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Transitional Justice and Prospects for Peace in Afghanistan

EXECUTIVE SUMMARY

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, a country which has been at war for 35 years and whose record of past human rights violations and war crimes include atrocities on a vast scale.

This new report discusses transitional justice in the context of the past decade's stabilization and peacebuilding interventions. The authors navigate between polarized views of the conflict: human rights arguments that transitional justice is an essential component of a peace process in competition with ostensibly *realpolitik* arguments that such issues are secondary (or counter-productive) to efforts to create stability. The truth, they argue, lies somewhere in between. Moreover, the length and complexity of the Afghanistan conflict have complicated peace efforts, feeding conflicting narratives about the war and the identities of its victims, villains and heroes. Many Afghans know only what they have directly experienced and not what people in other areas of

the country have suffered. It is for these reasons that documenting and telling the truth about the conflict are crucial if Afghanistan is ever to break the cycles of violence that have defined the last 35 years.

The report includes an overview of war crimes and human rights violations from the Communist putsch in 1978 that ignited the war to the continuing conflict of the present day. Spanning 35 years of Afghanistan's history, the report details violations, including the tens of thousands of disappearances and summary executions that characterized the early reign of the People's Democratic Party of Afghanistan (PDPA): entire families, religious elites, landowners, political rivals, ethnic minorities and anyone else perceived to be a potential opponent of the new regime was targeted. It describes the systematic torture under the new intelligence agency (KhAD) that defined the Soviet occupation, and the widespread indiscriminate bombings in the countryside that drove millions of refugees into Iran and Pakistan during the 1980s. The report recounts the killings, rape and other atrocities carried out by all parties during the civil war of the 1990s, and the massacres, arbitrary arrests, executions and other abuses carried out by the Taliban. Abuses have continued in the post-2001 era, including arbitrary

arrest and torture carried out by Afghan government forces and US and Coalition troops. As in earlier phases of the war, the past decade has been particularly devastating for civilians. A resurgent Taliban began attacking aid groups in 2003 – a notable case was the murder of an ICRC engineer in March 2003 – and assassinating civilians believed to be linked to the government. Beginning in 2006, they began carrying out large-scale attacks, including suicide bombings that have killed several hundred civilians each year. No group has claimed responsibility for some of the most lethal insurgent attacks that have killed large numbers of civilians.

The abuses have been of such a scale and gravity that it seems unthinkable that an Afghan government or the international community would not seek to acknowledge the suffering and provide some redress for the victims. This is particularly so because Afghans and many non-Afghans viewed the late-2001 transition as the end of the conflict and, thus, a genuine opening when such an accounting would be possible. In hindsight, it was only a pause. Coming as it did a few decades after efforts to address legacies of war crimes and human rights violations in countries ranging from South Africa, Argentina, the former Yugoslavia, Rwanda and East Timor, the US-led intervention raised high expectations among Afghans. Of course, in none of these transitions from authoritarian to democratic governance, or from conflict to peace, was addressing legacies of past abuses an easy or an uncontested process. However, through the experiences of these and other transitions the realisation has increased that addressing legacies of conflict not only provides victims with redress and helps resolve underlying grievances; it can contribute to building stronger institutions and a more-sustainable peace.

By 2001, the concept of transitional justice had developed into a framework for the often-temporary judicial and non-judicial mechanisms that 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, and 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.

Yet, in Afghanistan, for most of the post-2001 period, neither the Afghan government nor its international allies showed any serious commitment or urgency in grappling with concerns about transitional justice or investing 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 had to wait.

In the years that followed, the 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) published the results of a national consultation. *A Call for Justice* showed that the majority of those consulted perceived that they or their family members had been victims of human rights violations and that Afghans wanted those known to have committed abuses prosecuted or removed from power. Together with the UN and the government of Afghanistan, the AIHRC drafted a five-point government action plan focusing on transitional justice that included elements of documentation, institutional reform, memorialisation and accountability. Although the Karzai administration formally adopted the plan, it implemented little of it and finally, for all intents and purposes, shelved it. Re-adoption of the action

plan was included as one of the benchmarks of the priority plan for the implementation of the Afghanistan National Development Strategy (Kabul Conference 2010). It has not yet been readopted.

Just how difficult it is to address the legacies of war crimes and human rights violations is exemplified by the way two major documentations of war crimes in Afghanistan have failed to see the light of day. In 2005, the United Nations chose not to release its report mapping war crimes between 1978 and 2001, allegedly because it feared the release of the report would jeopardize the security of UN personnel in Afghanistan. Over the past year, the publication of AIHRC's long-awaited conflict mapping report – which also covers 1978 to 2001 – has been much debated. Its publication remains in the balance. The concerns around the release of these reports shows the extent to which Afghanistan's conflict history remains contested and how efforts to document this history tend to be read through a lens of political manipulation.

Another telling example is the media debate in 2012 around the history curricula and the history books that omit detail about the decades of conflict. Discussions with educators in the non-governmental sector and public schools showed a very 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'; i.e., it is futile to try to hide the truth.¹ A similar point was made earlier by a teacher who participated in a commemoration ceremony at a mass grave site at Pul-e Charkhi who asked rhetorically: 'Have you ever met a child who tells you that his father and grandfather are lying?'² In other words: every Afghan is part of the conflict, they all have grievances and an axe to grind with somebody and a tendency to defend their 'own people'. Until parents have an opportunity to discuss the events of the past and work toward real national reconciliation, they will continue to pass on their own histories and hatreds as a poisoned gift to their children.

¹ AAN Interview with teacher, Kabul, 2012.

² Author interview with former school teacher, Pul-e Charkhi, 10 December 2010.

Instead of using truth-telling as a mechanism for overcoming legacies of conflict and building national reconciliation, the Afghan government and its allies have allowed impunity to become entrenched. In 2007, the Afghan parliament adopted a blanket amnesty law (the National Reconciliation, General Amnesty and National Stability Law) that, with few exceptions, provides amnesty for all those involved in the past decades of conflict in Afghanistan. It took legal effect when it was published in the Official Gazette in 2008. The notion that conflict in Afghanistan can only be ended by providing amnesty has been strengthened by the reintegration and reconciliation programs, not least by the ongoing Afghanistan Peace and Reconciliation Program (APRP). The APRP's program document explicitly states that it should not be perceived as an amnesty program, but rather a program about addressing underlying grievances to the conflict. Yet, two years into its implementation, neither a clear definition of the limits of amnesty nor a consistent approach to grievance resolution exists. 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 institutional checks on the power of those accommodated in this way.

The consequences of the emphasis on short-term security are clear. At the time of writing, Afghanistan has neither stability nor justice. However, would a more robust approach to transitional justice have achieved a different end?

Almost by definition, transitional justice processes are crafted in situations where peace is fragile, the stakes are high, compromises inevitable and results uncertain. When they are negotiated as part of a deal to avert further conflict by persuading a ruling party to step down, or 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, former commanders or combatants are unlikely to 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 only for the past wrongs of the defeated 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.

The 2001 US-led intervention was seen at the time as ending not only Taliban rule but also the decades-long war and as giving Afghanistan a fresh chance to reflect and recover. Actually, it was 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.

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 ultimately about building accountability into the institutional reform and peace-building processes. As the authors noted at the outset, one of the foremost aims of transitional justice is to prevent a recurrence of the atrocities associated with past conflicts or the repressive policies of former regimes. 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 that threatens to erupt in renewed large-scale conflict. Yet, this objective is too often obscured by heated debate over the value of truth commissions and criminal prosecutions.

Evoking the past and challenging those in power continues to be a precarious affair 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 any judicial action against those responsible for the worst crimes of its 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. Instead, every regime came to power claiming to restore justice, but instead abused state power against its perceived opponents. While the transition in 2001 seemed at first to offer a break from the cycles of war, instead the decade that followed re-established a power structure that replicated earlier patterns of abuse. Breaking these patterns will require institutional change and acknowledgement of the crimes that have been committed. 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 means include vetting to exclude serial abusers from public office and the police, public discussions and memorialization of the past, documentation and symbolic acts to acknowledge the victims. As Afghanistan confronts its next transition, these measures may provide the only way that the vital history of this period, and the voices of Afghans who remember it, are not 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.

- 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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The Afghanistan Analysts Network (AAN) is a non-profit, independent policy research organisation. It aims to bring together the knowledge and experience of a large number of experts to inform policy and increase the understanding of Afghan realities.

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