were finally excluded on the basis of their

links to armed groups.¹¹⁵ Interestingly, the provision barring candidates who have links with illegal armed groups appears to have been deleted from the draft electoral law adopted by the Wolesi Jirga on 22 May 2013. The law is pending Mesharano Jirga approval.

3.5 The Amnesty Law

The failures of disarmament and vetting represented serious setbacks to combating impunity in Afghanistan's institutions. The adoption of the National Reconciliation, General Amnesty and National Stability Law (hereafter, Amnesty Law) by the Afghan Parliament in March 2007 and its publication in the Official Gazette in December 2008, delivered a near fatal blow.

Providing amnesty for certain factions and certain crimes is a long-accepted strategy in forging peace agreements. Amnesties have even been encouraged as a means for ending hostilities and contributing to stability in the immediate aftermath of conflict. Most notably, article 6(5) of Protocol II to the Geneva Conventions which deals with non-international armed conflict and was adopted in 1949 reads 'at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the hostilities. . . .' The article does not define crimes that can be given amnesty. This was also the case in the original commentary to the article provided by the International Committee of the Red Cross (ICRC) that instead explicitly emphasised that the aim of the article was to ' . . . encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided'.¹¹⁶ In later commentaries the ICRC asserted that the article was only aimed at encouraging amnesties for 'wartime crimes of

¹¹⁴ Michael Semple, unpublished paper provided to authors.

¹¹⁵ International Crisis group, 'Afghanistan's Elections Stalemate', *Asia Briefing No. 117*, 23 February 2011, 8.

¹¹⁶ ICRC commentary quoted in Freeman, *Necessary Evils*, 34 (see FN2).

hostility that are consistent with international humanitarian law obligations'.¹¹⁷

As noted above (see Section 3.3) amnesties are often included as elements of disarmament processes, and they remain important tools in peace-making processes (see discussion in Section 5). However, internationally the increasing recognition is that limitless amnesties may not only hurt the peacebuilding process, but also efforts to re-establish rule of law.¹¹⁸ Legal obligations confirming this trend, most of which are binding for Afghanistan, include those demanding that the state prosecute certain crimes, such as genocide,¹¹⁹ certain war crimes¹²⁰ and torture.¹²¹ Closely linked to the obligation to prosecute is the right to remedy, included in both the Universal Declaration of Human Rights and in the International Covenant for Civil and Political Rights, both binding for Afghanistan. The right to remedy encompasses '... state responsibility and authority ensuring the punishment of human rights

violations'.¹²³ The coming into force of the Rome Statute, also binding for Afghanistan, and the establishment of the International Criminal Court (ICC) has reinforced the trend in international law that certain crimes should be prosecuted and that the victims of these crimes have the right to remedy. Rome Statute crimes – genocide, crimes against humanity, war crimes and the crime of aggression – are ineligible for amnesty.¹²⁴ Many recent negotiations, such as those in Liberia, the Democratic Republic of Congo (DRC), Nepal and Kenya, have excluded these crimes from their amnesty discussions and laws.¹²⁵

The Afghan government has chosen a different road. In December 2006, President Karzai publicly launched the Action Plan for Peace, Justice and Reconciliation (discussed below in Section 4.1). In support of the launch, Human Rights Watch (HRW) rereleased its report *Bloodstained Hands*, documenting war crimes in Kabul during the Afghan year of 1371 (April 1992 to March 1993). The report's press release called for prosecution of faction leaders and commanders whom HRW had identified as responsible for war crimes and who were, as of 2005, members of parliament or held government positions.¹²⁶ The release also coincided with the death sentence and subsequent execution of Saddam Hussein in Iraq – an unwelcome reminder of what fate might hold in store for abusive strongmen once out of power. In response to the HRW report, Parliament formed a committee to draft a bill on 'national reconciliation', later the National Reconciliation, General Amnesty and National Stability Law. The

¹¹⁷ Such crimes include rebellion, sedition, treason and other 'acts of mere hostility' (Freeman, *Necessary Evils*, 36) (see FN2).

¹¹⁸ See for instance 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', adopted by the General Assembly in 2005 (Res. 60/147). See also 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', 2005; Security Council Res. 1674 (2006), which emphasized 'the responsibility of states to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law ...' and the 'Secretary-General's Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations', S/2004/616.

¹¹⁹ Articles I, III and IV of the Convention on the Prevention and Punishment of Genocide (1948).

¹²⁰ The obligation to prosecute is limited to 'grave breaches' of the Geneva Conventions and Protocol 1, these include wilful killing, torture or inhuman treatment, unlawful confinement of civilians when committed in the context of international armed conflicts.

¹²¹ Art. 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

¹²² For a more extensive overview, see Freeman, *Necessary Evils*, 37–8 (see FN2).

¹²³ Freeman, *Necessary Evils*, 40 (see FN2).

¹²⁴ Afghanistan has ratified the statute of the International Criminal Court, and it is a party to the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity (1983), which specifically bars state parties from enacting legislation that provides for statutory or other limitations to the prosecution and punishment for crimes against humanity and war crimes and requires them to abolish any such measures which have been put in place.

¹²⁵ David Tolbert and Marieke Wierda, 'Stocktaking: Peace and Justice', *ICTJ Briefing*, May 2010.

¹²⁶ Human Rights Watch, 'Afghanistan: Justice for War Criminals Essential to Peace', 13 December 2006 (<http://www.hrw.org/news/2006/12/12/afghanistan-justice-war-criminals-essential-peace>).

law was adopted by Parliament on 31 January 2007. Three main opinions were voiced in the parliamentary debate of 31 January 2007 when the law was first presented to the plenary of Parliament: some parliamentarians emphasised that they could not decide on a draft law that had not been circulated to them beforehand; others, including Malalai Joya and Shinkai Kharokhail, criticised the draft law for violating the Afghan Constitution and Afghanistan's commitments under international law and others, including Mohammad Muhaqeq, emphasised that Parliament had the power to review Afghanistan's international law obligations and that forgetting the past the way forward in Afghanistan.¹²⁷ The law was then reviewed by the President's Office and a few substantial changes were introduced (further discussed below). It was then again discussed in Parliament and finally approved on 10 March 2007. Again, a number of parliamentarians, including Shukria Barakzai and Kabir Ranjbar, emphasized that the draft law should have been circulated beforehand and that a hasty decision should not be taken on such an important topic. Others, including Abdul Rasul Sayaf, Burhanuddin Rabbani and Mohaqiq, emphasized that the law had been sufficiently debated, including in consultations conducted by President Hamed Karzai, so there was no need for further debate.¹²⁸

The scope of the adopted law is vast. Its stated aim is to strengthen 'reconciliation and national stability, ensuring the supreme interests of the country, ending rivalries and building confidence among the belligerent parties'. However, the method is to provide blanket amnesty for those involved in past and present conflicts in Afghanistan. Article three of the law states that 'all political factions and hostile parties who were involved in a way or another in hostilities before establishing of the Interim Administration shall be included in the reconciliation and general amnesty program' (art. 3(1)). Article three also extends the amnesty to those 'who are still in opposition of the Islamic Republic of Afghanistan' (i.e., the current

insurgency) if they 'join the process of national reconciliation' and 'respect the Constitution and other laws' (art. 3(2)). That is, the law grants amnesty for all groups and individuals without focusing on specific crimes. The law has been interpreted as not only providing amnesty for crimes that have been committed, but potentially for future crimes.¹²⁹ A limitation to the amnesty is included in the last paragraph of article three, which states that the amnesty shall not 'affect the claims of individuals against individuals based upon Haq ul-Abd (rights of people) and criminal offences in respect of individual crimes'. This limitation was included when the law was reviewed by the President's Office and it is particularly important under Islamic law, it is not the role of the state to forgive; only victims can choose to forgive.¹³⁰ Another limitation is included in article four: No amnesty is granted for persons currently 'under prosecution for crimes against internal and external security of the country', although such amnesties can be made based on the recommendations of the Commission for the Consolidation of Peace (art. 4(1–2)).

The law took legal effect when published in Afghanistan's Official Gazette in December 2008.¹³¹

¹²⁹ AIHRC and ICTJ Note on the Amnesty Law (unpublished document, 2009).

¹³⁰ Emily Winterbotham. 'Healing the Legacies of Conflict in Afghanistan. Community Voices on Justice, Peace and Reconciliation'. Afghanistan Research and Evaluation Unit, Kabul, January 2012, 67.

¹³¹ Gazette No. 965, 3 December 2008; Law 9 Qaus 1387 (29 November 2008) (http://moj.gov.af/content/files/officialgazette/0901/og_0965.pdf). The human rights community in Afghanistan did not become aware of the amnesty becoming law until December 2009 and that the circumstances of how the law came to be in the gazette remain unclear. Afghanistan's report to the UN Human Rights Council under its universal periodic review process published just a few months later, on 24 February 2009, states the opposite. When discussing the implementation of the Action Plan for Peace, Justice and Reconciliation, the report noted that, 'Although the National Assembly approved the National Reconciliation Bill, the President did not sign the bill. The bill has caused some misunderstandings and as a result, this program was not implemented in 2008' (UN Doc. A/HRC/WG.6/5/AFG/1, para. 43). The fact that the law was published in the Official Gazette at about the same time the Afghan government must have been drafting its report to the HRC, is an example of how weak Afghanistan's institutional capacity is: The drafters of the

¹²⁷ Informal transcript of the Wolesi Jirga session on 31 January 2007.

¹²⁸ Informal transcript of the Wolesi Jirga session on 10 March 2007.

As noted above, it is incompatible with Afghanistan's international treaty obligations,¹³² but because Afghanistan's legal system and its justice institutions remain weak, few avenues exist for challenging the law. For example, no attempt was made during the process of drafting and adopting the law to actually compare it with Afghanistan's obligations under international law, and Afghanistan has no functioning constitutional court that could be a forum for challenging the adopted law.¹³³ Rumours are that the amnesty law has been applied at the appeals' court level in Afghanistan; we have not been able to confirm this – or review any case law relating to the law.

This section has attempted to show how the Bonn process and its aftermath have contributed to entrenching impunity in Afghanistan: by failing to refer to the necessity of dealing with legacies of past violations in the Bonn Agreement, by suppressing documentation of past war crimes, by politically manipulating the vetting in the parliamentary elections and finally by adopting the Amnesty Law that, with few exceptions, provides blanket amnesty for all those involved in the past and present conflicts in Afghanistan. The next section will look at efforts to promote transitional justice despite these failures.

Human Rights Council report probably did not know that the amnesty law was about to or had been published in the Official Gazette.

¹³² Especially worth mentioning is the International Covenant on Civil and Political Rights and the Convention against Torture. For a broader legal analysis, see 'Note on the Afghan Amnesty Resolution' (unpublished paper by the AIHRC and ICTJ, 2007).

¹³³ The Afghan Constitution's Art. 121 provides the Supreme Court with the right to review the constitutionality of laws, but only on request of the government or other courts. The Constitution's Art. 157 foresaw the establishment of an *Independent Commission for the Supervision of the Implementation of the Constitution*. The Commission was only established in 2009. For further analysis, see J Alexander Thier and John Dempsey, 'Resolving the Crisis over Constitutional Interpretation in Afghanistan', United States Institute for Peace, Peace Brief, March 2009 (<http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan>) and Sari Kouvo, 'Six Years Late, the Constitutional Commission Is Formed: But Will It Take On President and Parliament?' AAN blog, 3 July 2010 (<http://www.aan-afghanistan.org/index.asp?id=877>).

4 FRAGILE STEPS IN A TRANSITIONAL JUSTICE PROCESS

4.1 The Rise and Fall of the Action Plan for Peace, Reconciliation and Justice

The most consistent – and systematic – proponent of transitional justice has been the Afghanistan Independent Human Rights Commission (AIHRC). While most other actors, whether civil society or government, have had what one Afghan civil society activist described as 'a seasonal approach to transitional justice',¹³⁴ the Commission has progressed via consultation, to promoting a government plan to contributing to the implementation of the government plan through documentation (the Commission's documentation efforts are discussed in Section 3.2 above). The AIHRC interpreted its mandate on transitional justice issues as covering violations committed during the conflict of 1978–2001, and one of its first actions was to conduct a national consultation that focused on Afghans' experiences of the war and how they wanted to deal with the question of justice for past war crimes. The AIHRC published the findings in a report, 'A Call for Justice' in January 2005. The findings included a widespread perception of victimization (70 per cent of those interviewed said that they or their family members had suffered war crimes or human rights violations) and considerable support for either criminal accountability or for removing suspected perpetrators from power.¹³⁵ How this was to be achieved was not included in the survey. There was also a wide recognition that sustainable peace required national reconciliation. Although the term was not fully defined, participants described it as including overcoming conflict at the local level. Reconciliation was not equated with forgiveness.¹³⁶

Based on the findings of the report, the AIHRC and the President's Office, with technical support from UNAMA, drafted the first version of the Action Plan for Peace, Reconciliation and Justice (hereafter, 'the Action Plan'). The drafting committee included

¹³⁴ Author's discussion with civil society activist, Kabul, 2009.

¹³⁵ AIHRC, *A Call for Justice*, 8 (see FN5).

¹³⁶ AIHRC, *A Call for Justice* (see FN5).

representatives of the President's Office, the AIHRC, and UNAMA and was supported by the EU and the Netherlands. The Action Plan includes five measures in graduated sequence to be completed over three years: (1) according dignity to victims, including through commemoration and building memorials; (2) vetting human rights abusers from positions of power and encouraging institutional reform; (3) truth seeking through documentation and other mechanisms; (4) reconciliation; and (5) establishing a task force to make recommendations for an accountability mechanism.

To give impetus to its recommendations, in July 2006, the government of the Netherlands sponsored a ministerial-level conference in The Hague that brought together Afghan Cabinet ministers and ambassadors from among Afghanistan's donors to discuss the Action Plan. Dr Dadfar Spanta, who was a special advisor to President Karzai at the time, held the cabinet portfolio on transitional justice. Following the conference, several ambassador-level meetings were held in Kabul to tweak the language of the Action Plan to ensure it would be adopted by the Afghan Cabinet. And, of course, the Action Plan was debated – in detail – in the Afghan Cabinet before its adoption. The Cabinet adopted it in December 2005, and it was included as a benchmark in the Afghanistan Compact and the Afghanistan National Development Strategy (ANDS).

Two features of the five point action plan sparked more controversy than the others: the reference in the preamble that under international law, no amnesty could be given for war crimes and action point five that provided for the establishment of a mechanism for criminal accountability. As a result, action point five was watered down and only called for the establishment of a commission that would make recommendations to the president about how to promote accountability. As with most of the recommendations of the Action Plan, this recommendation was never implemented.

The Action Plan was adopted days before a conference on truth-seeking and reconciliation held in Kabul under the auspices of the UN Office of the High Commissioner for Human Rights. Participants included international experts on

transitional justice processes in other countries, government officials and ambassadors and delegations from all parts of Afghanistan.¹³⁷ As has been the case at every conference addressing transitional justice in Afghanistan, the participants – especially those coming from the provinces – arrived with ready-made speeches describing the violations that they and their communities had experienced during the war and calling, at least, for recognition of their suffering. President Karzai's statement to the conference noted that the 'achievement of transitional justice must help to strengthen peace and stability. . . . The action plan represents an appropriate procedure in this regard'.¹³⁸

The adoption of the Action Plan came when the Afghan government and its international partners were preparing for the 2006 London Conference on Afghanistan which culminated in the Afghanistan Compact. The Action Plan was included as a benchmark in the Compact. One of the benchmarks of the Action Plan, establishing an independent panel to recommend senior-level political appointments to the president (action point two), was also included as an independent benchmark in the Afghanistan Compact. The idea of establishing an independent advisory panel was keenly supported, particularly by European diplomats who saw the rotation of governors with very poor governance records – and often human rights records – as a key constraint to good governance.

By chance, the establishment of an advisory panel also became the first Afghanistan Compact benchmark that needed to be implemented. Shortly before the first annual review of the Afghanistan Compact by the Joint Coordination and Monitoring Board (established to oversee the implementation of the Compact), it became clear that the first benchmark had not been implemented. To avoid embarrassment – for both

¹³⁷ Sari Kouvo was present at the conference.

¹³⁸ 'Kabul Conference Affirms Importance of Addressing Past Human Rights Violations Comprehensively and Practically', UN Office of the High Commissioner for Human Rights, 19 December 2005 (<http://reliefweb.int/report/afghanistan/afghanistan-kabul-conference-affirms-importance-addressing-past-human-rights>).

the Afghan government and its international supporters – the five member advisory panel was rather hurriedly established in late 2006. However, within six months of its establishment, the Ministry of the Interior

... bypassed the Appointments Board and ensured that its own candidates were appointed by the President. It then persuaded the President to issue a decree re-authorising the Ministry to take the lead in the appointments of district administrators.¹³⁹

The advisory panel has nevertheless continued functioning throughout the past seven years. Its members have been reappointed for a second term; they meet regularly and receive support from an administrative secretariat.¹⁴⁰

Only a few of the Action Plan's other benchmarks have been met. On December 10, 2006, President Karzai formally launched the Action Plan and named a national day commemorating war victims thus meeting two of the plan's benchmarks (action point one). And the AIHRC, as noted above, has started a documentation exercise as part of the implementation of action point three.

The Action Plan included a very brief timeline of three years for its implementation. Opinions differ as to when it expired (depending on if the start date was when the Cabinet approved it in December 2005 or when the President publicly launched it in December 2006) or whether it has expired at all. (Arguments have been raised that as long as the Action Plan has not been fully implemented, it cannot expire and as the Action Plan was included as a benchmark in the Afghanistan Compact and later in the Afghanistan National Development Strategy (ANDS), its internal deadline became obsolete and instead its actual implementation became aligned with the Compact and the ANDS.) The fact remains that after its adoption the Action Plan was largely ignored by the Afghan government and its donors. The only

consistent support for the action plan has been from the AIHRC and the Netherlands.

A final effort to breathe life in the Action Plan was made during the 2010 Kabul Conference, again partly by the AIHRC. The ANDS priority plan published at the conclusion of the 2010 Kabul Conference included a plan to

... reintroduce an updated version of the Three-Year Action Plan on Peace, Reconciliation, and Justice (2006–2008). Specific measures to be undertaken include, for example, the public acknowledgement of past human rights violations, the utilization of the results of and the implementation of the recommendations of the conflict mapping program, and measures to strengthen justice, accountability, and good governance across the Afghan State and society.¹⁴¹

As this report went to press, the Action Plan has not been reintroduced.

4.2 Civil Society and Survivors' and Victims' Mobilisation

The past decade's engagement in transitional justice by civil society has varied in intensity and quality. Several reports detail Afghan concerns that the suffering of victims has not been acknowledged and that no attempt has been made to find out the truth about the many disappeared.¹⁴² However, translating these concerns into action has not been self-evident for either Afghan or international civil society organisations.¹⁴³ Civil society has often been

¹⁴¹ *Afghanistan National Development Strategy: Prioritization and Implementation Plan, Mid 2010–Mid 2013*, Vol. I (23) (http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/speciali/Afghanistan2011/Pdf/afghanistan_and_pip_2010-2013.pdf).

¹⁴² Winterbotham, *The State of Transitional Justice in Afghanistan* (see FN5). For all the AREU reports within the legacies of conflict theme, see <http://www.areu.org.af/ResearchProjectDetails.aspx?contentid=2&ParentId=2&ResearchProjectId=27>.

¹⁴³ The term 'civil society' is usually equated with non-state actors, and it is more often used when discussing mobilisation or movement in the non-state sphere. The term 'civil society organizations' is usually used in a narrower sense, referring to different forms of interest groups, and it is a term that is all too often conflated

¹³⁹ Martine van Bijlert, 'Between Discipline and Discretion: Policies Surrounding Senior Subnational Appointments', Afghanistan Research and Evaluation Unit, May 2009, 11.

¹⁴⁰ Interview with member of the Advisory Panel, 4 June 2013.

described as 'reactive' rather than 'proactive' – and as a possible result, organised civil society has been more focussed on petitioning the Afghan government, international organisations and diplomatic missions than on building and supporting local constituencies.¹⁴⁴

Interestingly, however, the most active years for organized civil society engagement for transitional justice came after it became clear that the government is not implementing the Action Plan for Peace, Justice and Reconciliation and after the adoption of the Amnesty Law. Several civil society organisations working on transitional justice had been critical of the Action Plan because they perceived that civil society had not been consulted in its drafting process. However, when the Amnesty Law was adopted, civil society organizations seem to have realised that the stakes were higher; while not managing to deter the government from adopting the law, civil society advocacy did help introduce an important change in the law. Bowing to protests from some civil society and victims' groups that the law violated Islamic precepts specifying that only the relatives of a victim could grant forgiveness, the government amended it to provide that individuals could bring suits against alleged perpetrators. In

with non-governmental organisations. For an in-depth analysis of the term and its meaning in the Afghan context, see Elizabeth Winter, *Civil Society Development in Afghanistan*, London School of Economics, London, 2010. The civil society organisations that have been engaged on transitional justice have, on the international side, included the International Centre for Transitional Justice (it closed its Afghanistan program in 2012), Open Society Institute, United States Institute for Peace and, to a lesser extent, Amnesty International, Human Rights Watch and No Peace without Justice. Afghan civil society organisations and networks have included the Civil Society and Human Rights Network, the Transitional Justice Coordination Group and, to a lesser extent, the Afghan Civil Society Forum Organisation. Individual organisations have included the Killid Media Group, Afghanistan Human Rights and Democracy Organization and Afghanistan Watch. The Spanish organisation, Association for Human Rights in Afghanistan (ASDHA), deserves special mention: it is the only organisation that has consistently worked on women's and victims' issues; it is also the organisation behind the advocacy campaign against warlords in the Afghan Parliament (see <http://www.thismustend.org/>).

¹⁴⁴ Discussions with representatives of Afghan civil society organizations, Kabul, 2007–09.

the current climate, the odds against anyone pursuing such a claim on his or her own are formidable, but the possibility remains an important one.

Maybe the most concerted engagement for transitional justice, with support of both Afghan and international civil society organisations, is the work of the Transitional Justice Coordination Group (TJCG). In February 2009, a loose network of around 25 Afghan and international organizations¹⁴⁵ hosted a conference bringing together Kabul-based civil society organisations interested in transitional justice. A product of the meeting was the TJCG. Members included organizations that self-identify as victims' groups, organizations that employ victims and focus on the situation of victims, as well as organizations committed to the broader goals of transitional justice, which view acknowledgment of victims' suffering as important in establishing a transitional justice process in the country. The group's core mission was to salvage the Action Plan, especially its victim-centred approach. As a result, the TJCG came to focus many of its activities on the National War Victims' Day established by the Afghan government to coincide with international Human Rights Day (10 December).¹⁴⁶ This work evolved into establishing a national network, a process that culminated in the organisation of the Victims' Jirga in May 2010.

In the spring of 2010, details about the proposed participants in President Karzai's Peace *Jirga* emerged. The limited number of spaces granted to women, civil society and war victims was of great concern to the local human rights community. Alongside efforts to increase representation, activists proposed an 'alternative' jirga, one that would be inclusive and representative of the Afghan people. This unprecedented gathering of over 100 victims from all periods of the conflict

¹⁴⁵ Principally the AIHRC, ICTJ, OSI and UNAMA. Sari Kouvo was working with the ICTJ at the time of the establishment of the TJCG.

¹⁴⁶ In both 2009 and 2010, the TJCG organized activities around the National War Victims' Day. In 2010, the activities extended into a 'victims' week', during which the TJCG organized theatre performances, photo exhibitions, press conferences and a victims' march through central Kabul.

and from all regions of Afghanistan took place in May 2010, one month before the Peace Jirga. This was the first time individuals who identified themselves as victims of war crimes came together nationally. It was also the first time victims articulated a common position expressed in a final statement and to the media.¹⁴⁷ Before the jirga, participants meeting with the media demanded that they be filmed and photographed. They wanted their stories told; they wanted the names of their murdered family members known and they wanted recognition of what had happened to them. The Victims' Jirga was followed by a few more national and regional conferences. However, the early energy of the TJCG quickly faded, due to internal tensions over leadership of the group and the role of international organisations. The TJCG does, however, continue its work – although at lower intensity.

Unlike Guatemala, Argentina or Cambodia, victims' organisations, that is, solidarity and advocacy groups established by and for the relatives and survivors of past atrocities, have not been at the forefront of the push for transitional justice in Afghanistan. Victims' organisations have emerged only in the past five years and remain a weak force.¹⁴⁸ Why war crimes victims in Afghanistan have so little cohesion is a subject of some debate. It is partly due to the shifting nature of the war, which unlike many other conflicts has not featured one state power against a segment of its citizens, but has alternated among state and non-state actors, creating new patterns of violence and multiple variations of perpetrator-victim relationships over a span of 35 years. An ally and fellow victim during one phase of the war could easily be on the other side after a change of power. A victim of PDPA repression who joined a

mujahedin faction, for example, would likely find himself battling other mujahedin fighters in 1992, or the Taleban in later years. In a war like this, little is to be gained by trusting anyone outside one's immediate family or clan.

One reason for the absence of a strong war victims' advocacy effort has been that until today, many Afghans remain unaware of the extent of the devastation beyond their own community's losses. Given poor communications during the war, and the enormous dislocation of so many communities, Afghans have had little opportunity to learn about what happened in provinces across the country and to see any commonality in the war narratives that have been constructed. For these reasons, Afghan human rights advocates believe that telling the stories of what happened, not just in one province or to one ethnic community but the whole story, could provide a basis for rebuilding communities and negotiating peace.¹⁴⁹

Another weakness among Afghan human rights organizations has been their reluctance to work on post-2001 incidents. When this observation came up at a roundtable organized by ICTJ in June 2012, a number of participants responded that working on the present was too dangerous.¹⁵⁰ The result has been that, over time, groups have tended to document better-known incidents, going over the same ground covered by another organization, rather than investigate less well-known or newer incidents. In addition, the disproportionate number of Hazaras among Afghan human rights organizations has raised questions about how well the groups represent concerns in the broader community; Hazara activists point out that they were often targeted, particularly during the Taleban period, and this prompted them to organize around human rights issues. Finally, the Kabul-based groups have not developed strong links with victims groups and community representatives outside the capital, which has

¹⁴⁷ For the final statement of the Victims' Jirga, see Transitional Justice Coordination Group – Afghanistan, 'The Victims' Jirga', 9 May 2010 (<http://tjcgafghanistan.wordpress.com/2010/05/09/the-victims-jirga/#more-23>).

¹⁴⁸ In Kabul, the Foundation for Solidarity and Justice and the Organization of Afghan Justice Seekers have been active since around 2007. Smaller victims' or survivors' initiatives have also evolved in some provinces: A small victims' organisation has been established by some of the survivors of the Yakowlang massacre and has a branch in Bamyan city. Small groups have also formed in Jalalabad, Kunduz and Mazar-e Sharif.

¹⁴⁹ Over the years, the authors have participated in many conferences and conducted several trainings on transitional justice and related issues in Afghanistan, and documenting and learning about the past has been a constant priority voiced by participants at conferences and trainings.

¹⁵⁰ Author's notes on meeting, June 2012.

undermined their ability to mobilize support for transitional justice beyond their local constituencies.

4.3 Debating and Remembering the Past

4.3.1 Teaching History

Beyond a few Kabul-based public demonstrations and some media discussions, the public debate about the conflict has been muted. Because Afghans continue to see individuals that they deem responsible for violations in positions of power, they are wary of discussing these issues in public. In addition, Afghanistan continues to be a country in conflict that breeds on political and ethnic divides in Afghan society that, in turn, also mitigate against public denunciations of military figures who have a defined ethnic base.

The debate about how to teach contemporary Afghan history, especially the years of conflict, and the debate about how to commemorate the conflict, its heroes and its victims, exemplifies the challenge. In the absence of officially sanctioned truth-seeking, information about war crimes and human rights violations circulates in a twilight zone where everyone thinks they know but no one dares speak about it. At the same time, it is not uncommon to hear Afghans today wax nostalgic about Soviet-era reforms, the relative peace under Najibullah or the 'tough justice' of the Taliban years. Some of the nostalgia obviously relates to the vast differences in how different regimes were experienced by different ethnic and political groups and in different areas of conflict. Some of it may be due to a re-writing of history – conscious or not. One of the key aims of a truth commission – and other truth-seeking mechanisms – is to 'reduce the number of lies that can be circulated unchallenged in public discourse'.¹⁵¹ Today, the absence of a real effort to document history, debate findings and develop a shared, if not common, narrative about what happened during years of conflict, who was responsible for what and who was victim when, works to the detriment of

national reconciliation. Memories are ground in a mill of grievances and fear.

Already in the first years after the 2001 intervention, efforts started to reform Afghanistan's school curriculum. In this process it was decided not to in any detail discuss the decades' of conflict.¹⁵² The authors have not been able to discern why exactly the conflict decades were excluded, responses have varied from 'recent history does not belong to a history curricula' to 'those designing the history curricula could not themselves agree on how to tell the story about the conflict'. The issue about how history is taught in schools flared up in a media debate when new history text books were launched. When asked why the history books omit the war years, Minister of Education Farouq Wardak noted that 'our recent history tears us apart. We've created a curriculum based on the older history that brings us together, with figures universally recognized as being great'.¹⁵³ The new history books were the first in decades that 'depoliticized and de-ethnicized' Afghanistan's history.¹⁵⁴ Discussions with officials and educators in NGOs and public schools showed a complex understanding of the past, and revealed the problems teachers face addressing issues that the Afghan government has been unwilling to confront. One teacher argued that one 'cannot hide the sun with two fingers' – it is impossible to try to hide the truth; it will come out and needs to come out.¹⁵⁵ A teacher who participated in a commemoration ceremony at a mass grave site at Pul-i Charki rhetorically asked 'have you ever met a child who tells you that his father and grandfather are lying?'¹⁵⁶ His point was simple: Every Afghan is part of the conflict, they all have grievances and an axe to grind with somebody. Until there is an opportunity to discuss the events of the past and work toward real national reconciliation, parents will continue to pass on their own histories and hatreds as a poisoned gift to their children.

¹⁵¹ Charles Maier, 'Doing History, Doing Justice', in *Truth v. Justice: The Morality of Truth-Commissions*, ed. Dennis Thompson Robert I Rotberg, Princeton, Oxford Princeton University Press, 2000, 268.

¹⁵² AAN interview with government official, June 2013.

¹⁵³ Kevin Sieff, 'Afghanistan: New Approaches to Teaching History: Leave Out the Wars', *Washington Post* 5 February 2012.

¹⁵⁴ Sieff, 'Afghanistan: New Approaches' (see FN 153).

¹⁵⁵ AAN Interview with teacher, Kabul, 2012.

¹⁵⁶ Author interview with former school teacher, Pul-e Charkhi, 10 December 2010.

An official at the Ministry of Education held the opposite view, telling AAN 'my personal opinion is that this is not the time to give a detailed history; if the next generation wants to, they can rewrite the books'.¹⁵⁷ A senior educator in a large NGO noted that they had had trouble in Ghazni because of a school book that portrayed the US forces in a more positive light than the Taliban; he noted that as the education curricula has to work in the whole country it is better to omit detail: 'You can say what happened during different phases of the conflict, but not what a specific group did.'¹⁵⁸ This opinion was also shared with some of the educators AAN talked to, although not because they thought history should not be discussed, but because they doubted whether teachers were in a position to speak of things that neither the Afghan and American governments nor the UN dared to speak about. In their view, teachers should not provoke conflicts in the classroom, with parents or with powerful individuals in the community.

National reconciliation does nevertheless entail developing some mutual historical narrative about the conflict, even if there is not agreement on every aspect. For national reconciliation to be successful, not only the elites, but a large proportion of the whole population needs to be involved. As Elizabeth Cole notes, the 'one place where history becomes more concrete and relevant to non-elites is in schools'.¹⁵⁹ And public schools are important as their programs and the materials that they use derive their authority from the fact that they are government institutions.¹⁶⁰

Afghan media has been hailed as one of the successes of the state-building process, and one segment of society where different views can be expressed and actually debated: Call-in programs and round tables are popular on Afghan radio and television. To a very limited extent, some of these programs focus on Afghans' experiences of the conflict; one example is 'dar justuju-ye gomshodagan' (In Search of the Missing), a

program aired on Radio Azad. Personal accounts of the war have been aired by Ariana Television on program called 'Qessa-ha-e Jand' ('War Stories') featuring personal accounts of the war and by *Hasht-e Sobh*, an Afghan daily, that has published victims' stories on a daily basis. Shamshad Television aired a program originally called 'Gran tsook Dey' (Who Is Responsible?) and that featured stories of stories of women as victims and survivors of the war. Other media outlets, including Killid Media Group and Saba Television have also produced programs with a focus on transitional justice issues. Most of these programs have ended due to funding constraints.

4.3.2 Memorialisation

Some attention has been given to public memorialisation in Afghanistan. Memorialisation has become an increasingly important part of transitional justice as it can be done without pointing the blame at anyone and is often viewed as less contentious than accountability measures. Memorialisation can serve dual functions: contributing to *redress* and, perhaps, to *prevention* (Never Again).¹⁶¹ In terms of redress, memorialisation can create spaces for healing, mourning and reflection. This 'sacred side of memorialisation'¹⁶² should not be underestimated as it may help individuals and also communities to grapple with their loss. The prevention (Never Again) element of memorialisation can create opportunities for dialogue about how people were (and are) able to commit atrocities against each other.

The appointment of 10 December as a day for commemorating victims of war crimes (coinciding with international Human Rights Day) and 8 September as National Martyrdom Day (coinciding with the day of the death of Ahmad Shah Massoud on 8 September 2001) are the only national level initiatives so far. However, museums and public memorials have been developed at the sub-

¹⁵⁷ AAN interview with government official, Kabul, 2012.

¹⁵⁸ AAN interview with senior NGO staff, Kabul, 2012.

¹⁵⁹ Elizabeth A Cole, 'Transitional Justice and the Reform of History Education', *International Journal of Transitional Justice* 1 (2007): 120.

¹⁶⁰ Cole, 'Transitional Justice', 121 (see FN 159).

¹⁶¹ Unpublished report on memorialisation in Afghanistan, ICTJ 2010.

¹⁶² See Louis Bickford, 2006, 'Memory, Museums, and Memorials: Building a New Future', in *Transitional Justice and Human Security*, eds. Alex Boraine and Sue Valentine, Cape Town: ICTJ, 135–50.

national level, in particular in Badakhshan and in Herat.

The memorial in Dasht-e Shohada just outside Fayzabad city centre in Badakhshan was built to commemorate the victims of the 'three months of terror' (September to December 1979) when, under the leadership of Hafizullah Amin, opponents of the regime were executed or forcibly disappeared en masse. The memorial is built at a mass grave site accidentally discovered in 2007 when construction was started on the location.¹⁶³ The project, managed by the AIHRC, has enjoyed the support of the governors of Badakhshan and has also received national attention. However, the museum was originally intended to commemorate not only the victims of the killings in 1979, but the victims of the three phases of conflict in Afghanistan (until the fall of the Taleban regime). Because of threats, the AIHRC was forced to change the name of the museum so that it only refers to the Soviet occupation, the first period of the conflict.¹⁶⁴ The memorial, inaugurated in 2009, consists of a twelve-meter-high white marble minaret ('martyrs' minaret), a museum, a small library and lecture or seminar facility. The exhibition in the museum consists of photographs of the victims (most likely donated by the families), photographs of the efforts to excavate the mass grave and items (cloths, shoes, money, bullet cases, etc.) supposedly retrieved from the mass grave.

Herat boasts two memorial museums. One was built by Herat's strongman and Afghanistan's current Minister of Energy and Water, Ismael Khan. It commemorates the mujahedin and their struggles and in particular the mujahedins' role in the Herat public uprising ('24 Hoot'). This museum seems to have become a tourist attraction in Herat, largely because it is located in a park area popular for family outings and picnics at the outskirts of Herat. An interlocutor that AAN talked to who often takes out-of-town visitors to see the museum noted that it gives insights in the

mujahedins' struggle, but ignores the involvement of other groups such as students and intellectuals in the uprisings of 24 Hoot.¹⁶⁵ This made him always come away with a bad feeling, and he wondered whether his feeling was shared by others, he said. The other memorial museum, 'A Way from Darkness' (Rah-i az meyan tarik) is located on AIHRC's premises and commemorates the victims of the wars. This memorial museum covers the three phases of the conflict, but with less focus on the mujahedin years as Herat was relatively calm then. The museum contains pictures of violations that occurred during the conflict and items that AIHRC has received from private individuals, including victims.¹⁶⁶ Abdul Qadir Rahimi, the head of AIHRC's Herat office, noted that peoples' experiences of the museum were quite different: When former mujahedin visit the museum, he noted, they are interested in the old guns and the memories that those evoke while university students are shocked to learn about the horrors of Afghan history.¹⁶⁷

Societies – or their leaders – make choices about how to remember the past. In the absence of a coherent narrative of what happened during the conflict, the past can remain a source of hatred and recrimination. This is to a large extent where Afghanistan remains today: the past remains so contentious that it is deemed impossible for teachers to teach and the few memorialisation efforts have been done at the sub-national level. As the section on documentation also clearly showed, those closely involved in the conflict are not ready to allow their actions to be publicly scrutinized. In other contexts, the failure to address parts of history has been shown to result in 'absent memory'; i.e., a society (or its elites) develops an approach to history that ignores some of the most offensive parts of that history.¹⁶⁸ In these contexts, it is relevant to ask what replaces those parts of history that cannot be discussed – it

¹⁶³ The memorial was visited by Fabrizio Fochini in September 2012.

¹⁶⁴ AAN telephone interview with Sarwar Ahmadi, head of the Transitional Justice Unit, AIHRC (Badakhshan), 9 September 2012.

¹⁶⁵ AAN telephone interview with a Herati human rights activist, 6 September 2012.

¹⁶⁶ AAN telephone interview with Abdul Qadir Rahimi, head of AIHRC Herat office, 20 September 2012.

¹⁶⁷ AAN telephone interview with Abdul Qadir Rahimi, head of AIHRC Herat office, 20 September 2012.

¹⁶⁸ See <http://csis.org/program/absent-memory-and-transitional-justice>.

can be only nostalgia; it can also be further factionalism or nationalism (depending on context). An alternative to absent memory could be to allow documentation in as many forms as possible, and where a coherent narrative of the past cannot be created, to allow for a debate where relevant parties at least can agree to disagree.

4.4 Small Steps towards Accountability

4.4.1 *Flawed Trials in Afghanistan*

Criminal prosecution is the most known mechanism for transitional justice. Internationally supported ad hoc tribunals such as those established for Rwanda and the former Yugoslavia, hybrid tribunals such as those established in Cambodia and Sierra Leone and, of course, the establishment of the International Criminal Court (ICC) have promoted prosecution as a means to address legacies of conflict. Prosecutorial strategies are, however, also controversial: because they can deter known war crimes suspects from entering peace processes; because the legal categories of war crimes may be at odds with victims' understanding of the violations that they have suffered and because they are inherently selective and can become another means for 'victor's justice'. Afghanistan is no exception; when the Action Plan for Peace, Reconciliation and Justice was adopted, the references to accountability for war crimes resulted in most debate and almost kept the Action Plan from being adopted. Despite the resistance, a few individuals have been prosecuted for crimes committed during the conflict, including during the current phase. First we will discuss prosecutions inside Afghanistan, and then those based on universal jurisdiction and the preliminary investigation by the International Criminal Court. This report will not address prosecutions as a result of the 'war on terror' inside Afghanistan or elsewhere.¹⁶⁹ It will

also not address legal procedures relating to the international military intervention in Afghanistan.¹⁷⁰

Despite the dearth of documented evidence, a few Afghan war crimes suspects have been tried in court, two of them in Kabul and four internationally. The first person prosecuted in Afghanistan was Abdullah Shah, who was taken into custody in 2003 under obscure circumstances and accused of a number of murders that occurred between 1992 and 1993. At the time, Abdullah Shah was a commander with Ittehad-e Islami, operating under Haji Sher Alam and Abul Rasul Sayyaf. During the trial, the prosecution made unsubstantiated claims, including that Abdullah Shah was 'a professional murderer', a 'member of al-Qaeda', and responsible for the murder of several wives, his mother, a neighbour's son and others. Although the Criminal Investigation Department of Kabul Province (*Riasat Jinaie Wilayat Kabul*) and the Attorney General's Office Special Section (*Saranwal-e Ikhtesasi*) 'conducted site visits in West Kabul to inspect places where mass graves [were] alleged to contain victims of Abdullah Shah', this evidence was not produced in the trial. When the judge questioned Abdullah Shah on the stand, asking if he had 'killed many people', the defendant replied that he had done so in *the course of the war*. There was no reference in the indictment or, during the trial, to the conflict or

Zero Dark Thirty, the Movie' AAN blog, posted 5 February 2013 (<http://www.aan-afghanistan.org/index.asp?id=3235>) and Kate Clark, 'The Other Guantanamo': Bagram and the Struggle for Sovereignty', AAN blog posted 10 September 2012 (<http://www.aan-afghanistan.org/index.asp?id=2980>).

¹⁷⁰ See Section 2.2 for an overview of human rights concerns in the post-2001 period. Both the Canadian and British governments have been successfully challenged in national courts for handing over detainees to Afghan authorities (see http://bccla.org/our_work/afghan-detainee-case-documents/ and <http://www.aan-afghanistan.org/index.asp?id=3150>). In both cases, the courts found that the governments could not ensure that detainees handed over by them would not be mistreated or tortured by Afghan authorities and that detainee transfers therefore violated the principle of non-refoulement codified in both international refugee law and human rights conventions.

¹⁶⁹ For discussions about US human rights violations and war crimes committed over the past decade, see for example, <http://detaineeetaskforce.org/>. See also AAN's reporting: Kate Clark, 'What Exactly Is the CIA Doing in Afghanistan? Proxy Militias and Two Airstrikes in Kunar', 28 May 2013 (<http://www.aan-afghanistan.org/index.asp?id=3370>); Kate Clark, 'Ambiguous about Torture:

to the possibility that any of these killings might constitute war crimes.¹⁷¹

Abdullah Shah was convicted of multiple murders and sentenced to twenty years in prison. Shortly after the sentencing, however, the head of the Supreme Court overruled the sentence and imposed the death penalty. During interviews conducted in jail by one of the authors for this report, Abdullah Shah did not deny his part in war crimes, but said that he was acting under orders from Sayyaf. He claimed to have knowledge of mass graves from the early 1990s' factional conflict in Kabul. He asked to be transferred to the custody of another ministry where he might have some protection from what he said were plans to silence him. Abdullah Shah was executed in secret on 20 April 2004. According to Amnesty International, the execution 'may have been an attempt by powerful political players to eliminate a key witness to human rights abuses'.¹⁷²

The second trial held in Afghanistan was similarly flawed. The trial of Assadullah Sarwary represents the only attempt in Afghanistan to hold a senior government official accountable for past crimes. Sarwary is the former director of the intelligence agency, AGSA or the Department for Safeguarding the Interests of Afghanistan, which operated under President Taraki from 1978 to 1979. He was first taken into custody by Shura-e Nazar forces in April 1992 and held in detention in the Panjshir Valley until he was brought to Kabul and imprisoned in Sedarat in 2005.

In the formal indictment Sarwary was charged with conspiracy against the Rabbani government in 1992; the arrests of people by AGSA or of Khalq officers who were sent to Pul-e Charkhi Prison, from where they subsequently disappeared; and with mass killings of persons from the 1978–79 period.¹⁷³ At the time the alleged crimes were

committed, Afghanistan's criminal code did not – and does not yet – have provisions for addressing gross human rights abuses of the past. The charges against Sarwary did not include allegations of systematic human rights violations.

The trial itself consisted of the prosecutor reading the indictment described above.¹⁷⁴ The evidence cited (but not shown during the actual trial) included letters describing Sarwary's responsibilities and his activities as head of AGSA, some reportedly signed by him, and documents and transcripts from the Afghan Independent Human Rights Commission.

The proceedings were conducted quickly, and Sarwary was not given the opportunity to question witnesses or challenge the evidence against him. When Sarwary challenged the authenticity of a document he allegedly signed ordering illegal executions, no evidence was offered to show it was authentic and the Court turned down his request for a forensic test. The letter itself was not produced in court; it was only shown on film.

Evidence of Sarwary's role during this period, the chain of command within the intelligence agency, and his responsibility for abuses carried out by intelligence agents under his command was not used by the court. It is not clear whether the court had such evidence in Sarwary's file. In the court proceeding, no procedure was made to admit evidence and witnesses; witnesses did not give advance statements and the defence did not have a chance to study their testimony.

On 26 February 2006, the National Security Court ruled that Assadullah Sarwary was guilty of all charges and sentenced him to death. After the ruling, the dossier was sent to the Appeals Court, which then sent the dossier to the Military Court Department, and from there to the Military Appeals Court. In early 2007, the Appeals Court reviewed the primary court proceedings and reached the provisional conclusion that the arguments and evidence presented were not

¹⁷¹ UNAMA observation notes from Abdullah Shah trial, 8 September 2002. Emphasis added.

¹⁷² Amnesty International, 'Afghanistan: First Execution since Fall of Taliban', ASA 11/007/2004, 25 April 2004.

¹⁷³ Case files relating to the case of Asadullah Sarwari s/o Mohammad Sarwar, grandson of Fatiay Mohammad, Supreme Court of Afghanistan, correspondence No. 2609, dated 84/6/16 of the National Security Prosecutor's Office for Sharia decision which has been

registered in the book No. 602 dated 84/6/16 and Registry No. 267 of this Presidency; authors' notes. Both authors followed the trial against Asadullah Sarwary closely.

¹⁷⁴ Sari Kouvo attended the first two sessions of the trial.

strong enough to support the verdict. The Appeals Court then formally requested the primary court to supply any supplementary arguments and evidence it may have so that it could give an appeal decision. If it had transpired that the appeal decision was going against the primary court, the appeal court had the option of returning the file to the Attorney General for retrial.

After considerable back and forth between the Supreme Court and the military courts involved, Sarwary was sentenced to 20 years imprisonment, beginning with the first day he was taken into custody, 25 June 1992. If that verdict is not overturned, Sarwari is due to be released on 25 June 2012. As of this writing, he has not yet been released.

4.4.2 *Universal Jurisdiction*

In the UK and the Netherlands a few Afghans have been convicted for conflict-related crimes committed in Afghanistan.

The first such case using universal jurisdiction was of co-defendants Hesamuddin Hesam and Habibullah Jalalzoy in the Netherlands. Hesamuddin Hesam was the Director of Military Intelligence (KhAD) from 1982 until 1990, and also held the position of vice-minister of the Ministry of Intelligence. Habibullah Jalalzoy was Head of the Interrogation Department of the Military KhAD in Kabul from 1979 until 1990. Hesamuddin fled Afghanistan in 1992; Habibullah in 1996; and both ultimately took up residence in the Netherlands. A criminal investigation was conducted against Hesamuddin and Habibullah beginning in 2003. During the investigation, the Netherlands National Investigation Team for War Crimes took testimony from witnesses in Afghanistan and elsewhere. The two suspects were arrested in late 2004. The accused co-defendants were charged with torture and allowing subordinates to violate the laws and practices of war in Kabul from the period of 1 October 1985 up to and including 31 December 1988.¹⁷⁵ The trial commenced in 2005.

¹⁷⁵ In response to a challenge from the defence regarding the jurisdiction of the court and validity of universal jurisdiction in a case of non-international armed conflict, the court ruled that during the period mentioned in the indictment, a non-international armed

Hesamuddin and Habibullah were convicted on 14 October 2005, and sentenced to twelve and nine years in prison, respectively.¹⁷⁶

A similar case in the UK was that against Faryadi Sarwar Zardad, a commander of the Hizb-e Islami faction under Gulbuddin Hikmatyar. Between 1992 and 1996 he controlled the area around Sarobi, east of Kabul. After the Taliban took control of the area, Zardad abandoned his base, ultimately fleeing Afghanistan. He eventually obtained asylum in the UK under a false identity. He came under investigation by the UK Home Office and was briefly arrested on 1 May 2003 by officers of the Scotland Yard's Anti-Terrorist Branch. He posted bail and was released only to be re-arrested on 14 July 2003.

The investigation lasted more than a year, with police investigators traveling to Afghanistan to interview witnesses. Like the prosecution, the defence visited Afghanistan, though not as often. Other witness testimony was taken in the UK. The investigation was the first of its kind for Scotland Yard, and the trial was the first such trial in the UK. An unusual aspect of this case was that many of the witnesses were in Afghanistan, and appeared in court for examination and cross-examination by way of a television link.

On 18 July 2005, the jury convicted Zardad of hostage-taking and torture. As with the Dutch cases, it hinged on credible and coherent witness testimony. Unlike the Dutch cases, Zardad's was a jury trial, and the challenge for the prosecution was to convince ordinary British jurors that Zardad

conflict existed on the territory of Afghanistan, and thus the humanitarian laws of war, in particular common Article 3 of the four Geneva Conventions was applicable. The crimes with which the defendants were ultimately convicted were punishable offences pursuant to Article 6, first paragraph, subsection a, of the International Crimes Act. The court further noted that on 1 October 2003, the International Crimes Act came into force in the Netherlands, carrying with it the penalties formerly defined under the Criminal Law in Wartime Act. The penalization of torture was included in this Act (replacing the Torture Convention Implementation Act).

¹⁷⁶ Trial Judgement in the case against Heshamudin H, 14 October 2005 (see <http://www.haguejusticeportal.net/index.php?id=5104>) and Trial Judgement in the case against Habibullah J., 14 October 2005 (<http://www.haguejusticeportal.net/index.php?id=5105>).

was in control of a significant part of the country during a time of chaotic infighting among mujahedin forces. The prosecution succeeded in doing so by assembling a number of credible witnesses, including Afghans who had personally suffered torture under Zardad's orders and could positively identify him from photographs and Afghan witnesses with military expertise who could explain the hierarchy within the mujahedin faction to which Zardad belonged and the importance of the checkpoint Zardad controlled. Finally, expert testimony from humanitarian aid officials who had worked in Afghanistan at the time provided a clear description of the base and helped establish the fact that Zardad had control of it, which corroborated the testimony from the torture victims.¹⁷⁷

Unlike the two Afghan cases, the trials that have taken place in the UK and the Netherlands provide useful lessons on how evidence should be evaluated and used in trials of this nature. These cases also provide an important insight into understanding the critical issues of command responsibility.

4.4.3 Preliminary Examination by the International Criminal Court

Afghanistan ratified the Rome Statute of the ICC in February 2003, and the ICC has jurisdiction over war crimes and crimes against humanity that have happened in Afghanistan from 1 May 2003.¹⁷⁸ The Rome Statute came into force in July 2002 and the Afghan government has the right to extend the ICC's jurisdiction to that date. Not all war crimes committed in Afghanistan fall under ICC's jurisdiction, as ICC only prosecutes crimes that meet its threshold of grave and systematic abuses. The ICC should also complement the Afghan justice system; the ICC can only prosecute where national courts are unable or unwilling to do so.

In 2007, the ICC prosecutor formally acknowledged that the situation in Afghanistan was under preliminary examination.¹⁷⁹ According to the ICC's report on preliminary examinations,¹⁸⁰ alleged crimes include killings, most notably civilian casualties from insurgent activities, but also from aerial bombardments and search and seizure operations by 'pro-governmental forces'; torture by 'various parties to the conflict'; attacks on humanitarian targets, the UN and protected objects (for example, mosques, hospitals and MEDEVAC helicopters); and recruitment of child soldiers. The preliminary examination report recognized that while 'a large number of alleged crimes have been and continue to be reported, verifying the seriousness of such allegations and obtaining the detailed information required to conduct a proper legal assessment of each reported incident and attribute responsibility is proving challenging and time-consuming'.¹⁸¹

The ICC can receive and does rely on information received from civil society during preliminary examination. Since the ICC started its examination, a few small-scale efforts have been made to coordinate between relevant civil society organizations to send available information to the ICC, but as far as the authors know, this has not yet been done. Instead, those Afghan civil society organisations that aware of the ICC's preliminary examination, seem to be expecting that the ICC approach them rather than the opposite, and there is little understanding of how limited ICC's preliminary examination resources are. There is a sense among those Afghan civil society actors who know about the ICC that it is ignoring Afghanistan. For example, at the annual war victims' demonstration on 10 December 2011 one of the banners noted that the ICC had not hesitated to

¹⁷⁷ Crown Prosecution Service, 'CPS: The Counter Terrorism and Special Crime Division of the Crown Prosecution Service – Successfully Concluded War Crimes Prosecutions Since 2001' (http://www.cps.gov.uk/publications/prosecution/war_crimes.html).

¹⁷⁸ According to Art. 126 of the Rome Statute, the statute enters into force on the first day of the month after the sixtieth day of ratification has passed.

¹⁷⁹ See http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/afghanistan/Pages/afghanistan.aspx.

¹⁸⁰ Office of the Prosecutor, 'Report on Preliminary Examinations Activities', International Criminal Court, 13 December 2011, 6–9.

¹⁸¹ Office of the Prosecutor, 'Report on Preliminary Examinations Activities' (see FN180).

start investigations on Sudan and Libya, but is not moving forward on Afghanistan.¹⁸²

In November 2012, prompted by the lack of progress made by the ICC in its preliminary examination on Afghanistan, 15 Afghan civil society networks and organizations, including the TJCG, Afghan Women's Network (AWN) and the Afghan Civil Society Forum (ACSF) delivered a petition to the ICC prosecutor, stressing their readiness to support the court, but also demanding that the court publicize information about the cases it has under investigation.¹⁸³ The petition emphasized that the civil society organisations considered that Rome Statute crimes had been committed in Afghanistan and that the government was unable or unwilling to investigate and prosecute these. Although diplomatically phrased, the petition also contained stark criticism against the ICC, as civil society organisations demanded that the court disclose what it is doing, communicate with relevant authorities in Afghanistan (government, AIHRC and UNAMA) and shift from ad hoc communication with Afghan civil society to establishing a focal point for Afghanistan within the ICC's prosecutor's office that regularly engages Afghan civil society. The criticism against the ICC – or the fact that civil society are now approaching the ICC – is most likely also a result of all other avenues having been seen to fail.

5 JUSTICE AS A NECESSARY ELEMENT OF RECONCILIATION – AND PEACE

5.1 'Strengthening Peace' without Justice

Within the transitional justice literature, reconciliation tends to be viewed either as a transitional justice mechanism or as the end result of a transitional justice process (see Sections 1.2–1.3). Reconciliation as an element of or as the end product of transitional justice does build on an understanding that while reconciliation will certainly involve forgiveness, it cannot equal amnesty for all crimes – and that it needs to be part of wider efforts to address grievances and

underlying causes of conflict. While a move has been made away from broad amnesty provisions in recent peace agreements (see discussion in Section 3.5), there is a broad recognition that amnesties are necessary, especially in reintegration processes (see discussion in Section 3.3). However, when amnesties are used as incentives for reintegration, these must be clearly defined and legally binding, not the least to ensure that those that do reintegrate can feel confident about not being detained or prosecuted.

In Afghanistan, transitional justice and reconciliation have in both policy and programmatic terms been promoted as largely separate processes. Or as noted by Joanna Nathan 'reconciliation efforts for insurgents have . . . been largely premised on a militarized/security agenda, developing separately from transitional justice initiatives emerging from a human rights perspective'.¹⁸⁴ That is, 'reconciliation efforts have for the most part been narrowly premised on a paradigm of amnesty and surrender rather than true peace-building'.¹⁸⁵ There has also been an emphasis on disarmament against cash benefits (money, work opportunities, housing, etc.), instead of a focus on solving the grievances that fuel the conflict.

National-level reconciliation – currently interpreted as efforts towards peace talks with the Taliban – has developed in fits and starts. When attempts to define red lines have been made, the government side emphasises accepting the Constitution and laying down arms. However, it is not possible at this stage to say to what extent concerns for justice would be integrated into such talks. Reconciliation has also been sought from the bottom up, by encouraging combatants to reintegrate. The two main reintegration and reconciliation programs in the post-2001 period have been the *Program-e Tahkim-e-Solh* (PTS or 'Strengthening Peace Program') and, the ongoing, Afghanistan Peace and Reconciliation Program (APRP). It is beyond the scope of this paper to do a comprehensive overview of the national-level reconciliation efforts or the reintegration

¹⁸² Both Sudan and Libya were Security Council referrals to the ICC.

¹⁸³ Civil Society Petition to the ICC Prosecutor, 22 November 2012.

¹⁸⁴ Joanna Nathan, 'A Review of Reconciliation Efforts in Afghanistan', *CTC Sentinel*, 2 (8) (August 2009): 13.

¹⁸⁵ Nathan, 'A Review', 11 (see FN184).

programs.¹⁸⁶ The focus here will be on some of the disjunctures between these programs and the transitional justice initiatives in Afghanistan, namely the approach to amnesty.

The PTS program was established by presidential decree in 2005 and headed by Speaker of the Meshrano Jirga Sibghatullah Mujaddedi. The aim of the Peace and Reconciliation Commission established by the program is to 'end inter-group armed hostilities, resolve unsettled national issues, facilitate healing of the wounds caused by past injustices, and take necessary measures to prevent the repeat of the civil war and its destruction'.¹⁸⁷ In practice, the program's aim has been to certify that former fighters had joined the government and to facilitate the return of detainees released from US detention.¹⁸⁸ According to the PTS website, 6,215 militants had joined the PTS program by the end of 2008. It is, however, unclear how many of these had actually been fighting or actively involved with the insurgency.¹⁸⁹ The PTS program's claimed successes have been hard to verify as the program did not establish independent criteria for reintegration and reconciliation.¹⁹⁰

The PTS program was not coordinated with the then ongoing disarmament programs (see Section 3.3) and no attempts were made to forge links between the PTS program and the 2005 drafted Action Plan for Peace, Justice and Reconciliation. The Action Plan does refer to the need to 'encourage the return and re-integration into society of all Afghans' and states that this should be done through a range of programs, including the PTS program. The PTS program, however, did not include a plan for dealing with human rights violation and war crimes; its patrons did publicly promise amnesty for all those ready to lay down

arms and accept the Afghan Constitution.¹⁹¹

Mohammed Masoom Stanikzai emphasises that Mujaddedi's controversial amnesty offer endorsed by President Karzai was in direct conflict with UN Security Council sanctions and US policy at that time.¹⁹² While the amnesty offer had no legal basis in 2005, and was inconsequential because the PTS reintegration program targeted mainly foot soldiers and low-level commanders, it can be seen as one of the many steps that laid the ground for the Amnesty Law.

5.2 The APRP and the High Peace Council: A New Start for Reintegration and Reconciliation?

The plans for a new national program that would focus on reintegration, reconciliation and ultimately peace were unveiled at the high-level conference on Afghanistan in London on 28 January 2010.¹⁹³ The Afghan government's strategy of establishing a High Peace Council to oversee the implementation of the APRP was approved and launched at the government's Peace Jirga in June 2010. The National Victims' Jirga (discussed in Section 4.3) was organised as a reaction to the lack of civil society and victims of war at the government's Peace Jirga, but also because of concerns that the Peace Jirga agenda would leave little room to discuss legacies of conflict and issues of accountability. The slogan promoted by the organisers of the government Peace Jirga – 'those who support peace will support the peace jirga' – also suggests the extent to which the Jirga was

¹⁸⁶ For an overview, see Semple, *Reconciliation in Afghanistan* (see FN10).

¹⁸⁷ See http://www.pts.af/index.php?page=en_Home.

¹⁸⁸ Semple, *Reconciliation in Afghanistan*, 54 (see FN10).

¹⁸⁹ Semple, *Reconciliation in Afghanistan*, 55 (see FN10). See also Matt Waldman, *Golden Surrender: The Risks, Challenges and Implications of Reintegration in Afghanistan*. Afghanistan Analysts Network, Discussion Paper 03/2010.

¹⁹⁰ Semple, *Reconciliation in Afghanistan*, 55–6 (see FN10) and Nathan, 'A Review' (see FN184).

¹⁹⁴ Mojaddidi's amnesty offer did not only aim at encompassing the petty crimes of foot soldiers, but as was confirmed by President Karzai 'that offer is there to all', as quoted in Ron Synovitz, 'Karzai Confirms Amnesty Offer Is for All Willing Afghans', Radio Free Europe, May 10, 2005. See also Ashley J. Tellis, *Reconciling with The Taliban? Toward an Alternative Grand Strategy in Afghanistan*, Carnegie Endowment for Peace, 2009, 5.

¹⁹² Mohammad Masoom Stanekzai, 'Thwarting Afghanistan's Insurgency: A Pragmatic Approach toward Peace and Reconciliation', United States Institute for Peace, Washington DC, 2009.

¹⁹³ See London Conference Communique (http://www.isaf.nato.int/images/stories/File/factsheets/Documents_Communique%20of%20London%20Conference%20on%20Afghanistan.pdf).

intended to be a forum for actual debate and discussion.¹⁹⁴

Accounts from the Peace Jirga suggest that there was vivid debate in its many working groups,¹⁹⁵ but also some less-than-subtle political engineering through a 'surprise' handover of the chairmanship from Mujaddidi to Rabbani. In his conclusions, Rabani emphasised that the Jirga unanimously approved the APRP. The Jirga was perceived by many as a means to rubber stamp a plan already presented to donors in London and Washington. As Wazhma Frogh, one of the civil society delegates at the Jirga, noted, if the government has already developed the APRP and presented it to donors, 'then how important is this current debate or the Jirga in shaping those decisions that already earned millions of dollars in the London Conference'?¹⁹⁶

As opposed to the PTS, which remained a fairly marginal program implemented at a time when reconciliation with the Taliban was not yet high on the political agenda, the APRP is a large-scale, complex program governed at the national level by the High Peace Council (HPC) and implemented through a joint secretariat. The HPC's activities at the national level are mirrored by Provincial Peace and Reintegration Committees (PPRCs) at the provincial level. The five-year and close to 800 million USD program is divided into a security pillar; a governance, rule of law and human rights pillar; and a social and economic development pillar.¹⁹⁷ The three pillars hold up the APRP's three

phases of social outreach, confidence building and negotiation; demobilization; and consolidation of peace and community recovery.

Many commentators view the HPC as a rather unruly and blunt instrument for confidence-building measures and peacemaking, and the implementation of the APRP has been marred by challenges ranging from conflicting ambitions by key stakeholders of the program and resulting in an unclear relationship between the two tracks of national level reconciliation efforts and local level reintegration efforts, failure to disburse funds, unclear guidelines for the reintegration process and inability to provide security or alternative livelihoods for reintegrees.¹⁹⁸ The program was launched before proper procedures for vetting and other formalities for reintegration were established and before alternatives for the reintegrees had been identified. As a consequence, early reintegrees in some of the less conflict-affected provinces were most likely members of illegal armed groups rather than members of the Taliban or other anti-government groups.¹⁹⁹ Some of the criticism against the APRP is then that it is a program for 'reintegrating local thugs' rather than those who for political reasons are opposing the government, and that this reintegration is being done without providing any option for the reintegrees other than joining the Afghan Local Police (ALP).²⁰⁰ The most damning criticism is that it is nothing but a program to 'give common criminals uniforms'²⁰¹ – while letting them keep

¹⁹⁴ Kate Clark, 'Peace Jirga Blog 2: Peace Jirga Goes to Washington: Whose Opinions Count on Reconciling Taliban?', AAN blog posted 10 May 2010 (<http://www.aan-afghanistan.org/index.asp?id=747>).

¹⁹⁵ For discussions, see AAN's reporting here: Kate Clark, Peace Jirga Blog 8: The Afghan Jungle's Big Beasts and "Lively Debate", AAN blog posted 4 June 2010 (<http://www.aan-afghanistan.org/index.asp?id=797>), and a collection of Peace Jirga tweets by two participants (see <http://www.aan-afghanistan.org/index.asp?id=798>).

¹⁹⁶ Wazhma Frogh, 'Peace Jirga (Guest) Blog 7: The First Day of the Peace Jirga', AAN blog posted 2 June 2010 (<http://www.aan-afghanistan.org/index.asp?id=794>).

¹⁹⁷ 'Afghanistan Peace and Reintegration Program', programme document, National Security Council / Disarmament and Reintegration Commission, Kabul, July 2010. For an overview of the technical support to the program, see <http://www.isaf.nato.int/subordinate->

[commands/afghanistan-peace-and-reintegration-program/index.php](http://www.isaf.nato.int/subordinate-commands/afghanistan-peace-and-reintegration-program/index.php) and http://www.undp.org.af/WhoWeAre/UNDPinAfghanistan/Projects/psl/prj_aprp.html.

¹⁹⁸ Deedee Derksen, 'Impact or Illusion? Reintegration under the Afghanistan Peace and Reintegration Program', United States Institute for Peace, Washington DC, 2011; and Deedee Derksen, 'Peace from the Bottom-Up? The Afghanistan Peace and Reintegration Program', PRIO Paper, Oslo, September 2011.

¹⁹⁹ Derksen, 'Peace from the Bottom-Up?' (see FN198).

²⁰⁰ For related analysis from Khas Uruzgan, see <http://aan-afghanistan.com/index.asp?id=3336> and <http://aan-afghanistan.com/index.asp?id=1846>.

²⁰¹ Author's interview with Afghan civil society activist, August 2012. An analysis of the Afghan Local Police conducted by the Peace Training and Research Organization (PTRO) showed that reintegrees often come forward with the expectation that they will be enrolled into ALP. PTRO's study in Bagdhis suggested that 'almost all the groups that have come forward have

their weapons. The challenges have been such that a mid-term evaluation found that 'APRP delivery is too slow and uneven to be allowed to continue without a determined effort to improve performance and delivery'.²⁰² Technical shortcomings of the APRP could of course eventually, as is noted by Deedee Derksen, be solved, but 'it seems clear that the lack of a coherent political approach may prove to be the major limitation in the APRP. In the attempt to roll out the program quickly, difficult political issues were ignored'.²⁰³ Some of these political issues are the limits of the amnesty provision and the establishment of a grievance resolution framework.

The APRP Rule of Law, Governance and Human Rights Pillar emphasises that '[in] order to ensure the protection of human rights, APRP will be open, transparent, and compliant with the laws and Constitution of Afghanistan and Afghanistan's international treaty obligations'.²⁰⁴ As noted in Section 3.4 an inbuilt contradiction exists between Afghanistan's international legal obligations that demand prosecution of war crimes and gross human rights violations on the one hand and the Amnesty Law on the other. As opposed to being 'transparent' about this conflict, the APRP complicates the situation by refraining from defining the limits of amnesty under Afghan laws and Afghanistan's obligations under international law. Instead it introduced another – equally undefined concept – that of 'political amnesty'. According to the APRP,

a legal framework for political amnesty and forgiveness will be set by the Government, in consultation with the justice sector, respecting Afghan laws, Constitution and treaty

obligations, and the Afghan peoples' desire for peace.²⁰⁵

According to the APRP, a legal team established under the Joint Secretariat was to 'align the terms of political amnesty and grievance resolution/*afwa* with the Afghan constitution and existing domestic counter terrorism and criminal legislation'.²⁰⁶ In practice, no substantial progress was made in the first years of its operation to define the extent of amnesty under the APRP. As noted by Deedee Derksen, 'If the reintegrating commander and his men agree to respect the Afghan Constitution and renounce violence and terrorism, they are in theory eligible for political amnesty, but to date [2011] there is no detailed amnesty policy to define the parameters of this status. Western and Afghan officials have been reluctant to tackle this politically sensitive issue, which one describes as an '800 pound gorilla sitting in the room', and another refers to as a "Pandora's box which can kill the program"'.²⁰⁷

Some aspects of the extent of amnesty under the APRP were addressed in a joint order published by the National Security Council in June 2012.²⁰⁸ However, the joint order only emphasised that individuals who have been convicted for crimes should not use the APRP's amnesty to evade punishment; i.e., the APRP should not be used as a springboard for releasing possible reintegrees from prison, especially not in cases where these reintegrees have been convicted for both conflict-related and common crimes. The joint order emphasises that the PPRCs are to coordinate with judicial entities at the provincial level to ensure that this does not become an amnesty program for anybody and everybody.²⁰⁹ While the distinction between conflict- and non-conflict-related crimes

stated wishes to be given a checkpoint, arms and some control over their local areas' (see [http://www.ptro.org.af/images/stories/ptro_docs/Afghan%20Local%20Police%20\(ALP\).pdf](http://www.ptro.org.af/images/stories/ptro_docs/Afghan%20Local%20Police%20(ALP).pdf)). Another analysis of reintegration in Bagdhis emphasised that the reintegrees were only symbolically disarmed, but actually got their weapons back (see <http://www.aan-afghanistan.org/index.asp?id=2052>).

²⁰² 'Mid-term Evaluation of the Afghanistan Peace and Reintegration Program', 19 February 2013.

²⁰³ Derksen, 'Peace from the Bottom-Up?', 23 (see FN198).

²⁰⁴ APRP Program Document, Executive Summary, 2.

²⁰⁵ APRP, 'Mid-term Evaluation', 15 (see FN202).

²⁰⁶ APRP, 'Mid-term Evaluation', 15 (see FN202).

²⁰⁷ Derksen, 'Peace from the Bottom-Up?' 15 (see FN198).

²⁰⁸ Joint Order, National Security Council of the Government of the Islamic Republic of Afghanistan, June 2012.

²⁰⁹ One of the challenges raised against the APRP, similar to that raised against the PTS, is that assessing whether the reintegrees were actively fighting insurgents has been difficult. Derksen, 'Impact or Illusion?' (see FN198) and Derksen, 'Peace from the Bottom-Up?' (see FN198).

is important, the joint order provides no guidance about which conflict-related crimes can be given amnesty or to whether APRP's notion of 'political amnesty' actually amounts to legal amnesty that would provide reintegrees immunity from prosecution.

The lack of progress in defining the extent of amnesty under the APRP has several consequences. First, it can be assumed that the APRP will provide a broad amnesty similar to that provided by the Amnesty Law adopted in 2008. This prospect should give the program's donors cold feet because the Amnesty Law's blanket amnesty is not compatible with international law. Second, the lack of clarity has been disturbing for potential reintegrees as they cannot feel confident that they will be immune from prosecution or will be taken off ISAF target lists.²¹⁰

Progress has been equally slow on establishing a grievance resolution framework. Stage one of the APRP, which focuses on social outreach, confidence building and negotiations, also includes a component of grievance resolution stating that:

Where necessary, community, district and provincial negotiations and grievance resolution will be undertaken, facilitated by mediators identified by the affected parties, such as, combatants, communities (men, women and minorities) and victims of the conflict. Where grievances are with the Government, it is likely that combatants and/or communities will prefer to nominate a *Shaks-e Sawoomi* [third person] to facilitate discussion and confidence-building.²¹¹

The APRP resolution will focus on 'grievances that are creating armed resistance and violence and those linked to dissatisfaction with governance'. In cases where grievances cannot be solved

at the local level, the joint secretariat will 'facilitate the establishment of an independent Ombudsman'. At the time of writing, no formal framework for grievance resolution had been adopted (although drafts of a grievance-resolution framework were shared with the authors). Discussions with close observers of the APRP process suggest the grievance resolution component has been largely overlooked.²¹² There is then no uniform approach for channelling and addressing grievances of the insurgents and the communities that support them, or for addressing the grievances that victims may have with insurgents – or with the government. In practice, the APRP program neither protects nor offers a resolution to the reintegrees or to those who may have grievances with the reintegrees or with the government.

6 CONCLUSIONS

The burden of the past continues to hinder Afghanistan's transition to stability and peace. This legacy constitutes what Barnett Rubin described as a 'decades-long succession of crimes that constitute a virtual catalogue of all that is supposedly forbidden, but remains prevalent, in human affairs.'²¹³ And yet, while the history of who-did-what-to-whom continues to feed grievances and fuel hostilities, through rounds of peace negotiations covering three decades, no party to Afghanistan's conflict has ever demanded justice for past crimes, even if many Afghans have. Some of the relatives of men buried in mass graves during the Amin era, or the Karmal era, or other phases of the war have sought information about how they died and who was responsible, but again, many have not. Is there support for transitional justice among Afghans? That depends on how you ask, and whom.

²¹⁰ Derksen, 'Peace from the Bottom-Up?', 15 (see FN198). That the promise of amnesty under the APRP was 'vague and unclear' and only based on a government decision was raised in the APRP mid-term evaluation as a factor that undermined the legitimacy of the program and also the possibilities of the reintegrees to actually rely on the promise. See APRP, 'Mid-term Evaluation', 15 (see FN202).

²¹¹ APRP, 'Mid-term Evaluation', 9 (see FN202).

²¹² Interviews with diplomats, April 2012.

²¹³ Barnett R. Rubin, 'Transitional Justice in Afghanistan,' The Anthony Hyman Memorial Lecture, School of Oriental and African Studies, University of London, 3 February 2003 (<http://www.soas.ac.uk/ccac/events/anthonyhyman/file25446.pdf>).

This report has focused on how the legacy of war crimes and human rights violations has been dealt with in post-2001 Afghanistan. Looking at key moments in the past decade's state-building process, including the Bonn conference of December 2001, the implementation of the Bonn Agreement in the years thereafter, the partial disarmament process and the adoption of the Amnesty Law, we have showed how a politics of accommodation and priority for short-term stability weakened the state-building process, as well as prospects for peace. At the same time, efforts to promote transitional justice through national consultations, the adoption of a national action plan, and documentation as a possible precursor to truth-seeking and memorialisation have made minimal progress. At this writing, transitional justice is off the agenda; only on rare occasions does a civil society representative raise the issue.

And yet many of the concerns Afghans and Afghanistan's international allies have for the integrity of the Afghan state after 2014 stem from the practice of impunity and the lack of accountability. The error made in 2001 was to see stability and justice as an either-or proposition. While it was not possible, and may never be possible, to pursue criminal accountability for the most-powerful of the perpetrators, that is not the sole aim of transitional justice, particularly in a country that not only still faces violent conflict, but where the transition came about through military intervention. The crimes committed during the years of conflict in Afghanistan were not only committed by individual perpetrators, or military units; they were also facilitated by institutional failures that have been replicated with some variations over three decades.

Transitional justice is still a young field, and most research has emerged from post-conflict situations. What transitional justice tools are most valuable in a society that is not yet post-conflict? As Juan Mendez discussed in his seminal work, *Truth and Partial Justice*, decisions about what to do about these crimes take place in an extremely difficult political context. While justice may not be politically feasible, seeking the truth about what happened is still vitally important, so that the people may be informed of what happened, how it

happened and who is responsible for the atrocities. The 'truth' phase of this difficult process is essential to understanding the past and to avoiding repetition in the future. In addition, an accounting of what took place is due to the victims, their families, their friends and their neighbours. Finally, essential to the process of securing redress against those who committed massive abuses is exposing their shameful conduct to public view.²¹⁴

A more consistent focus on truth and on institutional reform by the Afghan government and its international allies may have secured greater accountability and protection of civilians in the ongoing conflict. It might also have created a different starting point for the current reconciliation efforts. Ultimately, we believe that the cycle of abuse cannot be broken unless the truth is acknowledged. Forging peace after a conflict as protracted and complex as that in Afghanistan cannot be done without political accommodation of leaders with 'blood on their hands'. At the same time, a balance must be achieved, not only for the sake of victims, but also to ensure some level of transparency and accountability in new institutions. This balance was not struck in 2001 or in its aftermath.

A great deal of the blame for not pursuing accountability rests with Afghanistan's international partners. The international community's engagement on justice issues in Afghanistan has been very different from how it addressed atrocities in, for example, former Yugoslavia, Rwanda or Sierra Leone. Kabul was burning at the same time that atrocities were committed in Sarajevo, Kigali and Freetown. In response to the atrocities committed in those countries, the international community supported both costly criminal prosecutions and, at least in the case of Rwanda, local reconciliation initiatives with a clear justice component. The nature of these four conflicts is substantially different, and the outcomes mixed, but in none except Afghanistan have justice issues been so completely swept under the carpet.

²¹⁴ Juan Mendez, *Truth and Partial Justice*, New York: Americas Watch, 1991, 61 (<http://www.hrw.org/sites/default/files/reports/argen914full.pdf>).

While it is unlikely that the Afghan government or the international community will increase attention to addressing legacies of human rights violation and war crimes, other interesting comparisons show that peace can be built without an intrusive focus on transitional justice – by keeping the door open for future initiatives. For example, the Good Friday Accord on Northern Ireland lacked specific transitional justice provisions. While it acknowledged the suffering of victims of violence, and the rights of victims to remember, ‘the right to remember is not translated into any truth-commission-like mechanism, but rather into the provision of social services, support for civil society reconciliation initiatives, and the creation of a culture of tolerance.’²¹⁵ Subsequently, a number of inquiries in Northern Ireland have focused on notorious incidents such as the Bloody Sunday massacre in order to gradually establish the truth about specific events of the past.²¹⁶

Now, in the midst of escalating political tensions, ongoing violent conflict and a gradual drawdown of the international military and civil presence, efforts are being made once again to seek a political solution for the conflict in Afghanistan. Can such a process move forward without some acknowledgement of the past?

Looking at the situation in Afghanistan today, concluding that the perpetrators have won is easy. However, it is not true that Afghans want to forget the past. Or, they may wish to, but find it is not really an option for them, at least not for those Afghans whose communities have been directly affected by the conflict, who live with memories of massacres or in proximity to known but un-investigated mass graves or whose family members have disappeared.

Evoking the past and challenging those in power continue to be a precarious undertakings in Afghanistan. At the same time, trying to suppress the past has proved to be a continuing source of

grievance and potential conflict. It may be a long time, if ever, before Afghanistan is ready to initiate judicial action against those responsible for the worst crimes of Afghanistan’s 35-years of war. The horrors visited upon Afghanistan over the past three decades were not the work of any one set of individuals or any single regime. Breaking patterns of abuse that have been in place for thirty years will require institutional change and acknowledgement of the crimes that have been committed. The transition in 2001 seemed to offer the chance of a break with the past; instead the decade that followed replicated patterns of abuse already in place. Ultimately, transitional justice is about setting standards for the use of state power, and finding the means to meet them. In addition to criminal accountability, these include vetting to exclude serial abusers from public office and the police; public discussions and memorialisation of the past; documentation and symbolic acts acknowledging the victims of abuse. As Afghanistan confronts its next transition, these measures may provide the only way that the vital history of this period, and the voices of the Afghans who remember it, are not be lost.

Recommendations

- Reform of Afghan justice and security sector institutions should continue. Reforms should be minimalist and adapted to the Afghan context, but they also need to be guided by principles of transparency and accountability.
- Support the publication of the AIHRC’s conflict-mapping report and a publication strategy that allows its wide and careful dissemination inside Afghanistan and internationally with the view that the report becomes an important tool for national reconciliation.
- Define the limits of ‘political amnesty’ under the APRP. Amnesties are a necessary element of peace processes, they can serve as a ‘political carrot’ and as a tool for reintegrating those with little command-and-control responsibility, the many foot soldiers of a conflict. However, blanket amnesties are no longer accepted under international law, and they are also considered to be counter-productive to long-term stability and peace.

²¹⁵ Naomi Roht-Arriaza, ‘Transitional Justice and Peace Agreements’, International Council on Human Rights Policy Review Meeting, Role of Human Rights in Peace Agreements, Belfast, 7–8 March 2005, 6.

²¹⁶ Roht-Arriaza, ‘Transitional Justice and Peace Agreements’ (see FN215).

- Amend or revoke the Amnesty Law. The Amnesty Law is not compatible with the Afghan Constitution or Afghanistan's commitments under international law. The legality of the law is difficult to challenge because of the weakness of Afghanistan's legal system. The consequence of having a law in force that is most likely illegal is, however, that those who now believe they have been amnestied may face legal charges if the political situation in Afghanistan changes. The uncertainty in the situation is then itself a source of instability.
- Continue the work of creating a national directory of mass graves, to recognize those communities that have faced massacres and to protect the sites. Mass graves may contain evidence of war crimes and crimes against humanity and it is a violation under international law to tamper with or destroy them.
- Establish a national directory of the disappeared. To the extent possible, link this with further documentation and memorialisation efforts. Being able to inform a government authority of one's disappeared family members will provide some acknowledgement and can then be a step towards, if not justice, then healing.
- Disseminate information about the ICC's preliminary analysis, the universal jurisdiction cases and other cases where Afghans or foreigners have been held accountable for war crimes committed in Afghanistan. This may place some constraint on impunity and limit the travel of some individuals.
- Ensure that harm and violations suffered by the civilian population becomes a key issue for all parties, both in the process towards and during possible peace negotiations.

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