



# The State of Transitional Justice in Afghanistan

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## Introduction

Through 30 years of conflict, the people of Afghanistan have witnessed disappearances, torture, mass executions, civil conflict, internal displacement and forced migration to Pakistan, Iran and other countries. Almost every Afghan has a story of struggle, suffering and loss to tell.<sup>1</sup>

As conflicts end, nations and international actors confront the challenge of “transitional justice” to address the legacy of large-scale wartime abuses, to ensure accountability, serve justice, reconcile former enemies and achieve lasting peace. Developments in international law reflect a growing international consensus that genocide, war crimes and crimes against humanity should not go unpunished.<sup>2</sup> Diplomats and negotiators involved in ending violent disputes acknowledge more frequently that ignoring war crimes can perpetuate a culture of impunity that can encourage future abuses.<sup>3</sup>

Despite the scale and length of the violence, there has been no accountability in Afghanistan for past crimes between any of the phases of war. Since the signing of the Bonn Agreement in 2001, no concerted efforts have been made by the Government of Afghanistan (GoA) to implement a process of transitional justice in the country. Instead, government figures and some of the most influential international actors have argued that implementing justice could disrupt the uneasy peace.<sup>4</sup>

<sup>1</sup> During nationwide consultations conducted by the Afghanistan Independent Human Rights Commission (AIHRC), nearly 70% of those interviewed said they or their immediate families had been direct victims of serious human rights violations during war. AIHRC, *A Call for Justice: National Consultation on Past Human Rights Violations in Afghanistan* (Kabul: AIHRC, 2005), 8.

<sup>2</sup> The creation by the UN of ad hoc war crimes tribunals, the establishment of the International Criminal Court (ICC), and the disposition of the judiciaries of some countries to act extraterritorially by applying universal jurisdiction creates a legal basis for acknowledging past crimes and holding people to account.

<sup>3</sup> Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,” in *Law and Contemporary Problems* 59, no. 127 (1996): 127.

<sup>4</sup> An International Centre for Transitional Justice (ICTJ) representative, Kabul, 23 November 2009, said: “2002 to 2005, the view among key policy actors was that any focus on justice and the rule of law would undermine security.”

Consequently, some alleged perpetrators of war crimes still dominate government structures. The short-term logic of ignoring the past to bring an end to violence can perhaps be appreciated. Nevertheless, the simple truth is that the conflict has not ended. Transitional justice is not only about addressing past crimes, but about dealing with continuing impunity, which delegitimises and hinders governance and counter-insurgency efforts.

This policy note draws on interviews conducted as part of ongoing AREU research on transitional justice, and focuses on the recent policy approaches, activities and aspirations of three key actors: the Afghan government, the international community (diplomatic and civil society), and Afghan civil society. This overview of the current policy context highlights that transitional justice issues are slipping off the political agenda in Afghanistan, without reasonable justification.

## Focusing on the people of Afghanistan

Afghan people have never experienced systematic justice for war crimes. Instead, the victims see former perpetrators of human rights violations in government, in their communities, and on television. Moreover, Afghanistan’s victims remain largely unacknowledged by the government, although civil society organisations have expressed support for an official process to commemorate the victims of conflict. For example, after

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### About AREU

The Afghanistan Research and Evaluation Unit’s mission is to inform and influence policy and practice through conducting high-quality, policy-relevant research and actively disseminating the results, and to promote a culture of research and learning.

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the discovery of a mass grave in Badakhshan in 2007, President Karzai publicly promised to erect a memorial at the site. When this was created in 2008, it was a civil society initiative with no government involvement.<sup>5</sup> The creation of a War Museum in Badakhshan at the end of 2009 was also led by AIHRC and not the government.

Ignoring victims' suffering and grievances may ultimately have serious long-term consequences. In Afghanistan, some international experts argue of evidence that impunity and a lack of faith in justice institutions act as drivers of the insurgency.<sup>6</sup> If Afghanistan's victims have been forgotten, it is their voices that need to be brought into the discussion. AREU's "Legacies of Conflict in Afghanistan: Justice, Reconciliation and Ways Forward" project seeks to contribute to the fragile transitional justice process by exploring through in-depth qualitative research what people really mean by "justice," "peace" and "reconciliation." In doing so, it aims to collect ideas in order to identify strategies and mechanisms that could allow communities to move forward. Research, which began late 2009, will take place in four provinces (Kabul, Bamiyan, Badakhshan and Ghazni) and conclude by end-2011.

Preliminary findings show that Afghans, even those from a single community, have varied perceptions of and desires for justice, reconciliation and peace. The international community has often transported terms into Afghanistan without giving enough consideration to what these notions may mean in the Afghan context, and how they sit with Afghan values and culture.<sup>7</sup> Identifying ways to move forward thus requires ongoing consultation with the general Afghan population, who should be the key actors in any future accountability and reconciliation processes.

## The policy environment

Afghanistan has both a national *Action Plan for Peace, Reconciliation and Justice in Afghanistan* (2005) (the "Action Plan") and a *Law on National Reconciliation, Public Amnesty and National Stability* (2007) (the "Amnesty Law").<sup>8</sup>

<sup>5</sup> Nader Nadery, Commissioner, AIHRC.

<sup>6</sup> See Frank Ledwidge, "Justice and Counter-Insurgency in Afghanistan: A Missing Link," *RUSI Journal* 154, no. 1 (Feb 2009); and ICTJ, "Afghanistan: Submission to the Universal Periodic Review of the UN Human Rights Council Fifth Session: May 4-15" (3 November 2008).

<sup>7</sup> For example, see Anna Larson, *Toward an Afghan Democracy* (Kabul: AREU, 2009).

<sup>8</sup> Official Gazette no. 965, 3 December 2008 (SY13/09/1387). The Amnesty Law was passed in 2007 but did not appear in the Official Gazette until the end of 2009, where it is dated 2008.

Hotly debated, the Action Plan was narrowly adopted by the Cabinet, pushing transitional justice onto the political agenda of the time.<sup>9</sup> It was subsequently included in the 2006 *Afghanistan Compact* and the 2008 *Afghanistan National Development Strategy* (ANDS). To date, the Action Plan has not been implemented.<sup>10</sup> The deadline for achieving the activities outlined in it expired in March 2009 and President Karzai subsequently refused a request from the Afghanistan Independent Human Rights Commission (AIHRC) and civil society groups to extend its deadline. Moreover, AREU interviews with national and international actors demonstrated that awareness of the plan within the ministries responsible for its implementation and among some members of the international diplomatic community is weak. Nevertheless, many international and national respondents still consider that it provides a framework for civil society and the international community's support for transitional justice. As one international civil society respondent remarked, "As long as the activities are not enforced, the Action Plan is still relevant."

The Action Plan rejected amnesty, but it failed to serve as a safeguard against the passing of the Amnesty Law by Afghanistan's National Assembly in 2007.<sup>11</sup> This had enormous political significance, serving as a clear signal of the continuing power of alleged human rights violators, a message that became even clearer when the law was published in the *Official Gazette* in December 2009. The law does uphold the right of people to bring charges against individuals in court (which is unlikely given the victim/perpetrator power dynamics) but, in the absence of a complaint by a victim, Afghan authorities are prohibited from prosecuting accused war criminals. This allows the government to deflect its responsibility for investigating and prosecuting perpetrators. Moreover, as one international expert highlighted, the law complicates the implementation of transitional justice mechanisms.

<sup>9</sup> The Action Plan outlined five key activities: symbolic measures, institutional reform, truth-seeking, reconciliation and accountability measures.

<sup>10</sup> The only actions taken were the creation of the Presidential Advisory Board and Victim's Day.

<sup>11</sup> This granted amnesty to "all the political wings and hostile parties who had been in conflict before the formation of the interim administration" and "those armed people who are against the Government of Afghanistan, after the passing of this law, if they cease their objections, join the national reconciliation process, and respect the constitutional law and other regulations of Islamic Republic of Afghanistan." The official Dari version is available on the Ministry of Justice website: [http://www.moj.gov.af/OGs/OfficialGazette/Browse/Dari/OG\\_0965.htm](http://www.moj.gov.af/OGs/OfficialGazette/Browse/Dari/OG_0965.htm).

## International responsibilities and transitional justice responses

Through ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The Afghan government has ratified a number of relevant treaties<sup>12</sup> and consequently should bear the primary responsibility for implementing transitional justice in Afghanistan. However, the deterioration of security has allowed arguments of “peace before justice” to increasingly dominate, pushing transitional justice and the Action Plan further off the political agenda. Moreover, the 2009 presidential election process entrenched the position of several alleged perpetrators of human rights abuses among the political elite. Despite approving and launching the Action Plan, President Karzai also appears increasingly reluctant to address the past (he recently called criticisms about the presence of war criminals in his government an “outdated issue,” claiming these were a conspiracy of the “enemies of Afghanistan”).<sup>13</sup> The new government therefore looks unlikely to address issues of impunity and accountability for war crimes.

Although some governments—specifically the Norwegian and Dutch—have at times used international platforms to highlight the importance of transitional justice and the Action Plan,<sup>14</sup> many of Afghanistan’s international partners remain conspicuously silent on issues of accountability for war crimes, despite previously acknowledging the dangers of doing nothing in response to war crimes and related atrocities in other countries.<sup>15</sup>

<sup>12</sup> Under the Bonn Agreement, Afghanistan is bound by the Geneva Conventions of 1949; the Genocide Convention of 1948; the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968; the International Covenant on Civil and Political Rights; and the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment of 1984. Afghanistan also ratified the Rome Statute in February 2003, and consequently falls under the jurisdiction of the International Criminal Court (ICC).

<sup>13</sup> Afghanistan Watch, Afghan Media Monitoring Newsletter No. 6, 31 September 2009, [http://www.watchafghanistan.org/files/Newsletter\\_06\\_English.pdf](http://www.watchafghanistan.org/files/Newsletter_06_English.pdf).

<sup>14</sup> At the 2009 Human Rights Council’s Universal Periodic Review, Norway, Mexico and Morocco requested that the GoA implement the Action Plan, while the Netherlands and the Czech Republic highlighted the importance of transitional justice. In October 2009, the Dutch government even withdrew its funds in support of the justice sector, citing insufficient progress on implementing the Action Plan.

<sup>15</sup> Examples can be seen in the creation of an International Criminal Tribunal for the former Yugoslavia by a UN Security Council Resolution in 1993, followed by the establishment of the International Criminal Tribunal for Rwanda in 1994.

International civil society has been working to keep the issue of transitional justice alive. Ongoing efforts in supporting processes documenting war crimes and human rights abuses and on identifying and preserving mass graves are part of policies that confront the past. An accurate accounting of past crimes can make it embarrassing and difficult for official actors to deny them, applies pressure to remove perpetrators from power, and raises awareness toward preventing future abuse.<sup>16</sup> International experts are helping build domestic capacity to document and register mass graves in an attempt to secure and investigate them, and where possible to stop the unprofessional destruction of evidence. In Badakhshan, when the mass grave presumed to date from the communist era was discovered, the local community excavated it improperly, making forensic analysis impossible.<sup>17</sup> As one international expert explained, in a country where little effort has been put into credible truth-finding, the international community is helping with the collection and preservation of evidence so it is available if and when Afghans are ready to decide what transitional justice mechanisms they want.<sup>18</sup>

International respondents explained how the politicisation and marginalisation of transitional justice by the Afghan government and its international partners prompted international energy to shift away from the government and focus primarily on Afghan civil society. A key aim of some international actors is now to build the capacity of civil society so they can push a transitional justice agenda themselves. UNAMA, the Delegation of the European Union (EU), and a range of international NGOs conduct and support a variety of workshops, discussions and training sessions designed to develop the capacity of Afghan organisations in advocacy, media awareness and transitional justice related issues. These international actors are, however, still subject to criticisms by Afghan civil society of insufficient support and transitional justice is often not high on their agendas. Their so-called “seasonal approach” is, in the opinion of one international actor, weakening civil society organisations and reducing their trust in the process.

### The new voice: Afghan civil society

The creation of a Transitional Justice Coordination Group (TJCG) in 2009, bringing together over 20 representatives of Afghan civil society organisations

<sup>16</sup> “Final Report on Civil Society,” Transitional Justice and Documentation Workshop, Kabul, 17-19 February 2009. The workshop was organised by the AIHRC and supported by ICTJ, the Open Society Institute (OSI) and the United States Institute of Peace (USIP).

<sup>17</sup> Author interview, international expert, 6 December 2009.

<sup>18</sup> Author interview, international expert, 6 December 2009.

(CSOs), has helped to strengthen the individual voices of organisations. With international support, Afghan civil society has consequently grown increasingly confident and strategic, using media and key events as a platform to raise transitional justice issues.

Several Afghan NGOs and AIHRC work to raise awareness about transitional justice, document past and present human rights violations, and try to ensure past conflict and victims' suffering are not forgotten. Victims' support networks build communities of interest, a travelling theatre elicits reflection on the legacy of impunity, and victims have related their personal stories and testimonials, which have appeared in some newspapers and been aired on radio programmes. AIHRC's recent documentation project has mapped human rights violations in Afghanistan from 1978-2001 in every province.<sup>19</sup>

Generally speaking, however, these efforts have gone unheeded by the GoA and the international diplomatic community. Afghan media also remains largely quiet about transitional justice.<sup>20</sup> Further, capacity among both media and CSOs to research, understand and inform the public about the nation's experiences during conflict remains limited. Only a few organisations have sought to develop expertise on specific issues, such as victims' mobilisation, documentation, awareness-raising and training. Moreover, some civil society respondents described how internal divisions and lack of coordination within the TJCG is weakening the effectiveness of their initiatives.

Most civil society initiatives remain restricted to Kabul and outreach to the regions has been limited, partly as a result of prevailing security concerns. According to the director of an international NGO, the significant danger that is present in the provinces means that the plan to expand transitional justice projects there is currently stalled. International actors consequently highlighted that an ongoing challenge will be for Afghan and international actors to find ways to connect regionally and in the provinces.

Of further concern is the lack of interaction between CSOs (international and Afghan) working on transitional justice and the government. To substantively address the past, political will needs to be developed and political institutions will need to be involved. It remains crucial for actors advocating a transitional justice agenda to bring the government back into the dialogue, even if it means first only putting on paper what its responsibilities are. The challenge is to find ways of doing so.

<sup>19</sup> Author interview, Nader Nadery, AIHRC.

<sup>20</sup> Afghanistan Watch's media monitoring newsletter covers issues from negotiations with the Taliban to transitional justice.

## Looking ahead: Reintegration, reconciliation and transitional justice

A current emphasis of the government and the international community is on reconciliation with the Taliban and the reintegration of its fighters. President Karzai unveiled an "effective, inclusive, transparent and sustainable national Peace and Reintegration Programme" at the January 2010 London Conference, offering work, education, pensions and land to insurgents who defect.<sup>21</sup> Representatives of the governments present in London said they would back the programme, and plans were made for a "Peace Jirga" from 2-4 May, followed by a Kabul Conference. The Amnesty Law, which appeared in the month before the London Conference, could play a key role in any deal.

What repercussions could this have for transitional justice? At present, the programme does not address the issue and, as such, fails to acknowledge the dangerous legacy of impunity in Afghanistan. It also ignores ongoing International Criminal Court enquiries into atrocities committed in Afghanistan since 2003 by the Taliban (and foreign forces). The approach could allow Taliban perpetrators of war crimes back into communities with no attempt to hold them to account and with little concern for the consequent impact on respect for the rule of law.

It is doubtful whether this type of policy should even be classified as potentially engendering reconciliation. To ensure a lasting and genuine peace, reconciliation is often recognised as transforming the behaviour and attitudes of former enemies to create new relationships based on mutual trust. Reconciliation is consequently a process that might take decades. The current policy is perhaps better explained as part of a conflict resolution strategy. It could be a *starting point* to create the conditions for peace and reconciliation, but envisaging that it could *create* reconciliation might mean the sweeping aside of longer-term policies that work toward creating mutual trust and new understandings between communities. Reconceptualising the new programme as part of an ongoing conflict resolution strategy might help build a clearer picture of what its intentions are.

The failure to address the legacy of impunity in Afghanistan is contributing to ongoing insecurity. Transitional justice needs to be brought back onto the agenda. Those supporting it need to find new ways to connect with and involve the GoA, while policymakers need to consider the implications of perpetuating impunity on the long-term stability of Afghanistan.

<sup>21</sup> London Conference communiqué, <http://afghanistan.hmg.gov.uk/en/conference/communique>.