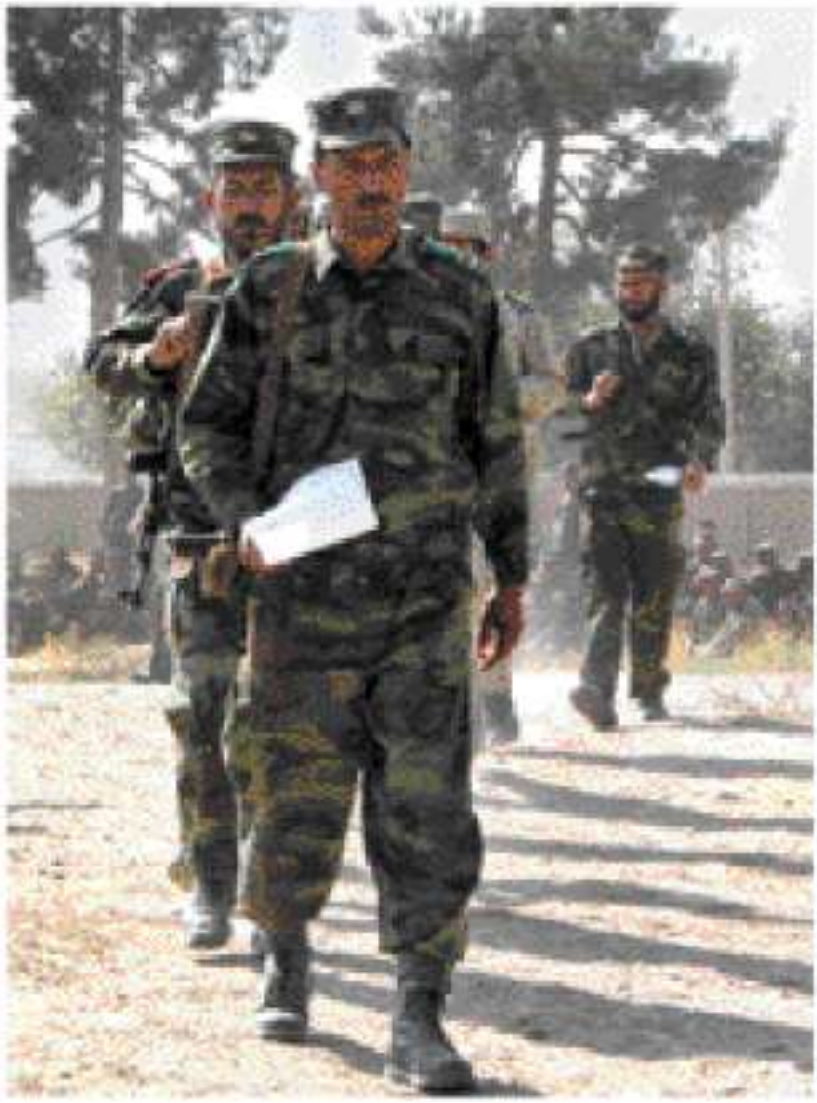
Issues Paper Series

Ending Impunity and Building Justice in Afghanistan



Rama Mani

Afghanistan Research and Evaluation Unit

December 2003

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Issues Paper Series

Ending Impunity and Building Justice in Afghanistan

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Funding for this study was provided by the governments of Sweden and Switzerland, and from the United Nations Assistance Mission in Afghanistan.

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About the Author

Rama Mani is currently a visiting scholar at the Geneva Centre for Security Policy. She has worked previously as the senior strategy adviser to the Centre for Humanitarian Dialogue in Geneva, the Africa strategy manager and policy adviser for Oxfam GB based in Uganda and Addis Ababa, and for the Commission on Global Governance in Geneva. She serves on the advisory board of the GFN-SSR.

About the Afghanistan Research and Evaluation Unit (AREU)

The Afghanistan Research and Evaluation Unit (AREU) is an independent research organisation that conducts and facilitates action-oriented research and learning that informs and influences policy and practice. AREU also actively promotes a culture of research and learning by strengthening analytical capacity in Afghanistan and by creating opportunities for analysis, thought and debate. Fundamental to AREU's vision is that its work should improve Afghan lives. AREU was established by the assistance community working in Afghanistan and has a board of directors with representation from donors, UN and multilateral organisations agencies and non-governmental organisations (NGOs).

Current funding for the AREU has been provided by the European Commission (EC), the United Nations Assistance Mission in Afghanistan (UNAMA) and the governments of Sweden and Switzerland. Funding for this study was provided by Sweden, Switzerland and UNAMA.

Acknowledgements

I feel privileged and fortunate for the overwhelming hospitality, candour and generosity with which I was greeted without exception by Afghans across the country, whether high ranking officials or ordinary civilians in rural and urban areas.

I am also grateful for and most appreciative of the insights and honesty of dedicated and committed members of the international community, particularly the United Nations Assistance Mission in Afghanistan (UNAMA). I wish to thank all the staff of UNAMA both in Kabul and in the provinces, who were always accessible and willing to meet with me, however interminable their day. I thank the Kunduz UNAMA staff in particular for facilitating my stay, particularly Mr. Sergei Illianov.

I extend my appreciation to Dr. Timorshah Alizoi for his patient and able translation, and genuine commitment both to his task and to the aims of this study. I thank Mr. Sultan Ansari and Mr. Sharif Mohammed for their assistance in Mazar-e-Sharif, and Mr. Ismael Ansari for his assistance and occasional translation in Kunduz.

I wish to express my deep gratitude to AREU staff for their support and good cheer. In particular I thank Kathleen Campbell for her untiring support and Andrew Wilder, Joyenda and Rafi Tokhi for their able leadership of AREU and their warm and personal assistance to me in my work. I thank Christina Bennett and Thomas Muller for editing, communications and media support, and to Haji Amman, Nasrullah, Ismat and Loqman in particular for their good-hearted driving. I also thank Ahmed Gholam at Lund University for his exhaustive email Afghan news briefings, and also his helpful advice.

In closing, I thank most gratefully all the people who were kind enough to meet with me, whether Afghans or internationals. I regret that I cannot name each of you individually, in the interests of confidentiality and security. Instead, I pay a silent tribute to each of you for your courage and for your determination to make this country whole again.

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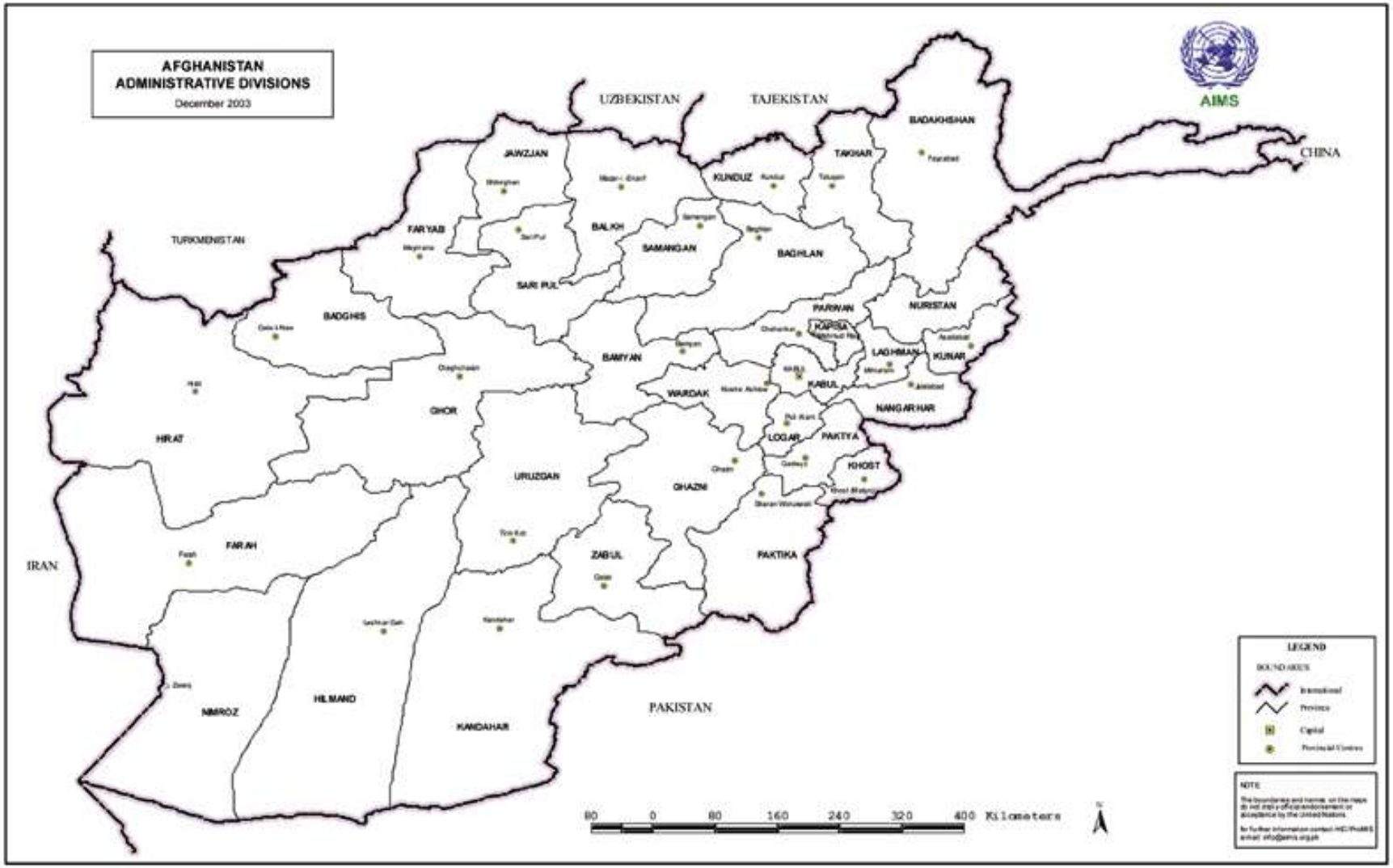
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ADMINISTRATIVE DIVISIONS
December 2003
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NOTE

The re-establishment of the rule of law in Afghanistan is essential to the peace process. Without reform of the institutions of justice... impunity for armed lawbreakers will persist, citizens will remain deprived of justice and the confidence of international investors will remain low.

Report of the UN Secretary-General to the Security Council, 23 July 2003-08-14A/57/850-S/2003/754.

***

Accountability of perpetrators, including their accomplices, for grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a state.

Commission on Human Rights Resolution 2003/72: 25 April 2003.

***

The State shall take appropriate measures to ensure that victims do not again have to endure violations which harm their dignity. Priority consideration shall be given to:

a) Measures to disband para-statal armed groups;
b) Measures repealing emergency provisions, legislative or otherwise, which are conducive to violations; and
c) Administrative or other measures against state officials implicated in gross human rights violations.

Joinet Principles: Principle 37, "Administration of Justice and the Human Rights of Detainees," Revised Final Report of Mr. Joinet. Commission on Human Rights E/CN.4/Sub.2/1997/20/Rev., 2 October 1997.

Executive Summary

In December 2001, the signatories to the Bonn Agreement pledged that they were *"determined to end the tragic conflict and promote national reconciliation, lasting peace, stability and respect for human rights in the country."*[1] The Bonn Conference was followed by a donor conference in Tokyo, where these promises were backed by financial pledges that signalled the commitment of Afghanistan's international backers to stay the long haul and assist the country in its reconstruction.

Nearly two years later, these promises appear particularly empty. Today, human rights abuses continue to add to the unaccounted stockpile of war crimes committed during 23 years of war. Ethnic divisions and political factionalism complicate the path towards national reconciliation and the country continues to experience general insecurity and hostilities in the south, southeast and north.

The Missed Opportunities of Bonn and the Emergency *Loya Jirga (ELJ)*

Between September 2001 and June 2002 certain choices were made by national and international decision makers that have had long-lasting repercussions for the political process in Afghanistan.

At the Bonn Conference in December 2001, the factions represented were invested with responsibility for governance under the Interim Administration arrangements and were not called to account for their part in perpetrating war crimes and human rights abuses during Afghanistan's long years of war. No attempt was made to address either the underlying causes or the consequences of the war on millions of Afghan victims, as it was feared that doing so would upset the leaders whose cooperation was considered vital to secure an agreement. Instead, an inconclusive agreement was rapidly negotiated in 10 days that legitimised warlords and their *de-facto* control on the ground, without extracting any significant commitments from them to justice.

At the ELJ in June 2002, the opportunity to rectify this situation was missed and impunity was more deeply entrenched. While several warlords who stood for elections lost as their constituencies rejected them, others managed to win through intimidation. However, the credibility of the process and the outcome were undermined when governors and commanders, who had not been elected to the ELJ, were allowed to enter as non-participating guests. Several of them came with their bodyguards and security apparatus creating a climate of fear that hampered the proceedings. Finally, although the ELJ was to decide who would preside over the Afghan Transitional Administration (ATA), the entire cabinet was chosen outside of the process, with no consultation with ELJ delegates and was then imposed as a *fait accompli*.

The Balancing Act

The central argument of this paper is that the political process of peacebuilding in Afghanistan is inherently unstable and unsustainable because it is based on impunity, which was neglected at the Bonn Conference and entrenched at the ELJ. The first step to restoring security and stability in Afghanistan will require replacing peacebuilding based on impunity with peacebuilding based on accountability.

Peacebuilding is predicated on balancing "negative" peace or stopping overt hostilities through, for example, a ceasefire, and "positive" peace, that is structural, systemic and institutional changes that will consolidate peace and avoid a relapse into renewed conflict. These two aspects of peacebuilding are integrally linked and interdependent, and must be pursued in tandem. In Afghanistan the link between "negative" and "positive" peace has been ignored and impunity has been gambled on as the guarantor of stability at the expense of accountability and transitional justice.

The decisions made in Bonn and at the ELJ favoured "negative" peace over "positive" peace. That is, the Bonn Agreement and the ELJ focused

[1] "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions," (Bonn Agreement), 5 December 2001, Preamble.

on stopping hostilities and securing agreement, however minimal, between parties through a power-sharing deal. In the process, the parallel need to identify and institute the necessary structural, systemic and institutional changes to consolidate peace and avert a relapse into conflict were overlooked.

A key part of balancing "negative" and "positive" peace is disarmament, demobilisation and reintegration (DDR). In Afghanistan, however, almost two years after the termination of open hostilities, there is no likelihood of the disarmament process removing the majority of unauthorised arms from society. The "Afghan New Beginnings Programme (ANBP)," which finally began at the end of October after many postponements, does not promise to provide full disarmament for the foreseeable future, but only to engage in modest pilot projects. Moreover, the ANBP does not institute the necessary structural change required to ensure that ex-combatants are reintegrated into civilian life, which is essential for sustainable peace.

For Afghans guns have become a metaphor of the lawlessness, fear and insecurity that stem from impunity.

The Consequences of Impunity

The failure to address impunity in the Bonn Agreement and at the ELJ meeting has had several consequences for political reform and peace in Afghanistan:

- *Insecurity:* The entrenchment of impunity has become one of the central causes of insecurity in the country. Commanders aligned with the Northern Alliance and included in the power-sharing agreement have acted with impunity in pursuing their own factional, ethnic and economic interests. Moreover, because of the limitations of DDR, disenfranchised, marginalised people faced with a government that offers them little protection or means of livelihood are finding no alternative to misusing guns as a way of life.
- *Human Rights Violations Tolerated*: Impunity has led to a tolerance of human rights violations, due to a fear that calling attention to them will lead their perpetrators to withdraw their cooperation from current political arrangements. Addressing human rights violations has come to be seen as a threat to security rather than a necessary component of dealing with insecurity. Despite a steep rise in violations over the past two years, there has been very modest monitoring of human rights across the country by the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghan Independent Human Rights Commission (AIHRC).
- *Delayed Security Sector Reform:* The three principal and interlinked tasks of security sector reform – building a new Afghan National Army (ANA) and Afghan National Police (ANP), and undertaking disarmament, demobilisation and reintegration (DDR) – have faced obstacles that stem directly from decisions made at the Bonn and ELJ meetings. All three tasks have been delayed and undermined due to the intransigence and rivalry of warlords and commanders, their control over police stations and militias across the provinces and their refusal to disband militias as required by the Bonn Agreement. The Ministry of Defence is a major obstacle to DDR and the creation of the ANA.
- *The Rule of Law Undermined*: The work of the Judicial Reform Commission, established in accordance with the Bonn Agreement, has been undermined by two consequences of the Bonn Agreement and the ELJ. First, Northern Alliance commanders, allowed by the Bonn Agreement to maintain their *de-facto* control over the areas won in removing the Taliban from power, established authority over the courts in their areas. The factional control of courts has lead to intimidation of centrally appointed judges and attorneys. Moreover, corruption and incompetence are endemic as unqualified personnel loyal to a specific faction are installed as court officials. Secondly, at the ELJ, Fazal Hadi Shinwari, a loyalist of the Ittihad-e-Islami party, headed by Abdul Rasul Sayaf, was reconfirmed as the chief justice of the Supreme Court. The chief justice has defiantly asserted the Supreme Court's independence from the judiciary and executive, and sought to extend the influence of his particular faction and view through numerous appointments of often unqualified persons.

- *The "Securitisation" of the Rule of Law*: One of the effects of unchecked impunity is the "securitisation" of the rule of law. The priority given by national and international decision makers to security has led to rule of law reform being treated as a subset of security sector reform. The decision by UNAMA and international donors to approach rule of law reform as part of security sector reform may stem from a positive desire to lend strategic coherence to their work, especially at this critical time of volatility. However, the "securitisation" of rule of law reform has had certain negative ramifications as the meaning, objectives and principles of the rule of law have been buried under the focus on security. Subordinating rule of law to security connotes a hierarchy of needs established according to the priorities of the international community and the ATA, rather than the majority of the Afghan population. Treating the rule of law as a tool to deliver on security carries the risk that justice and rule of law may be subordinated to security considerations and that police will be trained primarily to provide order rather than to protect citizens according to the law. The "securitisation" of rule of law suggests that as long as courts follow the rules of legality and are physically rehabilitated to conform to minimal standards, their deep and dangerous politicisation will not be addressed.

Building a Response to Afghanistan's Past

So far, both national and international efforts to address the past have been cautious and limited. This is, in part, due to the prevailing wisdom that the "time is not right" to address Afghanistan's past. At the national level, the AIHRC established the Transitional Justice Unit in accordance with the Bonn Agreement. The Transitional Justice Unit identified two priorities: i) documenting evidence of abuse, and ii) conducting consultations with the public across the country, particularly to identify the preferred mechanism of dealing with past crimes. The ambitious timeframe of the Transitional Justice Unit has fallen behind due to various difficulties, including security concerns and concurrent processes like the constitutional consultations.

At the international level, the proposal of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to set up a commission of enquiry was taken up at the UN Human Rights Commission in March 2003, but was not adopted. Observers criticised the negative role of certain member countries, particularly the United States, in dissuading the UN Human Rights Commission members from adopting the proposal. As a result, only a weak resolution was adopted. This was a great blow to the human rights community in Afghanistan at a time when human rights violations were rising.

Dealing with Perpetrators and their Violations

One of the main barriers to dealing with past crimes is the fact that the subject has become so taboo. Thus the first requirement of addressing past war crimes is simply putting the issue on the public agenda. This must be done not only through academic and policy debates, but more importantly through media, newspapers and other informal public settings.

Such public debate will serve to allay the fear associated with this subject. It would reveal that the opinions of Afghan people vary widely, that each set of opinions is valid and legitimate and that it is unlikely that a single mechanism will serve to respond to the variety of views. If a national consultation process is conducted, it should not simply determine the preferred mechanism of dealing with the past, but engage in a broad participatory process that begins to allow people to express their diverse and complex feelings on this emotive subject.

As a prelude to any national consultation this study found three sets of diverse opinions among Afghans interviewed for dealing with the past. First, there were many who preferred to forgive and focus on the future and argued that those who committed abuses have already been punished by history, for example by their defeat or loss of power.

Second, there were many who would like to see the perpetrators punished, but felt it was not feasible in the current circumstances, as many of those responsible for past human rights violations and war crimes are in positions of political power and still possess the guns of impunity.

There was, however, a third group that provided two key rationales for accounting for the past: i)

the nature of abuses committed during the war not only violated national and international law, but also Islamic values and Afghan customs; and ii) if perpetrators are not punished for their violations, they will repeat their acts and the cycle of impunity and insecurity will continue endlessly.

The Afghans interviewed were not stuck in the past, but were deeply concerned about rescuing the present and safeguarding the future. Those interviewed were irked less by past crimes of perpetrators than by the continuing abuse of authority in violation of the law with full impunity. Afghans interviewed were concerned with the past in terms of how it impinges on the present and on the future, and therefore felt the past must be dealt with, as it is past perpetrators of violence who are the cause of insecurity today and the greatest threat to Afghanistan's future.

Recommendations

The recommendations are divided into two sections. The first section deals with the immediate challenge of reversing impunity. This will require actions to curb both the tools of impunity and the actors spreading impunity. The second section deals with the task of elaborating an appropriate integral response to Afghanistan's past, proposing immediate steps and also broad guidelines. More detail on each recommendation is provided in the conclusion.

The recommendations spelled out below will be impossible for Afghans to achieve without the firm political commitment of the international community. Afghans interviewed expressed hope that the promises made by the international community two years ago will not be abandoned and it is today that the international community must demonstrate that they will indeed stay the long haul.

Recommendation One: End Impunity

End impunity by removing guns from society

- Expand ANBP to a nationwide disarmament drive, with full financial backing of international donors. As part of the expansion of ANBP, the lack of measures to ensure the reintegration and livelihoods of ex-combatants should be addressed.
- Hold symbolic weapon destruction ceremonies to signal public commitment to the elimination of weapons from society.
- Issue a decree banning the carrying of guns, particularly during election registration and the holding of the elections.

Address the actors that spread impunity

- *Expand the International Security Assistance Force (ISAF) to protect the peace*: A realistic and proportionate expansion of ISAF commensurate with security needs across the country, building on UN Security Council (UNSC) Resolution 1510 (2003), is required.
- *Use the International Criminal Court (ICC)*: If the above steps and continued actions by the ATA to dismiss or transfer intransigent commanders do not succeed in curbing the impunity of such actors, the ATA should consider using the ICC mechanism, as Afghanistan has acceded to the Rome Treaty of the ICC.
- *Apply universal jurisdiction in third countries to try past perpetrators*: Third countries, particularly the UK and Canada, should be encouraged and assisted to exercise universal jurisdiction to begin criminal prosecution of a few symbolic cases of war crimes.

Recommendation Two: Build a Response to Past Injustices

Given the taboo around past injustices, the first step is to open up civic and political space through open debate before or simultaneous to any decision on official mechanisms and processes.

Formulate an integrated approach

The guidelines presented below should complement national consultations on dealing with the past which should be undertaken by the AIHRC with full political and financial support from the international community.

- *Look beyond perpetrators and victims - A "survivor"-oriented approach:* Several approaches and mechanisms tend to either focus exclusively on perpetrators or victims, ignoring the frequent overlap between these two groups over different periods of conflict. Mechanisms that might inadvertently

accentuate divisions and antimony between opposed groups, alienate the broader society and waste scarce resources must be avoided.

- *Employ multiple mechanisms to meet different wishes*: Recognise that the opinions of people are strong but deeply varied. The planned national consultations may not yield a clear response in terms of a single "preferred" mechanism.

- *Caution with truth commissions*: There is a tendency today to believe that no society emerging from conflict is complete without its own truth commission. However, the outcome and benefits of truth commissions have been mixed.[2] A truth commission that is poorly resourced and lacks political support is often worse than none at all.

- *Explore the use of trials*: If the option of trials is pursued, an investigation should be conducted with the ICC into the possibility of instituting hybrid trials such as those instituted in Sierra Leone.

- *Penalise war economies:* Given the continued challenge of dealing with illegal economies, and their impact on security, there is a strong rationale for devising a robust mechanism to address such activities. The finance ministry, the justice ministry, the AIHRC, donor countries, neighbouring states and financial institutions should cooperate to investigate and curb illegal economic activity.

- *Restore distributive justice by addressing the social injustices underlying the causes of conflict:* The eagerness of international financial and development agencies, and their local counterparts, to promote rapid economic growth overshadows the parallel need to address social and economic inequalities. Political power sharing between leaders claiming to represent ethnic groups, as undertaken in Bonn and at the ELJ, is not a satisfactory proxy for re-distributive justice.

Create civic space and a conducive atmosphere for accountability

- The ATA should issue a public apology to all Afghans within and outside the country affected by 23 years of war, in the name of all previous governments and all fighting forces.

- Open debate should be fostered via radio, television, print media and public forums to foster free expression and discussion of experiences during the war, violations and ways to deal with them.

- Full guarantees of free speech should be provided to journalists and all media for airing such issues publicly.

- Local *shuras* and *jirgas* could be used as venues for story telling and sharing of experiences by both perpetrators and victims.

- The government should make a declaration commemorating the victims and all survivors of Afghanistan's wars.

- The government should institute a reparations commission to investigate financial, social and traditional means for providing reparations and compensations to victims, and for fulfilling international standards and norms regarding victims' rights to redress.

[2] Priscilla Hayner explores the lessons learned from truth commissions in her book *Unspeakable Truths*. Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2002.

Introduction

Photo by: Arpan Munier © Office of Communication and Public Information/UNAMA

In the 1990s, the question of dealing with the legacy of war crimes and human rights abuses was put on the international agenda by the traumatic events of genocide in Rwanda and ethnic cleansing in the former Yugoslavia. In the course of negotiations to resolve conflict between opposed parties, it became standard practice for third-party mediators, particularly the UN, to include within peace agreements some measure of accountability for war crimes. The notion that "peace without justice" is meaningless and incomplete seemed to take hold as much for peacemakers as for political leaders and populations emerging from conflict.

However, the peace agreements negotiated in Afghanistan during the 1990s, often mediated by the UN, failed to address the issues of war crimes and transitional justice.[3] It was only the attacks on New York and Washington of 11 September 2001, that created the first genuine opportunity for the pervasiveness of impunity and the lack of justice for the past to be addressed through the Bonn Conference negotiations and the holding of the Emergency *Loya Jirga* (ELJ).

Impunity most simply understood means "exemption from punishment or penalty."[4] From a legal perspective, impunity is defined as follows:

> *"Impunity means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not*

[3] William Maley, *The Afghanistan Wars*, Macmillan, London, 2002. Maley discusses the failed UN attempts to mediate peace agreements in Afghanistan in his book. It is also important to note that the successive agreements negotiated were never fully implemented as each time the conflict re-ignited or simply continued without cessation.

[4] Also "immunity or preservation from recrimination, regret, or the like; escape from what is probable, certain or just," *American Heritage Dictionary*.

> *subject to any enquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."*[5]

If any word has been overused in the 23 years of war in Afghanistan, it is impunity, and yet it remains the most evocative. In Afghanistan, dealing with impunity does not require only confronting the past. It is a question of grappling with the present in order to safeguard an endangered future. Dealing with impunity in Afghanistan raises the pressing challenge of breaking the cycle of actions without consequence that results from the continued power and misconduct of various internal and external actors who shaped the history of Afghanistan's wars and are currently shaping – indeed jeopardising – the prospects for Afghanistan's peace.

In Afghanistan, dealing with impunity does not require only confronting the past. It is a question of grappling with the present in order to safeguard an endangered future.

It is for this reason that the issue of dealing appropriately with Afghanistan's past takes on particular urgency, as the shadows of the past continue to impinge upon and compromise the present and the future.

Section One of this paper argues that the Bonn Agreement and the ELJ, unfortunately, failed to address war crimes and the need for transitional justice and in the process entrenched impunity. National and international decision makers made key choices at Bonn and the ELJ, which represented a gamble in favour of impunity, rather than accountability, as the guarantor of stability in Afghanistan.

Section Two analyses the ramifications of this gamble for human rights, rule of law reform, security sector reform and the overall security and political situation in Afghanistan. It is argued that human rights violations have come to be viewed as a threat to security, rather than a signal of rising insecurity, and that reforms of key institutions have come to be seen predominately through the lens of security.

Section Three links the ramifications of continuing impunity with the need to pursue justice for the past and present. This section reviews attempts at "transitional justice" at the national and international level to date, before exploring the available options and mechanisms for justice and the perspectives of Afghans on how to deal with the past. Traditional and customary Afghan dispute resolution mechanisms are not reviewed as they are outside the scope of this study.

The concluding section of the paper looks ahead to the future. It presents recommendations on dealing with impunity in the immediate future and guidelines and steps to build a comprehensive response to the past and curb the prevalence of impunity.

A Note on Methodology

The primary research supporting this paper was conducted between April and July 2003, and was supplemented by literature research between May and September 2003.

The primary research conducted within Afghanistan consisted of interviews in Kabul and in several provinces and districts around the country. In Kabul, this included senior officials in the Afghan Transitional Administration (ATA), particularly the ministries of interior and justice, the Supreme Court as well as judges serving in Kabul courts, and police chiefs. Additionally, extensive discussions were held with the main commissions established by the Bonn process including the Judicial Commission (later to become the Judicial Reform Commission), the Human Rights Commission (established as the Afghan Independent Human Rights Commission) and the Constitutional Commission. Also interviewed both in Kabul and in the provinces were journalists, artists, non-governmental activists, academics and youth.

On the international side, interviews were held with a range of senior and mid-level officials from the United Nations Assistance Mission in

[5] *Administration of Justice and the Human Rights of Detainees*, Revised Final Report of Mr. Joinet, Commission on Human Rights, E/CN.4/Sub.2/1997/20/Rev., 2 October 1997, Annex II.

Afghanistan (UNAMA) and other UN agencies, diplomats of most of the major countries supporting the Bonn process, the Coalition, the International Security Assistance Force (ISAF) and organisations working in police and judicial reform.

Field visits were made to Mazar-e-Sharif and Shibergan in Balkh province, Khanabad in Kunduz province, Jalalabad in Nangarhar province, rural areas of Hazarajat and the Panjshir Valley. In the provinces, districts and villages outside Kabul, three kinds of meetings were held. First, informal and spontaneous meetings were held with small groups of individuals drawn from different backgrounds – scholars, journalists, youth, media, teachers, as well as villagers. International and national NGOs were not consulted in the provinces, with only one exception in one location. Nobody in these meetings attended or spoke as "representatives" of any particular organisation or group. These meetings were conducted in Dari and translated. A few conversations were conducted in Urdu. Second, one-on-one meetings were held with representatives of the police, courts and some government ministries. Third, representatives from UNAMA and other international structures such as Provincial Reconstruction Teams (PRTs) were interviewed.

As a piece of political science research, the paper is the result of analysis of trends, causes and consequences, the linkages between various factors and events and the weighing of risks and outcomes based on the primary and secondary research undertaken. The framework of analysis is not based on questionnaires or survey data that can be compiled and evaluated quantitatively or qualitatively. Finally, the report draws on the comparative experience and expertise of the author working in the field of post-conflict justice both as an academic and practitioner over the last several years.

1. The Entrenchment of Impunity

1.2. The Bonn Conference

The Bonn Agreement of 5 December 2001, negotiated under the auspices of the UN and signed by Afghan leaders representing four different factions, including the Northern Alliance, is the closest Afghanistan has to a peace agreement. Not a standard peace agreement, it is cautiously titled, "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions." It sets the timetable and provides the backbone to the fragile peace and stabilisation process that began to unfold thereafter under the protection of UNAMA.

In Bonn, the signatories to the Agreement pledged that they were "*determined to end the tragic conflict and promote national reconciliation, lasting peace, stability and respect for human rights in the country.*"[6] The Bonn Conference was followed by a donor conference in Tokyo, where these promises were backed by financial pledges that signalled the commitment of Afghanistan's international backers to stay the long haul and assist the country in its reconstruction.

Bonn also presented the first opportunity to deal with the legacy of war in Afghanistan in terms of addressing both the perpetrators and victims of war. The UN team involved in the Bonn negotiations initially tried to include references to dealing with war crimes and human rights violations, but because of the opposition of the factions at the negotiations the issues had to be dropped.[7] The UN could have used its experience in mediation over a decade to leverage the stamp of international recognition and state sovereignty to ensure conditions and commitments to addressing war crimes and arrangements for transitional justice.[8] However, the Bonn Agreement was rushed through in 10 days and left out many standard parts of UN mediated peace agreements, such as concrete disarmament and demobilisation arrangements.

Moreover, the Bonn Agreement invested the leaders of the factions – many of whom had been responsible for much of the suffering and carnage during Afghanistan's long years of war – with responsibility for running the Interim Administration.[9] As Afghan scholar Barnett Rubin notes:

> *"Those (Bonn) accords... reflected the distribution of power that resulted from the US strategy. The Shura-y-Nazar whose military, despite earlier promises, had occupied Kabul when the US bombing opened the way, kept control of the most powerful ministries. Resurgent warlords controlled most of the provinces."*[10]

The Bonn Agreement not only legitimised the authority of the different factions, but eulogised

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[6] "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions," (Bonn Agreement), 5 December 2001, Preamble.

[7] Barnett Rubin, *Transitional Justice and Human Rights in Afghanistan*, Centre on International Cooperation, New York, Revised Version of Anthony Hyman Memorial Lecture delivered in London, 3 February 2003.

[8] From 1989 onwards, UN negotiators conducting peace negotiations became adept at using international recognition and state sovereignty to ensure inclusion of human rights, rule of law and distributive justice conditions in final peace agreements.

[9] It is interesting to note that both Barnett Rubin and William Maley assert that the Bonn Agreement cannot be considered a real peace agreement because it did not include all parties to the conflict in the negotiations. That is the Taliban were offered no place at the negotiating table and were being driven from power. Consequently, in Rubin's view, there was not the give and take between opposed parties that normally occurs in negotiations, which also leads to mutually consensual arrangements on justice. While this is one plausible hypothesis, it is equally plausible that the absence of the Taliban from the negotiating table could have led to a more conducive atmosphere for addressing crimes of war. It is true that all parties have at various times been accused of violations, but at Bonn the focus of international and Afghan opinion was on the war crimes of the Taliban. It would have been easy and indeed strategic for *mujaheddin* parties to use this to their advantage and call for some measure of symbolic or concrete redress for the past to demonstrate their human rights credentials. They could at least have called for reparations for war victims if not prosecution of Taliban leaders. In El Salvador, for example, the government negotiators made major concessions on human rights and the rule of law in order to win international approval, and also to distract attention from their intransigence in economic negotiations.

[10] Barnett Rubin, *The Fragmentation of Afghanistan*, Yale University Press, New Haven, 2002, xxxii.

the *mujaheddin* (fighters in a holy war) while failing to mention the suffering of the Afghan people during 23 years of war:

> *"Expressing their appreciation to the mujaheddin who over the years have defended the independence, territorial integrity and national unity of the country, and have played a major role in the struggle against terrorism and oppression, and whose sacrifice has now made them heroes of jihad, and champions of peace, stability and reconstruction of their beloved homeland."*[11]

The focus in the Bonn Agreement on the *mujaheddin* has set a trend. While at public and political events in Afghanistan since Bonn, the *mujaheddin* have been lauded for their sacrifices, no commemorative mention has been made of the victims of the conflict. This, perhaps, reveals the fear that any public mention of victims will automatically raise the taboo subject of their perpetrators. Scholars of procedural justice have noted that often official recognition and apology can play an important role in providing symbolic remedy to victims, and the UN mediators at Bonn could have extracted a tribute to the millions of innocent civilians who suffered the consequences of war.

The failure of the Bonn Agreement to address human rights crimes and arrangements for transitional justice also cannot be divorced from the Coalition's decision to support the Northern Alliance and Pakistan as key allies in the War on Terror. The short-term military strategy of the Coalition of supporting those responsible for Afghanistan's internal strife has had long-term political consequences as it has meant affording impunity to different factions for past, present and future actions.

1.2. The Emergency *Loya Jirga* (ELJ)

The ELJ, held in June 2002, offered a new opportunity for addressing the issues of war crimes and justice in Afghanistan, as the Bonn Agreement only set interim arrangements.[12] The Bonn Agreement called for the holding of the ELJ to

Photo by: David A. Singh

"decide on a transitional authority, including a broad-based transitional administration to lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no later than two years from the date of the convening of the Emergency *Loya Jirga*."[13]

At the start of the ELJ process, procedures were established by the ELJ Commission to prevent warlords and commanders from running for elections to the ELJ. Candidates for ELJ elections were required to sign an affidavit asserting that they had not committed crimes during the war and had no innocent blood on their hands. Despite the procedural requirements, candidates who did not meet the criteria stood for elections and the ELJ Commission, the Interim Administration and

[11] Bonn Agreement, op cit.

[12] Several established Afghan experts and journalists have documented the ELJ process. While my account here incorporates similar themes, it mainly draws on the extensive and numerous discussions with many male and female ELJ delegates and ELJ Commission members in various urban and rural locations between April and July 2003.

[13] Bonn Agreement, op cit, General Provisions, Art. 4.

UNAMA, who was monitoring the process, failed to contest the right of such candidates to participate in the elections. The presence of UNAMA observers did not succeed either in stopping such candidates from winning the elections through blatant manipulation or heavy bribes - although in some areas they were defeated as Afghans in their constituencies refused to vote for them.

Election Procedures

"Before elections were held, we were told delegates should have certain qualifications – that is they should not be murderers, smugglers, not involved in fighting in the country, and should not have the blood of innocent people on their hands. But actually those who participated did not qualify." (a female delegate from northern Afghanistan)

The ELJ started with a majority of legitimately elected - albeit largely politically inexperienced - delegates. In the view of ELJ delegates, the process stood a fair chance of fulfilling its purpose but for two last minute decisions, made without the consent of delegates.

First, the commencement of the ELJ was postponed for one day and it was at the conclusion of this delay that commanders and governors were issued with invitations to enter the ELJ tent. For many ELJ delegates and observers, this provided a clear signal that a collective decision had been made by members of the Interim Administration, the US government and UNAMA to invite un-elected persons to the proceedings, without consulting the elected ELJ delegates. The final numbers and identity of the governors and commanders who entered the tent cannot be verified as a list of their names was never provided. The chair of the ELJ Commission insisted that the governors and commanders were invited only as guests and not as participants. Regardless of this understanding, the governors and commanders gradually came to dominate the proceedings.

Secondly, irregular security forces and bodyguards accompanied the invited governors and commanders into the tent and created a climate of fear and intimidation. The ISAF staff responsible for manning the site did try to enforce the regulation that no armed personnel or bodyguards were allowed into the tent and in many cases there were tense stand-offs between ISAF and commanders.[14] Despite the efforts of ISAF, armed security guards entered the tent and ELJ delegates interviewed reported overt intimidation and threatening behaviour from commanders and their armed guards.

Voices of Delegates

"Sayaf took the floor three times, while I never once was given the floor, though I kept requesting a chance to speak." (scholar from Kabul)

"When (.... a woman delegate) tried to speak about the condition and wishes of women in our country, the microphone was cut off deliberately in the middle." (a female delegate from northern Afghanistan)

"Our people criticised us when we returned – that this ELJ delegation has done nothing for us. But we took their wishes to ELJ, but were not given a chance to even speak. At the ELJ we were only given the right to choose the leader of the ATA, but not to extend our opinion to other issues facing our country." (a female delegate from northern Afghanistan).

The ELJ had two key items on its agenda - electing the president of the ATA and choosing the composition of the ATA government. However, ELJ delegates were only given the opportunity to elect the president, with the decision on the composition of the government made outside the tent and presented to the delegates on the last day as a *fait accompli*. As one ELJ delegate interviewed concluded:

> *"Loya means great. But the result of the ELJ was not great. We only chose Karzai. We did nothing else. We were not able to do anything for our people. Actually, the Loya Jirga should have made the law of our country; it did not. It should have created good relations between our people; it did not. It should have done the disarmament process; it did not. It should have created a good basis for governing our country; it did not."*

[14] Interview with ISAF member who provided security in the tent during the ELJ.

2. The Consequences of Impunity

The gamble taken in Bonn and at the ELJ to invest authority in factional leaders and to neglect impunity for the sake of political expediency has not paid off. Insecurity in Afghanistan is worsening and stems partly from untenable power sharing arrangements established through the Bonn Agreement and the ELJ. Both those who were included in the political process and invested with responsibility and those who were left out have become the principal threats to peace and political stability. On one hand, it is the factional fighting, the allegiance to regions rather than the centre, the withholding of revenues, the drug trafficking and illegal activities of commanders directly or indirectly part of the government that pose one set of threats. On the other hand, there is the continued and rising threat of violence from those left out of the power sharing arrangements.

The gamble in favour of impunity could have paid off if the leaders who were legitimised by the international community in Bonn and at the ELJ had been forced to comply with the responsibilities of authority and to act in the national interest rather than regional, ethnic or self-interest. This was not done. Instead, those invested with authority to rule at the centre or in the provinces, despite their past record, were provided further blanket immunity to conduct their affairs unchecked. Additionally, the limited international security force presence, without a protection mandate beyond Kabul, and the absence of a reliable national police force, has made monitoring, correction or punishment of unaccountable conduct impossible.

2.1. Impunity and Peacebuilding

The failure to address impunity has cast a long shadow on the transitional and peacebuilding process in Afghanistan.[15]

Peacebuilding encapsulates two fundamental aspects: i) the need to end "direct violence" by stopping the physical fighting, for example through the negotiation of ceasefires; and ii) the parallel and simultaneous need to end "indirect violence" through structural, systemic and institutional changes that eliminate the underlying causes of war and therefore avert a return to conflict by laying the foundations for a stable peace. Peace researchers refer to the former task as addressing "negative" peace and the latter as ensuring "positive" peace. The definition does not attribute a sequence or prioritisation to the two objectives, but recognises that the two are interdependent and reinforcing.

From the early 1990s, the practical experience of the UN from Cambodia to El Salvador reinforced the clear message that transition would lack sustainability if it were not founded upon accountability and the rule of law, and would lack legitimacy if it were not grounded in justice. There was recognition among peacemakers mediating agreements between parties to conflict and peacebuilders then seeking to rebuild sustainable societies after war, that peace and justice were interlinked. As a result, peacemakers and peacebuilders began to put the issue of war crimes and human rights abuses squarely on the negotiating agenda and sought to secure consensual agreement between the parties on measures to restore justice and the rule of law. Even when conflict ended with victory by one party over another – such as in Rwanda – the national and international community still focused on restoring justice and the rule of law through peacebuilding interventions on the ground.

Examining the decisions made in Bonn and at the ELJ from a peacebuilding perspective, it can be surmised that decision makers put the weight on one side of the balance and favoured "negative" peace over "positive" peace. That is, decision makers focused on stopping hostilities and securing agreement, however minimal, between parties through a power-sharing deal. In the process,

[15] The concept of peacebuilding was introduced into the UN's lexicon in 1992 in *An Agenda for Peace*, the report of the former Secretary-General Boutros Boutros Ghali. The report marked the coming of age of a new era within the UN. Three years after the crumbling of the Berlin Wall, it signalled that the UN had embarked officially on a new engagement with the world, and with nations engaged in or emerging from conflict. The task of peacebuilding was described as "actions to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict." (Para. 21, *Agenda for Peace*) Since then the concept has undergone rigorous academic scrutiny, development, and critique, and the practice has experienced several evolutions in the course of the challenges of the last decade.

decision makers overlooked the parallel need to identify and institute the necessary structural, systemic and institutional changes that would address the underlying causes of conflict to consolidate peace and avert a relapse into conflict. This explains partly why the gamble in favour of impunity to underwrite stability in Afghanistan has proved so short-lived.

2.1.1. Impunity and the Gun

A key example of the balance between "negative" and "positive" is disarmament, demobilisation and reintegration (DDR).

Afghanistan, however, is something of an aberration in terms of DDR. In Afghanistan, almost two years after the termination of open hostilities, there is no likelihood of the disarmament process removing the majority of unauthorised arms from society. The "Afghan New Beginnings Programme (ANBP)," which finally began at the end October, after many postponements, does not promise to provide full disarmament for the foreseeable future, but only to engage in modest pilot projects.

Several reasons, many quite legitimate, are extended by the responsible international actors to explain why disarmament has been so difficult and so often postponed. Some experts point to the lack of provisions and deadlines in the Bonn Agreement. Others say it is the lack of adequate security to collect arms. Others still link it to the prerequisite need for reform of the Ministry of Defence. A common default position for the inability to promise anything close to full disarmament is that it is the age-old custom of Afghans to possess arms and that full disarmament in any case would be neither feasible nor indeed acceptable to Afghans themselves.

There is no doubt good reason to examine the many technical, security and defence related reasons put forward for the delayed or failed disarmament process, and to try to resolve them. However, it is essential to question the assertion that full disarmament is not being provided to Afghanistan because it is against the wishes or customs of Afghans.

As in several other traditional societies, it became a tradition in Afghanistan for men to carry guns for a variety of reasons including the protection of property, animals and women. It also increasingly became a symbol of prestige and wealth.[16] This tradition was generally restricted to artisan, locally made guns that served as much ceremonial as security purposes. It was never a part of Afghan culture to carry Kalashnikovs or rocket launchers and it is not legitimate to use the excuse of respect for Afghan traditions and customs to leave such lethal modern weapons of warfare, which are neither customary nor ceremonial, amidst communities who have been traumatised by the misuse of guns for over two decades.

Furthermore, culture, traditions or customs are not static but fluid and in constant flux.[17] What was customary and accepted in one generation may come to be rejected in another generation. This is what has happened after 23 years of war in Afghanistan, at least on the subject of guns. Elders who themselves grew up in a culture of traditional gun usage are rejecting the gun culture of today as one of war and destruction, not preservation of either security or culture. Whatever the past attitude towards guns, today guns in society are seen as the cause of insecurity and loss of life. Afghan's interviewed do not want token disarmament, but want guns totally removed from their communities.

It must be made clear to both commanders holding guns and claiming to speak on behalf of all Afghans and the international community that does not want to offend local customs, that they are not acting out of respect for the majority of Afghans in limiting DDR. Afghans are certainly aware that due to the lack of education and employment over the last two decades, guns have become a way of life and survival. Many insist therefore that sustainable reintegration of militiamen needs be central to the disarmament programme; otherwise it will be difficult for the ordinary gun carriers to give up their guns.

One of the major criticisms of DDR in Afghanistan is that there has not been enough importance

[16] How far back this supposedly venerable custom goes in either Afghanistan or other Asian and African societies that claim this as a tradition is open to dispute. It may only date back to when European traders and colonisers arrived, and used their superior weaponry as a way to gain economic concessions and political power with local chiefs and started the gun trade.

[17] An interesting discussion of the fluidity of customary law is presented in Mahmood Mamdani, *Citizen and Subject, Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, Princeton, 1996.

placed on reintegration. Under the recent DDR pilot project in Kunduz, ex-combatants who handed in their weapons received US$200 and 130kg of different types of food. Unfortunately, under the pilot project the disarmament package was only transitional and included no systematic reintegration of ex-combatants into employment and normal civilian life.[18] Unless DRR is substantially refocused on not only disarmament and demobilisation but also reintegration it will be impossible to address impunity and its consequences in Afghanistan.

2.2. The Impact of Impunity on the Political Process in Afghanistan

The gamble on impunity and the lack of programmes to achieve "positive" peace have had a range of negative consequences for peacebuilding in Afghanistan: the need to address continuing human rights violations has been marginalised; the attempt to restore rule of law has been compromised; and the critical task of security sector reform including disarmament, demobilisation and reintegration has been delayed and overshadows Afghanistan's political future. Crucially, even while "security sector reform" came to be seen as the pre-eminent agenda item, impunity became one of the key causes of insecurity in Afghanistan.

2.2.1. Tolerance of Human Rights Abuses

An indirect consequence of the international community's reticence to address the past is a reluctance to address present day human rights violations. The human rights violations of today are a continuation of war-time violations, as they are perpetrated often by the same forces and due to the same permissive factors that existed during the war.

UNAMA received serious criticism in the early days of its mandate for its lack of attention to human rigths: according to senior staff UNAMA considered its prime responsibility as "protecting the living not the dead," which meant not attending to past human rights violations. It also viewed addressing human rights as a distraction from or threat to the more important priority of security. The monitoring and reporting of human rights violations was kept to a minimum. This was because of the belief that it was not UNAMA's responsibility. This position was derived from UNAMA's fear that reporting human rights violations would offend their violators who were key parties to the Bonn Agreement and whose continued cooperation was deemed vital for the political process. Thus addressing the causes of human rights violations came to be seen as a threat to security. In volatile situations like Afghanistan, human rights abuses serve as important indicators of insecurity if their trends, patterns and intensity are closely monitored. If addressed firmly and promptly, human rights violations can be checked and more importantly, insecurity can be prevented from expanding. Human rights abuses are not a distraction from the primary preoccupation of insecurity, but are central to it.

UNAMA's attitude towards human rights has undergone an evolution over time. UNAMA's human rights unit has been strengthened, while political affairs officers with a human rights mandate have been put in place in many if not all UN provincial offices.[19] Political affairs officers are, however, no substitute for properly mandated human rights observers.

A variety of reasons are put forward by UNAMA staff for the absence of human rights observers across the country. It is argued that human rights observers serve no purpose when there is no state authority to fulfil human rights obligations. It is postulated that the preoccupation of UNAMA should be to rebuild such institutions to protect human rights rather than simply to monitor their abuses. It is also pointed out that there is no security to protect observers if they were to be

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[18] IRIN, "UN-backed northern disarmament begins," IRIN, 17 November 2003.

[19] This minimal deployment is not in the least comparable to several recent post-conflict or transitional countries where human rights monitors were posted across the country from an early stage and throughout the peacebuilding process. In Guatemala, for example, a country similarly wracked by three decades of war, a UN verification mission was deployed two years before the end of the conflict, that is while hostilities continued, with the specific mandate of monitoring and verifying the global agreement on human rights through offices covering the entire country. Human rights observers across the country remain in place today, almost a decade after their initial deployment and seven years after the termination of war, albeit in reduced numbers. They are committed to remaining in country not only through the coming presidential elections in December 2003, but until at least June 2004 to monitor developments under a newly elected government.

deployed. While all these factors have weight, the fact remains that in other volatile and insecure environments the UN or regional organisations have deployed human rights observers. This was not done in Afghanistan and nor is it being considered. All that can be noted is that the current situation marks an improvement over the past.

UNAMA has also begun to acknowledge that the independent reporting of human rights violations is an important component of the agency's overall approach to human rights, even if that approach is geared more towards institution-building and rule of law to prevent abuses. UNAMA staff do note that they find the reporting of human rights violations by other independent groups an important and useful contribution, even if they do not feel that this is their own responsibility.

While the attitude towards human rights has evolved to some extent, the link between present and past violations does not seem to have been openly acknowledged and there has been no parallel change in the approach to dealing with past violations.

2.2.2. The Impact of Impunity on the Rule of Law and Judicial Reform

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Traditionally, rule of law reform in institutional terms consists of the reform of the judiciary, the police and the penal system. In Afghanistan, the main effort in restoring the rule of law has been in the area of judicial reform. Police reform has also been given great attention, but as noted below, it is seen as a component of "security sector reform."

The Bonn Agreement required the Interim Administration to establish, with the UN's assistance, a Judicial Commission "to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions."[20] The Judicial Commission was initially established in May 2002, then was dismissed and re-established in November 2002, with twelve members, and renamed the Judicial Reform Commission (JRC). The JRC's master plan identified the following tasks: compiling all Afghan laws; undertaking law reform; ensuring physical rehabilitation of the judicial and justice system; establishing a constitutional court in Afghanistan; providing legal training; and ensuring that Afghan laws conform to international standards and laws. The lead donor on judicial reform is Italy, although several other nations, particularly the US, are actively involved, and numerous agencies - UNDP, UNODC, UNFPA and UNICEF - are engaged in various parts of judicial reform. The overall budget for the justice sector is estimated at US$ 27 million for 2003. The UNDP performs the coordinating and support role with a two-year project for US$ 9 million.

As reported in the July 2003 report of the secretary-general, the JRC and the judicial reform process has made progress, particularly in the areas of "infrastructure rehabilitation and training."[21] This progress is significant given the deeply deteriorated state of the court system in Afghanistan following two decades of war, the challenges of contending with different legal regimes and the multiplicity of legal organs.[22]

Notwithstanding the technical and logistical progress, judicial reform has been severely hindered in making real advances towards restoring the rule of law due to two fundamental problems that stem from the decisions in Bonn and the ELJ. They are, first, the political factionalism across the country that holds provincial courts hostage

[20] Bonn Agreement, op cit, Legal framework and judicial system, Art. 2 (2).

[21] *The Situation in Afghanistan and its Implications for International Peace and Security*, Report of the Secretary-General, A/57/850-S/2003/754, 23 July 2003, para 20.

[22] For a full analysis of judicial reform and the rule of law, see, for example, International Crisis Group, *Judicial Reform and Transitional Justice*, ICG, Brussels, January 2003; Amnesty International, *Afghanistan: Restoring the Rule of Law*, Amnesty International, London, August 2003.

and, second, the control of the Supreme Court by one faction with a particularly intransigent chief justice.

In the provinces, factionalism is the main problem impeding the rule of law. When the Northern Alliance factions allied with the Coalition established control in various regions and provinces, the police stations and courts also fell under their control.[23] Northern Alliance commanders have either put in place persons loyal to them as judges or exert influence over the judges installed by the Supreme Court.[24] In both cases, persons lacking legal qualifications but loyal to either the local commander or the Supreme Court have been appointed. Local commanders intimidate provincial judges and attorneys, which makes free or fair trials almost impossible, while in most provinces corruption is rampant in the courts.[25] Failure to address intimidation and corruption means that even if court houses are refurbished and legal training provided in the provinces, the capacity to dispense fair justice and uphold the rule of law in such courts is minimal. Until the problem of factionalism is tackled and the influence of commanders over courts is removed, the legitimacy of court decisions will be questionable.

At the centre, the challenge facing the application of the rule of law stems from the Supreme Court. At Bonn, at the insistence of the Supreme Court, the following clause was added to the agreement: *"The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court."*[26] The chief justice of the Supreme Court has referred to this clause to justify his insistence on the complete independence of the Court, even from the Ministry of Justice and the ATA. The Chief Justice, Fazal Hadi Shinwari, a loyalist of Abdul Rasul Sayaf's Ittihad-e-Islami party, is a firm proponent of a particular version of Islamic law. As a result the judicial system is being held captive to one view of Islamic law, rather than allowing for an open and inclusive debate on the nature of the rule of law acceptable to all Afghans, which should be fostered by the JRC. Furthermore, the Supreme Court has sought to extend its influence throughout the judicial system through court appointments that are beyond its competence. For example, the Supreme Court has appointed 137 judges — 128 more than it is arguably competent to appoint.[27] Many of these appointments lack legal qualifications or only have limited legal training.

"The court today is not independent and fair. Courts just work based on money. If judges receive money from a criminal, they set him free. For victims, there is nothing." (woman from Kunduz)

"In my opinion, we will only have peace in our society when there is law. Practically, the three organs of law (police, attorney-general and Supreme Court) should be independent, but they are under the control of political parties or factions. When a person who committed a crime belongs to one of these political factions or parties, he is set free. Or if he can buy justice, he will be freed. If he does not belong to a party and cannot buy justice, then he will be punished. A person who sees that paying money can get you your freedom will repeat his action. In my opinion until the three organisations of police, attorney-general and courts are given to deserving people it is impossible to have peace. All three must be independent, non-political and neutral." (a young civil society activist from Kabul, July 2003)

So far, the JRC, the supporting donors, UNAMA and the president of the ATA have been unable to counter the politicisation of the judiciary. President Karzai, who holds ultimate responsibility for court appointments, has not reversed legal appointments made by the Supreme Court. Indeed, the actions of President Karzai at the ELJ served to legitimise Fazal Hadi Shinwari as the chief justice. Fazal Hadi Shinwari was originally

[23] Human Rights Watch, *Killing You is a Very Easy Thing For Us. Human Rights Abuses in Southeast Afghanistan*, New York, Vol. 15, No. 05, July 2003.
[24] Amnesty International, *Afghanistan: Restoring the Rule of Law*, op cit.
[25] Ibid.
[26] Bonn Agreement, op cit, Legal framework and judicial system, Art. 2(2)
[27] Amnesty International, *Afghanistan: Restoring the Rule of* Law, op cit.

appointed chief justice by President Rabbani just prior to the Bonn Conference. At the ELJ when the opportunity arose to change this appointment, President Karzai refrained from doing so. Instead, as one human rights activist lamented, when Hamid Karzai chose to take his oath of office under Fazal Hadi Shinwari he legitimised his authority as the head of the judicial system in Afghanistan. Again, decisions taken at Bonn and the ELJ have set precedents that are daily more difficult to reverse.

2.2.3. The "Securitisation" of the Rule of Law

A distinct but not unrelated impediment to the restoration of the rule of law is what might be described as the "securitisation" of the rule of law. While initially rule of law and judicial reform were not considered a priority by the ATA and UNAMA, leading to a slow start, by early 2003 there was a gradual realisation that insecurity might be linked to the absence of the rule of law. It was then that rule of law reform took on greater importance.

However, all too soon, as the security situation deteriorated in 2003, rule of law became subsumed under what is referred to as security sector reform (SSR). This is a relatively new term in post-conflict peace operations that variably covers military and police reform and DDR. In Afghanistan, it has been stretched to cover not only police reform, but judicial reform and in some versions human rights.

UNAMA officials now observe that while they consider rule of law reform important, they view it as a subset of SSR. By this, they mean among other things that a good part of the importance attributed to rule of law is due to its potential contribution to security reform.

The decision by UNAMA and international donors to place rule of law reform under the umbrella of SSR may stem from a positive desire to lend strategic coherence to their work, especially at this critical time of volatility. However, there are a number serious ramifications of this for rule of law reform in Afghanistan.

First, although the component parts of rule of law – judicial, police and prison reform – continue to be addressed in form, through technical, rehabilitation or training programmes, the very substance of the rule of law to which they are intended to contribute is no longer a matter of either concern or discussion. In the process, the meaning, the objective and the principles of the rule of law risk being buried under the focus on security.

Second, subordinating rule of law to the security sector connotes a hierarchy of needs – and one dictated by the international community and the ATA, rather than the majority of people of Afghanistan. Treating the rule of law as a tool to deliver on security has several possible implications. It carries the implication that justice and rule of law will be subordinated to security considerations. It suggests that the police will be trained primarily to provide order rather than as a vital organ whose duty is to guarantee equally to all citizens the protection of law and justice. It suggests that as long as courts follow the rules of legality and are physically rehabilitated to conform to minimal standards, their deep and dangerous politicisation will not be given attention. The reasoning seems to be that to meddle with the politicisation of the police or courts would provoke a backlash that would endanger security and therefore cannot be addressed.

The very term "security sector" is a problematic and contentious one particularly in post-conflict settings where the term "security" usually carries heavy connotations of militarism and war, rather than of peace and stability.[28] While SSR seems to signal a welcome attempt among donors and practitioners towards convergence and synthesis by adopting a 'sector-wide' approach, it also signals a return to the era of military and state security, rather than human security, which is the most important for post-conflict situations. Despite the attempts at a broad approach, SSR is still focused mainly on the military and to a lesser extent the police sectors, with a heavy emphasis on force and law and order.[29]

There is no doubt a need for forceful approaches to security in tenuous and agitated transitional

[28] See Rama Mani, "Contextualizing Police Reform: Security, the Rule of Law and Post-Conflict Peacebuilding," in Espen Eide and Tor Tanke Holm (eds.), *Police Reform and Peacebuilding*, Frank Cass, London, 2000.

[29] As a member of the Advisory Group on Security Sector Reform, established by DfID, I raise these cautionary remarks with policy makers and academics frequently regarding the term SSR in post-conflict settings.

situations, such as Afghanistan. However, the dangers of the proliferation of a security approach to the distinct area of the administration of justice must be recognised and addressed. The rule of law must not be subjected to the security lens, even while its contribution to enhancing security and safety is recognised.

2.2.4. The Impact of Impunity on Security Sector Reform (SSR)

Despite the overwhelming priority given to SSR as a means to deal with spiralling insecurity there have been numerous implementation problems, which are again related to the decisions made between September 2001 and June 2002.

SSR includes the three tasks of creating an Afghan National Police (ANP), an Afghan National Army (ANA) and engaging in DDR. While apparently distinct, the three tasks are interdependent and

Photo by: Arpan Munier

the same problems of factional politics and impunity have hindered all. Although it was recognised as early as Bonn that disarming the estimated 100,000 former *mujaheddin* in Afghanistan is an urgent task and a precondition for security, the DDR process has been repeatedly postponed and only started at the end of October 2003, that is two years after the removal of the Taliban from power. Of the many reasons given for the slowness in undertaking disarmament, the main one is the intransigence of the Ministry of Defence (MOD) to undertake necessary reform. Recent changes and appointments to the MOD while welcome in broadening the ethnic representation, have left the power balance unchanged.

The process of creating a new ANA has also been deeply affected by factionalism across the country. This is notwithstanding the collaboration of the US, France and ISAF to conduct training according to NATO guidelines and the application of recruitment standards destined to weed out undesirable elements.[30] Not only Defence Minister Qasim Fahim, but several other commanders who have established their power bases around the country, insist on maintaining their private armies. Many of them claim that their armies are part of the national military corps and several receive salaries from the MOD for their soldiers. While some cooperate in name with the ANA process, they resist the idea of a united, representative national army that would displace their own provincial and personal armies and deprive them of their source of power.

The process of police reform, conducted under German leadership and with a substantial American role is also severely affected by factionalism. The faction leaders and commanders who seized power in late 2001 also took control of police stations and in most cases installed commanders loyal to them as police chiefs. Trained policemen, who had served under previous administrations, were called back to their jobs by the ATA, but few of them hold senior posts and most serve under former *mujaheddin* commanders who lack qualifications for the positions of police chief. Many police stations also took on several '*askars*' (rank and file soldiers who fought with the *mujaheddin*) to serve under the qualified police officers. Thus despite the presence of trained police serving in mid-ranking posts in police stations, both the leadership and the rank and file are comprised of recent combatants, most of whom remain affiliated with and loyal to their commanders.

German and American police trainers emphasise the clear distinction between the police function of protecting the law and maintaining internal security in society, and the military function of defending the country against external threats. In interviews with police chiefs, including former *mujaheddin*, this distinction was often repeated.

[30] Confidential interviews with US and ISAF officers involved in training.

In spite of this training, the police forces in most provinces cannot be clearly distinguished from the military as former combatants control police stations and numerous armed men, with an assortment of uniforms, roam the streets without any clear indication of whether they represent the police, army or private militias.

A majority of the obstacles besetting the various aspects of SSR are related to the factional politics

> *"Outwardly it appears that there is law. But in fact they are all (police chiefs) dependent on political parties and can't be trusted, because they all are previous commanders." (village elder from Hazarajat)*

and unaccountable conduct of leaders that resulted from the decisions made in the early stages of transition.

2.2.5. Impunity and the Sources of Insecurity

Senior figures in the ATA, UNAMA and the diplomatic corps concur largely on the main factors causing insecurity in Afghanistan today, although they might attribute different priorities to each factor. These are: the Taliban and Al Qaeda, factional fighting between rival commanders, organised crime and drugs, the intervention of external actors like Pakistan and other neighbouring countries and the revenue crunch experienced by the ATA due in part to the withholding of tax revenues by provincial governors. Some would also cite the lack of economic development, which fuels criminal behaviour and the misuse of arms and is itself largely attributable to insecurity and lack of access to many regions.

There is also the recognition that many of these factors are inter-related. For example, the opium crop had a bumper harvest in 2003, after the Taliban nearly succeeded in eliminating all production towards the end of their rule.[31] This has not only fuelled the illegal drug trade but has also provided finances to rival commanders who are directly or indirectly involved in the opium business.

Actions have been taken by the ATA, particularly the interior minister, the Coalition, ISAF, UNAMA and certain donor countries to respond to the

> *"Some people in our province are so rich because of opium, and don't want stability and law because they get profit from disorder and lack of law. My own cousin is a commander, but his only business is looting people, and I do not have good relations with him. Today, if I want, I can do anything I want because my cousin is a commander and has power. I am not defaming the government; I am just saying the reality." (25-year-old youth from Badakhshan, July 2003)*

rising incidents of insecurity. These include increased activity by the Coalition and newly trained ANA forces along the Pakistan border areas against the Taliban, deployment of additional Provincial Reconstruction Teams (PRTs) and the much-awaited, albeit modest, expansion of ISAF beyond Kabul, under the initiative of the Germans who currently lead the NATO command.

At the national level, the interior minister has accelerated the formation of the ANP, created a rapid reaction force and a border police force to respond to insecurity. The most significant actions are the increasing attempts by the ATA to curb the conduct of regional commanders and provincial governors and subject them to rules. In May 2003, the National Security Council signed an agreement with the governors of border provinces, focusing on the sending of tax revenues to the centre. The president and the interior minister have frequently transferred or dismissed misbehaving governors or police chiefs and appointed new ones. While sometimes successful, many of these attempts to restore legitimacy and accountability have been ignored or backfired – for example, with the new appointee being denied access to his new office or being intimidated to leave. Illustratively, when Rashid Dostum, the leader of Junbish-e-Milli Islami, and ostensibly one of five vice presidents in the ATA, was recalled to Kabul to serve as a security advisor to Karzai, he simply refused to move.

In spite of all of the initiatives of the ATA and the international community, what has been

[31] This was an about face from the Taliban's earlier policy of using the opium trade to finance themselves. They then imposed draconian rules penalising poppy production, which were largely successful.

missed is an appreciation of the common factor that underlies insecurity in Afghanistan. Thus although the many responses to the symptoms and consequences of insecurity are understandable and have short-term beneficial effects, they do not address the roots of the problem.

2.2.6. Impunity's Weight on the Political Future

Many Afghans interviewed were deeply suspicious and critical of the way in which national consultations on the content of the constitution were conducted in mid-2003. The draft constitution prepared by the Constitutional Drafting Committee was not released during the consultations and there was suspicion that a constitution would be imposed. Afghans interviewed, especially those who were ELJ delegates, expressed their fear that what happened during the ELJ would not only be repeated in the Constitutional Loya Jirga (CLJ) but would be exacerbated, as commanders have had the time and resources to organise themselves more effectively. If the CLJ is indeed hijacked by political factions, and if the constitution that results is an outcome of manipulation or compromises between factions, then the rule of law in Afghanistan will be undermined.

Afghans interviewed also expressed similar fears about the elections scheduled for June 2004. There is already debate that the elections too might be postponed, in light of mounting difficulties associated with electoral preparations and campaigning in the climate of insecurity. Whenever elections are finally held, the sustainability of their outcome will depend on how legitimate they are seen to be in the eyes of Afghan people. Without legitimacy, the electoral outcome will not produce stability in the short term, as it will be constantly under challenge.

> *"We couldn't freely express our opinion on the constitution because warlords were present and intimidating us. As long as they are there, we cannot be free." (a woman in Kunduz)*

> *"We hope elections take place. But they may not be transparent. Those with guns will surely influence the elections." (elder and ELJ candidate from Jalalabad)*
>
> *"The people of Afghanistan have realised the character of commanders. Nowadays these commanders have no validity in our community. They are not useful to us." (doctor and ELJ candidate from Jalalabad)*

Afghans interviewed recognised that holding an election before impunity has been curbed, guns removed and warlords disempowered will only mean that discredited and reviled leaders will be "legitimised" in elections that are held under the threat of guns. The example of Charles Taylor in Liberia demonstrates that it is easy to become the so-called "legitimate" leader of a country through "democratic" elections held in a climate of overall intimidation and fear. Impunity must be tackled first if a genuinely legitimate outcome is desired in the elections in Afghanistan.

3. Transitional Justice for the Past and Present

3.1. Evaluating Efforts to Address Transitional Justice

Notwithstanding the difficulties imposed by the political constraints and the stiff resistance to any attempt to reopen the past, some efforts have been made to address the issue of "transitional justice" in Afghanistan. Attempts at transitional justice can be divided between national and international initiatives.

3.1.1. National Efforts

Photo by: David A. Singh

Despite the inability of negotiators at Bonn to include any reference to past violations directly, they were able to include in the agreement the requirement to establish a series of independent commissions. These included a Judicial Commission (later to become the Judicial Reform Commission), a Constitutional Commission, a Civil Service Reform Commission and a Human Rights Commission (established as the Afghan Independent Human Rights Commission [AIHRC]).

Ideally, each of these commissions could have played a role in addressing a part of the past that fell within their domain and mandate. However, only one of the four commissions established by Bonn has taken up directly the issue of addressing past violations. According to the Bonn Agreement, the Human Rights Commission was to be entrusted with the following responsibilities: human rights monitoring; investigation of violations of human rights; and development of domestic human rights institutions. There was no specific mention made of past violations committed during war.

The backdrop to the establishment of the AIHRC, which was formally created by President Karzai in June 2002, was the first Afghan National Human Rights Conference held on March 8, 2002, with former UN High Commissioner for Human Rights, Mary Robinson, and 100 Afghan human rights activists attending.[32] The Conference's four working groups addressed: women's rights, transitional justice, human rights monitoring and human rights education, corresponding to the four areas subsequently identified by the AIHRC in its work plan.

The meeting also served to identify human rights experts from which UNAMA was able to shortlist candidates to submit to the ATA to serve on the AIHRC.[33] Many international observers have lauded the AIHRC commissioners for their independence and commitment, as many were former civil society activists operating under difficult wartime circumstances. However, observers also note that few have direct experience of human rights and consequently their capacity is low. Further, their independence while vital for their task, also means that they lack the political clout of more politicised bodies with influential members.

A brief background on the work of the AIHRC is a useful prelude to an evaluation of its transitional justice activities.

Early on, the AIHRC identified four key areas of work:

- building the capacity of the AIHRC in Kabul and across the country through the opening of satellite regional offices;

[32] The analysis presented here is based primarily on many detailed discussions with members of the AIHRC and international advisors close to the AIHRC over the April 2003 to July 2003 period.

[33] The AIHRC is chaired by Dr. Sima Samar and has ten members: Ahmed Fahim Hakim, Humaira Niamati, Abdul Raziq Samadi, Hungama Anwari, Abdul Salam Rahimi, Ahmed Zia Langari, Amina Safia Afzali, Suraya Ahmadyar, Ali Ahmad Fakur, and Farid Hamidi.

- designing and implementing a programme of human rights education;
- promoting the human rights of women and children; and
- organising a nationwide debate on options for transitional justice i.e. ways to address the abuses of the past and promote national reconciliation.

UNDP was mandated to assist the AIHRC and perform a coordinating role. UNAMA and the UN Office of the High Commissioner for Human Rights (OHCHR) were mandated to play a key role in supporting the AIHRC and assisting the ATA in living up to its human rights obligations under the Bonn Agreement. Donors who have supported the AIHRC's work include Denmark (the most significant donor), Norway, Switzerland, the UK, the US, the Netherlands and Finland.

Since its establishment, the AIHRC has set up units dealing with each of the four areas of its work plan. It has also established seven satellite offices across the country. The AIHRC issues press statements and opinions on critical issues and political developments concerning human rights and security.

Initially, the AIHRC was marginalised because it was considered less important than other tasks under the Bonn Agreement and because its role was considered too politically sensitive. Some tensions also developed between the AIHRC and UNAMA due to a perception of inadequate or inappropriate support. It would appear that relations are slowly improving between the AIHRC and UNAMA, which has enabled joint press statements on certain critical issues, such as press freedom.

While earlier sidelined in key political debates or decisions, the AIHRC's role appears to have been more mainstreamed and made politically relevant. For example, with the establishment of human rights units in police stations by the interior minister, the AIHRC has been tasked with providing the units with human rights training. The importance of having the AIHRC represented in critical political processes and decisions to ensure a human rights perspective is being recognised.[34] On the less positive side, it appears that Afghans and international donors are getting impatient with the lack of concrete action and programmes by the AIHRC that would have a noticeable impact.

The AIHRC's Transitional Justice Activities[35]

The AIHRC's Transitional Justice Unit identified its two priorities as (i) documenting evidence of abuse and (ii) undertaking consultations with the public across the country. The Transitional Justice Unit set out an ambitious timeframe to start these two priority tasks over the months of June-August 2003, to coincide with the national consultations on the draft constitution.

So far little has happened in concrete terms. The ambitious timeframe of the Transitional Justice Unit has fallen back for various reasons. First, there was the question of whether to undertake the documentation process or the consultations first. International experts advised the AIHRC to first consult so that they could ascertain the public preference for the kind of mechanism preferred across the nation, and then determine what kind of documentation might be required to fulfil the needs of the mechanism. However, AIHRC cautioned that if consultations were started, and violators knew the procedure, evidence would be destroyed. The AIHRC also asserted that informal consultations had, in effect, been conducted through the satellite offices, which interact closely with diverse members of the public and local authorities.

The AIHRC has learned a key lesson from the ELJ process. Initially, those commanders with "innocent blood" on their hands did not come forward to stand for elections. However, once the affidavit process was publicised, whereby all candidates had to sign an affidavit affirming their clean record, which could then be contested, commanders actually started coming forward. This was apparently to "prove" their innocence,

[34] For example, the chair of the AIHRC was appointed a member of the Constitutional Commission, which while of obvious value, could not have been presumed some months ago.

[35] The New York based International Centre for Transitional Justice has been assisting Afghanistan in the area of transitional justice. It conducted its first evaluation in 2001 and presented its proposals of possible ways to address questions of transitional justice to Mr. Brahimi prior to the Bonn Conference. Thereafter, it has sent teams to Afghanistan to work with the AIHRC on transitional justice.

as standing back would have meant they were acknowledging their own guilt. To avoid a similar result, the AIHRC does not yet want to publicise or debate options for transitional justice. There are also immense security hazards in starting any detailed consultation process, as it is unlikely there would be any security coverage to protect the AIHRC staff.

AIHRC members also recognise the importance of sharing information and working with the other commissions established in the Bonn Agreement in order to achieve the aims of transitional justice. The detailed mandate of each commission was not articulated in the Bonn Agreement. However, if the commissions were fully independent and had worked in coordination with each other there was the potential to address aspects of the burden of the past in complementary and reinforcing ways. The Constitutional Commission could have incorporated judicious measures into the constitution to ensure that certain types of people, particularly war criminals, never participated in government.[36] This would have had the legitimacy of *Sharia* law and also Afghan tradition, as both have numerous injunctions that "those with blood on their hands should stand in the back row" as much in the mosque as in government. The Civil Service Reform Commission could have, for example, considered setting criteria to disbar from public office and government positions people who had either committed abuses or plundered during the war. The Judicial Reform Commission could have instituted systems of law making and law enforcement that acted as firm deterrents to war crimes and human rights violations.

Unfortunately, there is very little evidence that any of the commissions have either the independence or power to adopt such measures, and cooperation has been limited to communication and consultation. This represents a lost opportunity in forging a shared and united response to contend with the weight of the past that impacts on all aspects of society.

More broadly, there appears to be an implicit agreement in political circles, both nationally and internationally, that it is "not the right time" to address transitional justice. Two principal reasons are proffered for this. The first is the practical reason that conducting national consultations on available options and preferences would "confuse" people if done so close in time to national consultations on the constitution and national registration for elections. The second is the political reason that this would complicate and perhaps jeopardise these same political processes. The un-stated reason, however, appears to be a reluctance to take any step that would be fiercely and perhaps violently resisted by those still holding sufficient military and political power to upset the fragile peace process.

3.1.2. International Efforts

The main effort made at the international level to address past violations in Afghanistan was the appointment of a UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir. This was not intended to lead to a full investigation of the breadth of violations committed during the 23 years of conflict. Nonetheless, Jahangir's report was an important precedent and contained a key recommendation for the establishment of an independent commission of enquiry.[37]

The AIHRC had initially been ambivalent about Jahangir's proposal, but following internal and external consultations the AIHRC decided that with small modifications the proposal could provide a major boost to transitional justice in Afghanistan. The AIHRC suggested that the commission of enquiry's mandate and timeline be modified, and that it go further in consultations. The AIHRC acknowledged the immense importance of international support to provide political weight to the process. The AIHRC also recognised that such a commission of enquiry, being international, would be provided with security coverage that any national consultations could not hope for.

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[36] The draft constitution prepared by the Constitutional Commission does state that "*the person who is appointed as the Minister, should have the following qualifications...Should not have been convicted of crimes against humanity, criminal acts, or deprivation of the civil rights by a court*." Draft Constitution of Afghanistan, Chapter Four, Art. 2(4), 1382. While this does provide some scope for excluding war criminals from positions in the government, it requires the current politicalisation of the judicial system to be addressed and the prevalence of impunity to be curbed.

[37] *The Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on her visit to Afghanistan*, E/CN.4/2003/3/Add.4, 2003.

The AIHRC also saw the commission of enquiry as a critical catalyst for transitional justice in Afghanistan, and not as a substitute to the work of its Transitional Justice Unit. Informed international observers too recognised that the proposed commission of enquiry was not intended to be a definitive process or a fully-fledged truth commission, but simply one helpful step.

However, when the UN Human Rights Commission met in March 2003, it only adopted a weak resolution on Afghanistan in terms of both past and present human rights violations.[38] This in itself was a disappointment to the Afghan human rights community who felt that the ominously deteriorating human rights situation in their country deserved greater attention and response.[39] More disillusioning were the credible reports that emerged from the corridors of the UN Human Rights Commission that certain countries, particularly the US, used their influence to ensure that the proposal was not adopted.[40] While citing the US's obstruction on a whole range of issues at the UN Human Rights Commission, Human Rights Watch noted that the US *"strongly opposed any call for accountability for past human rights abuses in Afghanistan, and criticism of continuing human rights problems in the country."*[41]

Following this setback, the then-UN High Commissioner for Human Rights, Sergio Vieira de Mello, informally broached the idea of setting up a high level committee that might compile a record of past abuses based on available documentation. However, to avoid security and political difficulties, the committee was envisaged as working outside Afghanistan and therefore collecting already existing evidence available outside country. This idea has not yet, at the time of writing, gone beyond the drawing board stage. The AIHRC, for their part, say they have not been consulted on the shape, form or mandate of the committee and do not see its utility if it does not work on the ground where the need – and risks – are highest. The AIHRC would rather see international support and resources deployed in Afghanistan for more urgent purposes to lend them weight.

A more positive step was Afghanistan's ascension to the International Criminal Court (ICC) in 2003. The fact that this decision was made and supported by the Supreme Court is significant.[42] The Rome Statute of the ICC is prospective and not retrospective and, as such, it would not be possible to prosecute perpetrators for their past violations. However, it would not stop the ICC from investigating and prosecuting individuals found guilty of war crimes or crimes against humanity today. This would require that the ATA bring cases to the ICC and requesting the ICC to investigate and prosecute due to Afghanistan's own inability to do so. The ICC can only apply its jurisdiction if the country in question is unwilling or unable to prosecute domestically. Following the ascension of Afghanistan to the ICC, this is a clear option and should be considered by national decision makers.

It has been noted that the very indication that the ICC's special prosecutor intends to investigate a particular case or country has sometimes had a deterrent effect on violators. Recently, when the special prosecutor indicated that the Democratic Republic of Congo would come under scrutiny, it sent a clear message to those engaged in hostilities in the country. Likewise, when the Sierra Leone tribunal issued an indictment for Liberian President Charles Taylor – a step considered highly unrealistic and therefore dismissed by many at the time – it had a distinct effect on the political outcome in Liberia as Taylor realised that he could not count on the indefinite immunity provided by his authority.

The other possibility for dealing with past crimes is the application of universal jurisdiction by third countries. Certain crimes, such as crimes against humanity and genocide, are considered so grave that they can be tried universally, under the jurisdiction of any country. So far, only a handful of countries like Belgium and Spain have applied this with some frequency in recent years. While

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[38] UN Human Rights Commission Resolution 2003/77, April 2003.
[39] *The Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Afghanistan*, E/CN.4/2003/39, 2003.
[40] Interviews with diplomats and international observers, Kabul, May 2003.
[41] Human Rights Watch, *UN Rights Body in Serious Decline*, Human Rights Watch, Geneva, 25 April 2003.
[42] Interview with a senior Supreme Court official, who says it was the Supreme Court that held internal consultations and proposed the ascension to the ICC.

this is not yet on the fast track, there are indications that some countries, like Canada and the UK, might be prepared to use universal jurisdiction to act on cases of crimes against humanity. The UK, for example, arrested an Afghan residing in the UK suspected of torture in Afghanistan.[43]

What has not happened at all so far is any measure to address victims. Refugee returnees are getting some assistance from international agencies to help them with reintegration. However, this assistance cannot in any way be regarded as reparations or compensation for their losses as victims of war. The prospect of reparations for victims is a daunting one, especially amidst so many other competing demands and such limited and shrinking financial resources, but failure to do so contravenes existing international provisions on the right to remedy of victims.[44]

3.2. Building a National Response to the Abuses of the Past

3.2.1. The Choice of Mechanisms for Transitional Justice

From the experience of other post-conflict situations, a variety of means exist to deal with the heavy political, social, economic, cultural and above-all psychological burden of crimes committed during war or repression.[45] These include a full range, which could be categorised as follows:

- legal measures: prosecution, reparation, compensation, restitution, conditional amnesties;
- political measures: public enquiry, apology, public compensation;
- administrative and constitutional measures: lustration or removal from office, vetting public servants;
- social measures: commemoration, education or rewriting text books, memorials; and
- psycho-social measures: therapy, community ceremonies, traditional rituals.

Despite this wide range of mechanisms, international experience has focused on only two principal options. The first and most popular is commissions of enquiry or "truth commissions." Truth commissions became popular in Latin America in the face of amnesties that prevented trials. Since 1990 truth commissions have been instituted in several countries emerging from conflict, including El Salvador, Haiti, South Africa, Guatemala, Sierra Leone and East Timor. Some countries have sought to reopen the past years after transition and institute truth commissions, such as Peru and Ghana.[46]

The second most popular mechanism is trials. This mechanism became popular after the unprecedented decision by the international community to institute ad hoc international tribunals to prosecute war criminals in the former Yugoslavia and Rwanda, deeming that the war crimes were too grave to merit anything less than trial according to international law. Despite tremendous criticisms, their institution provided a significant boost to transitional justice and to the debate on the relative merits of national or international trials to provide justice in post-conflict settings.

A recent innovation has been to experiment with hybrid trials that combine national and international staff and procedures, but hold sessions closer to or within the country to ensure a beneficial return to local war-affected populations. After years of unsuccessful negotiation between the UN and the Cambodian government to institute such a mixed tribunal in Cambodia to try Khmer Rouge leaders, the first hybrid tribunal was established in Sierra Leone.

The international scrutiny and profile given to truth commissions and trials has helped the cause

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[43] Jo Tuckman, "Alleged torturer sent to Spain," *The Guardian*, Monday June 30, 2003. An ordinary commander was arrested in the UK when he was caught trying to murder wife. His prosecution for this crime has led other witnesses to come forward regarding his other violations.

[44] A discussion of these provisions can be found for example in Dinah Shelton, *Reparations to Victims at the Criminal Court*, Centre for International Cooperation, prepared for the Preparatory Commission of the ICC, July-August 1999.

[45] Some analytical treatment of the different means can be found in Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

[46] For a comprehensive analysis of truth commissions see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2002.

of fighting impunity. However, it may also have had an indirect adverse effect. Peacemakers and parties to conflict may have the impression that these are the only two options available to deal with past crimes. Hence, there may be a reluctance to drop entirely the issue of dealing with past violations when it appears to peacemakers that neither of these options will be acceptable to the parties. This has led to a contradictory trend. On the one hand, in countries like Sierra Leone and East Timor both truth commissions and trials have been instituted giving an impression of a trend towards accountability. On the other hand, in Kosovo and Afghanistan no measures have been taken, creating the impression of a trend towards impunity.

It is important for decision makers and the population to be aware of the full range of choices to redress the past. They must be aware of the possibility of adapting each of these measures to the particular needs of the given situation without succumbing to pressures for impunity. Decision makers must avoid the simplistic approach of adopting a single mechanism that might rouse fierce opposition from some stakeholders but disappoint others. Instead, decision makers must recognise the possibility and desirability of combining a variety of mechanisms across legal, political, social, administrative areas. Such combinations alone can yield a full process that could render justice to war-affected populations and craft inclusive political communities over a period of time.

3.2.2. Dealing with Perpetrators and their Violations

The subject of dealing with past violations has become so taboo that the first requirement is simply to put the issue on the public agenda. This must be done not only through academic and policy debates, but more importantly through media, newspapers and simple conversations in *shuras* and other informal public settings. At present, there is great fear even to air views on the subject. When two journalists voiced their opinions in articles that touched upon the issue of abuses committed by certain *mujaheddin*, they were immediately arrested in violation of laws protecting press freedom. The Supreme Court called for death sentences against them for their blasphemy. Such intimidation needs to be dispelled and genuine free expression permitted.

Public debate will also serve to allay the fear associated with the subject of transitional justice and dealing with war crimes. Any debate will reveal that the opinions of Afghan people vary widely, that each set of opinions is valid and legitimate and that it is unlikely that a single mechanism will serve to respond to the great variety of views. It may be spurious and artificial to expect a clear and authoritative majority opinion to emerge among the population regarding a single preferred mechanism – truth commissions or trials.

The starting point of a comprehensive response to the weight of the past is the people of Afghanistan. At present, it is not clear when the full scale national consultations on war crimes and transitional justice proposed by the AIHRC will take place. As a precursor to that full debate, a snapshot is provided below of some of the main opinions that emerged during this research. This is only an indicative analysis of existing opinions, and is in no way comprehensive or exhaustive, but does highlight the complexity of responses and the need for consultations to take place.[47]

From the individual interviews and group discussions three main approaches to dealing with war crimes and the abuses of the past emerged, although there is a degree of overlap between each of the categories:

- forgive and forget: for these people it is important to look ahead and therefore forgive and forget the past;
- judgment and prosecution: these people felt the need to judge those responsible for the worst crimes and looting; and
- wait and see: these people felt in the current circumstances that it is not realistic to prosecute war criminals, particularly where they still hold power and have guns.

[47] This analysis is based on in-depth individual interviews and informal small group discussions with men and women from a range of social backgrounds, ethnic groups and ages in selected parts of the country, including both urban centres and some rural areas. However, it is by no means a comprehensive or large enough sample to be able to draw conclusions about nationwide patterns or preferences.

Forgive and Forget

One frequent reason put forward against punishment is simply that there are too many perpetrators and that the distinction between perpetrator and victim is not so clear:

> *"If we account for all actions of all those who committed crimes from the Communist government till today, it would be very difficult, perhaps no one would be left out because all have committed some crime. All are accountable."* (elder from Khanabad)

> *"During these years, we may not be able to find anyone who is only a victim, but may also be a perpetrator. Now if we hold them accountable we will create lots of problems. So let's forget about the past."* (elder from Kunduz)

A second reason is that the *mujaheddin* sacrificed a great deal for their country and should not be punished. This view mirrors that of the Afghan factions who negotiated the Bonn Agreement:

> *"The future government should give some privileges to mujaheddin because they suffered a lot. All mujaheddin should have benefits and some role in future government."* (elder from Khanabad village)

People advocating a forgive and forget approach to transitional justice, often argued that war criminals had already been punished by history and it served little purpose to punish them again in a court of law:

> "*Those who committed crimes before Taliban were already punished i.e. Taliban themselves were a real punishment. It is now time for reconciliation."* (senior scholar and government employee from Mazar-e-Sharif)

> *"War criminals of all stages of conflict have already been punished. The Communists are hopeless and wandering –that is a good punishment. The Taliban - no one knows which cave they are hiding in. So all war criminals have received their sentences."* (government employee from Kunduz)

An Afghan expression that was also cited in favour of forgiveness was: *"amnesty is sweeter than revenge,"* and some people claimed that Afghans are more ready to forgive than to seek revenge.

Others advocated the need for an attitude of reconciliation and felt that dredging up the past is counter-productive:

> *"What happened is past, let us forget it, our only wish now is for peace and security and disarmament."* (elder in Khanabad)

Judgment and Punishment

Within this category there was a range of views, from those favouring harsh punishment, to a lighter punishment or simply an apology. Several people in this category insisted that the reason they felt so strongly about punishment was because the crimes committed were deplorable from both an Islamic and an Afghan perspective, and therefore could neither be forgiven nor forgotten. Several were direct witnesses to such crimes, particularly against women, and felt that both their religion and national traditions demanded redress.

One strong line of argument in favour of judgment came from an Islamic perspective. Devout Muslims and lawyers cited both *Sharia* and Afghan custom as reasons not to forgive:

> *"It is very clear in Sharia law: if somebody committed a violation, even if he is not a murderer, he should not stand in the first or second line in the mosque for prayers, but remain in the back. This is because a society should distinguish between those who respect the law and those who violate it.*

> *"Prophet Mohammed said, in a society anyone who misled or committed crime should be punished. You should not talk to him.*

> *"If he is sorry and apologises and stops wrongdoing then you can talk to him. During two decades of war, of the people who violated, we say perhaps 90 percent of wrongdoers will be forgiven. But 10 percent will not be forgiven because such crimes that no one will forgive.*

> *"Based on Islamic Sharia values, people will forgive someone if they are in power and not using their power to punish others, but if*

they exercise power in the right way." (judge from Mazar-e-Sharif)

This group was also dismissive of the claim of the *mujaheddin* that they had sacrificed so much for their country and did not deserve to be judged by their people. As one woman put it:

"They are mujaheddin and were only performing their duty to God. Why then do they expect people to forgive them and give them favours – if anyone must it is God."

This perspective does, however, differentiate between the leaders and rank and file:

"The leaders must be punished. Those followers, who only acted under 'Majboori' - pressure - can be released and forgiven." (Khanabad woman activist)

Another frequently expressed view was that perpetrators should be brought in front of the people of Afghanistan – their own people – for judgment:

"Persons who committed ruthless actions should be brought in front of people and enquiry conducted and punishment deemed necessary should be meted. Because they committed crimes against people, it is the people who have the right to judge them, Actually, all people want to punish any criminal according to criminal law, whether they committing killing, looting or rape. All people in my province share the same opinion, that those who committed crimes should be punished and they are waiting for this." (Badakhshan youth about 26-years-old)

Several people underlined the need for prosecution to take place outside Afghanistan in international courts and under international protection, due to the impossibility of fair trials in the country today.

Many Afghans interviewed felt strongly not only about physical abuses committed against people, but also about the looting and pillaging of the country's national wealth:

"They should be asked one simple question in the ICC. How much wealth did they possess 23 years ago and how much do they possess today? Both are the same: those who have killed innocent people and those who have looted national wealth, both should be punished. Yes, both murderers and looters must be punished." (elder from Jalalabad)

As wars driven by economic incentive continue around the globe, it is important that Afghanistan finds a way to address economic crimes committed during the war, both for itself and as a precedent for other countries immersed in war economies.

A strong, common argument expressed by many people in support of prosecution or judgment was deterrence. People hold the fear and conviction that if perpetrators are not punished they will continue endlessly their cycle of abuse and violence, as they are doing with impunity today:

"The perpetrators must be punished. If they are not punished they will have no fear of punishment and will repeat their crimes, and no end to it." (a woman from Khanabad)

One comprehensive view of what must be done to deal with the legacy of the past, encompassing reparations, was put forward by an elderly civil society worker in Hazarajat:

"First, all Afghans should have 100 percent disarmament. This is most important for the future of Afghanistan. Otherwise all gunlords will continue in power and repeat violence. I emphasise this.

"Second, it is impossible to punish people inside Afghanistan today. It must be with the assistance of the international community. Trials must be conducted overseas, not in Afghanistan. They must follow international laws of accountability and punishment.

"Third, those who lost houses, land, family must at least get some small compensation for material losses this will help them. However, nothing will compensate for sisters and brothers who have been killed."

Wait and See

This group can be divided between (i) those who felt that whereas judgment would be desirable at a later stage, it is not feasible or desirable today for circumstantial reasons, and (ii) others who felt it is unrealistic to even talk about what they would wish for in a different set of circumstances:

"There is no one rectifying their behaviour, so it's no use. They get lots of profit from their actions, so they won't give up their position and they cannot be corrected – that would only create new problems. So until they are out of their power, their positions, only then gradually we can try them for their crimes." (female teacher from Mazar-e-Sharif)

"It is quite difficult for the international community and our government to make them accountable now. It is too difficult to punish powerful people. Some may have fled. Many people who committed cruel acts have left here and never returned. The best is to work for the future. In future if there are any such cases, they should be brought for punishment. So we should think of future. So that this never be repeated." (young man from Hazarajat)

Some people interviewed also felt that because of an inability to address the past and the desire to look forward, the preferred result would be if perpetrators of violence apologised and genuinely showed they had changed their behaviour. However, if the violence and abuse was ever repeated, then stern and immediate punishment should be meted out:

"Let us forget the past. But let's make a deadline for the future: Anyone who commits such a crime in the future should be punished." (elder from Kunduz)

Several people underlined that whereas current conditions made immediate punishment impossible or improbable, as soon as these people are disarmed and removed from power, they should indeed be judged. However, one dissenting voice, a Kabul doctor, noted, *"in all other countries when people commit crimes they are punished then and there with a commensurate punishment. Why then in Afghanistan should punishment be 'slowly slowly?'"*

3.3. The Past Impinges Upon the Present and Future

While these three categories might suggest that opinions vary greatly, in reality there is convergence on the crucial points.

Afghans interviewed concur on what they aspire for and also what they want the international community to assist them with. The shared wishes expressed repeatedly in interviews included a desire that the guns that enable impunity and cause insecurity be taken away; that commanders be removed from power; and that a legitimate representative government be put in place where no one with blood on their hands may play a role.

Afghans interviewed can live with the past on condition that it does not continue to negatively impact upon their chances for the future. Those interviewed were irked less by past crimes of perpetrators than by the continuing abuse of authority in violation of the law with full impunity. The irony is that even while Afghans in different parts of the country speak of the brutality of the Taliban, they are almost more willing to forgo punishing Taliban – who have already been expelled from power, and therefore, publicly judged and punished. However, the Afghans interviewed felt it intolerable that the same *mujaheddin* commanders, who terrorised and plundered the country in 1992-96, have not learned their lesson and are once again abusing their position of power.

This is not an abnormal sentiment but a common and prevalent human response. It is entirely normal and common for people to hold their leaders to a higher standard than those not in power. This is particularly so for leaders who claim to act on the basis of religious or ethical values or who hold positions of government responsibility. It is harder for Afghans to accept the excesses of the leaders of their own ethnic groups who claimed to represent them and defend their common values as Afghans and Muslims against external enemies.

From the interviews and research conducted, Afghans are not stuck in the past. Rather the concern is foremost to rescue the present and to safeguard the future. However, the findings of this research are that Afghans are all too aware that if those who committed abuses in the past and continue to do so in the present are not called to account for their actions the cycle of abuse of power and impunity will not be broken. It might be understandable for those charged with restoring peace and stability in Afghanistan – the ATA, UNAMA and international donors - to put aside the past for the moment, if it did not impinge so heavily on the present and on the future.

Conclusion and Recommendations

Photo by: David A. Singh © Office of Communication and Public Information/UNAMA

"If you want our people to have justice, rule of law, democracy, health, education, first of all you should disarm our people." (ELJ delegate and Elder from Jalalabad)

"What we want is first complete disarmament, then take them (the commanders) out of power, then we can have free and fair elections ... With these guns, how can we express ourselves freely?" (elder from Kunduz)

Peacebuilding, it was noted earlier, is predicated on two objectives: it requires securing an end to (i) direct violence through a cessation of hostilities and establishment of physical security, and (ii) indirect violence through structural and institutional changes that address the causes of conflict and prevent a relapse into conflict. The experiences of the last decades in divided and fragile societies trying to emerge from war indicate that the two objectives of peacebuilding are inseparable and simultaneous rather than hierarchical. They must be pursued in tandem, not in sequence. This is also the lesson that the experience in Afghanistan suggests so far, but it has not yet been recognised or heeded.

In the immediate aftermath of the chaos and uncertainty of prolonged conflict, as experienced in Afghanistan on the removal from power of the Taliban, there may have been an understandable focus on only one dimension – that is securing "negative" peace – without a recognition of the need to underpin it with the second, "positive" peace dimension. Certain decisions at Bonn and the ELJ were made with this single objective of "negative" peace in mind. Each individual decision might have appeared to have mitigating conditions in the context, as each was taken to reduce the apparent risk of a violent backlash or relapse into conflict in the short-term. However, in succession and in accumulation the choices and decisions of

Bonn and the ELJ, communicated to the actors responsible for past and present insecurity that they would remain immune from punishment and shielded from the consequences of their actions.

In early to mid-2003, there were some signs that international and national decision makers were beginning to invest more in the second dimension of peacebuilding through structural and institutional changes and an attempt to emphasise accountability and the rule of law. It is possible that, belatedly, a better balance between the dimensions of peacebuilding could have been reached. However, all too soon, the degeneration of security in 2003 forced a return to a short-term focus on security as the overwhelming priority. It was not recognised that this degeneration of security was largely due to the failure to invest rapidly and sufficiently after Bonn in parallel structural changes and processes to consolidate peace, such as restoring accountability, rule of law, social justice and sustainable livelihoods. There appears to have been a belief that there is a trade off between the two objectives of "negative" and "positive" peace and that "positive" peace is too risky to invest in at an early stage as it might compromise "negative" peace. In reality, there is no trade off between "negative" and "positive" peace. Rather, both need to be pursued in tandem for peace to result, as they are mutually reinforcing.

Unless the imbalance in favour of "negative" peace over "positive" peace is addressed, the opportunity for addressing the justice situation in Afghanistan may pass and result in an overall deterioration in the security environment. Acting against impunity is the first step towards restoring this balance. This will require actions to curb both the actors and the tools that perpetuate impunity. After that, it will require the development of a realistic, integral and appropriate response to the hitherto taboo subject of accountability for past violations in order to set the basis for a just, inclusive and stable peace.

> *"We are upset with the international community. Because they took our people out of the control of the Taliban and terrorists and put us in the control of other cruel people." (professor from Jalalabad)*

Acting Against Impunity

Redressing impunity from a legal perspective presumes a fully functioning state that might fulfil its legal obligations. It also presumes an operational independent judiciary to provide fair trial. It could be argued that this is still not the case today in Afghanistan, and therefore that it is premature and unrealistic to expect as much today. Nevertheless, even if the state is the main duty holder and national courts have primary jurisdiction, it is acknowledged under international treaty and customary law that violations of certain fundamental human rights, war crimes and crimes against humanity have universal jurisdiction. Furthermore, the Joinet principles regarding the duties of states with regard to the administration of justice state:

> *"Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings, on either an individual or a collective basis, where the authorities fail to do so..."*[48]

Curbing impunity does not always require a legal remedy except as a last recourse. There is first a vast array of diplomatic and political measures that could control the behaviour of actors and stem impunity short of legal remedies. Indeed, it is and has always been standard practice in multilateral cooperation to apply diplomatic and political pressure – or at worst the credible threat of military force - rather than legal redress to elicit the desired change in conduct from political actors. It would be disingenuous to claim that the combined presence of a UN Security Council mandated peace mission (UNAMA) and international security force (ISAF), a military Coalition and all major donors, cannot deploy their diplomatic, political, and if necessary, their military might, to induce or coerce change in Afghanistan.

Recommendations

The recommendations are divided into two sections. The first section deals with the immediate challenge of reversing impunity. This

[48] *Administration of Justice and the Human Rights of Detainees*, Revised Final Report of Mr. Joinet, Human Rights Commission, E/CN.4/Sub.2/1997/20/Rev., 2 October 1997.

will require actions to curb both the tools of impunity and the actors spreading impunity. The second section deals with the task of elaborating an appropriate integral response to Afghanistan's past, proposing immediate steps and also broad guidelines.

The recommendations spelled out below will be impossible for Afghans to achieve without the firm political commitment of the international community. Afghans interviewed expressed hope that the promises made by the international community two years ago will not be abandoned and it is today that the international community must demonstrate that they will indeed stay the long haul.

Recommendation One: End Impunity

End impunity by removing guns from society

- Expand ANBP to a nationwide disarmament drive, with full financial backing of international donors. As part of the expansion of ANBP, the lack of measures to ensure the reintegration and livelihoods of ex-combatants should be addressed. The expansion of ANBP and the implementation of reintegration measures should be accomplished before any elections are held.

- Hold symbolic weapons destruction ceremonies, particularly to mark the elections with ceremonial attendance of community representatives - women's *shuras*, elders as well as governors and warlords - to signal public commitment to the elimination of weapons from society.

- Issue a decree banning the carrying of guns, particularly during election registration and the holding of the elections, with stiff penalties rigorously and systematically enforced with the assistance of ISAF.

Address the actors that spread impunity

- *Expand the International Security Assistance Force (ISAF) to protect the peace*: A realistic and proportionate expansion of ISAF commensurate with security needs across the country, building on UN Security Council (UNSC) Resolution 1510 (2003), is required. Fulfilling the UNSC mandate to support the "maintenance of security" outside Kabul and to protect the Bonn-mandated political processes from being hijacked will necessarily require ISAF to act firmly against impunity by demonstrating that violations of human rights and unaccountable conduct will not be tolerated. For this, ISAF must be empowered to intercept and arrest actors who threaten the political process and the personal security of Afghans.

- *Use the International Criminal Court (ICC)*: If the above steps and continued actions by the ATA to dismiss or transfer intransigent commanders do not succeed in curbing the impunity of such actors, the ATA should consider using the ICC, as Afghanistan has acceded to the Rome Treaty of the ICC. This could involve the ATA requesting the ICC special prosecutor to investigate and prosecute ongoing violations that fall within ICC's mandate due to the inability of Afghan courts at present to provide fair and independent trials.

- *Apply universal jurisdiction in third countries to try past perpetrators*: Third countries, particularly the UK and Canada, should be encouraged and assisted to exercise universal jurisdiction to begin criminal prosecution of a few symbolic cases of war crimes.

Recommendation Two: Build a Response to Past Injustices

Given the taboo around past injustices, the first step is to open up civic and political space through open debate before or simultaneous to any decision on official mechanisms and processes.

Formulate an integrated approach

The guidelines presented below should complement national consultations on dealing with the past which should be undertaken by the AIHRC with full political and financial support from the international community.

- *Look beyond perpetrators and victims - A "survivor"-oriented approach:* Several approaches and mechanisms tend to either focus exclusively on perpetrators or victims, ignoring the frequent overlap between these two groups over different periods of conflict. Mechanisms that might inadvertently accentuate divisions and antimony between

opposed groups, alienate the broader society and waste scarce resources must be avoided. The most appropriate response to dealing with the traumatic past, while building the future, is "reparative justice." "Reparative justice" aims to repair the legal, social and psychological harm in a way that encompasses the diverse needs and perspectives of all survivors in society, whether victims or perpetrators; it seeks to respond to the fundamental need for all to live together in an inclusive society where all are treated as equals according to the law.

- *Employ multiple mechanisms to meet different wishes*: Recognise that the opinions of people are strong but deeply varied. The planned national consultations may not yield a clear response in terms of a single "preferred" mechanism. Nor should decision makers settle for one single mechanism and process to "deal with" past injustices in Afghanistan. Afghans and their international sponsors should be prepared to consider a range of mechanisms and processes, some official and some informal.

- *Caution with truth commissions*: There is a tendency today to believe that no society emerging from conflict is complete without its own truth commission. However, the outcome and benefits of truth commissions have been mixed. Careful attention should be paid to the emerging lessons about the benefits and drawbacks of truth commissions from similar countries emerging from prolonged conflict.[49] A truth commission that is poorly resourced and lacks political support is often worse than none at all. Nor is it a panacea. If instituted in Afghanistan, such a commission should be given a strong mandate, full internal and international political support and adequate resources to investigate, publish, disseminate and implement its findings and recommendations.

- *Explore the use of trials:* If the option of trials is pursued, an investigation should be conducted with the ICC into the possibility of instituting hybrid trials such as those instituted in Sierra Leone. These would combine national and international staff, but could be held within Afghanistan, thereby being more accessible to the local population. Such a process would help to strengthen the rule of law and due process in the country's legal system.

- *Penalise war economies:* Usually approaches towards "transitional justice" focus only on direct violations of political and civil rights or war crimes. However, economic crimes perpetrated during war including looting and engaging in lucrative illegal war economies (narcotics or precious natural resources) are rarely addressed or penalised. Given the continued challenge of dealing with illegal economies, and their impact on security, there is a strong rationale for devising a robust mechanism to address such activities. The finance ministry, the justice ministry, the AIHRC, donor countries, neighbouring states and financial institutions should cooperate to investigate and curb illegal economic activity. This would set an important precedent and act as a deterrent not only in Afghanistan but also in other warring countries.

- *Restore distributive justice by addressing the social injustices underlying the causes of conflict:* The main lesson that those engaged in so-called successful experiments with transitional justice have drawn, such as in South Africa, is that any measure of justice is incomplete until social justice is restored to the society. The deep-seated social, political and religious inequalities between groups, and ethnic perceptions of injustice and exclusion must be redressed as a precursor to any political, social and economic programme that intends to build peace in Afghanistan. The eagerness of international financial and development agencies, and their local counterparts, to promote rapid economic growth overshadows the parallel need to address social and economic inequalities. Political power sharing between leaders claiming to represent ethnic groups, as undertaken in Bonn and at the ELJ, is not a satisfactory proxy for re-distributive justice.

[49] See Priscilla Hayner, op cit.

Create civic space and a conducive atmosphere for accountability

- The ATA should issue a public apology to all Afghans within and outside the country affected by 23 years of war, in the name of all previous governments and all fighting forces. This would serve as an important symbolic step for victims, send a signal to perpetrators and would open the door to free expression and debate.
- Open debate should be fostered via radio, television, print media and public forums to foster free expression and discussion of experiences during the war, violations and ways to deal with them.
- Full guarantees of free speech should be provided to journalists and all media for airing such issues publicly.
- Local *shuras* and *jirgas* could be used as venues for story telling and sharing of experiences by both perpetrators and victims in a safe and protected environment within the community.
- The government should make a declaration commemorating the victims and all survivors of Afghanistan's wars. An official day of commemoration might be instituted. This could be enshrined within the new Afghan constitution or declared by the Afghan government.
- The government should institute a reparations commission to investigate financial, social and traditional means for providing reparations and compensations to victims, and for fulfilling international standards and norms regarding victims' rights to redress. The work and recommendations of this commission should be fully supported by the international community.

Appendices

Appendix I: The Legal Arguments for Addressing the Past

It was in the aftermath of the Second World War, and particularly after the experience of the Holocaust, that world leaders realised the moral and political importance of dealing with the legacy of war in terms of its violations of human rights, humanitarian law and the suffering of victims of genocide. Although controversial, mixed in success and accused of victor's justice, the Nuremberg and Tokyo Trials set up by the Allied Forces after the Second World War to try German and Japanese war criminals dramatically demonstrated a new determination to prosecute such gross violations committed in war.[50]

The establishment of the United Nations itself in 1945 was a consequence of the collective determination of world leaders to protect successive generations from war and its depravations. Thereafter, a series of international instruments was crafted against this backdrop to constrain the conduct of war and to protect civilians from the brutalities of war. International law spread its coverage rapidly: the Genocide Convention (1948); the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966); the International Covenant on Social, Economic and Cultural Rights (1966); the Convention on the Elimination of All Forms of Racial Discrimination (1969); the Four Geneva Conventions (1949) and their two Additional Protocols (1977); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment (1984).[51]

The establishment of the International Criminal Court (ICC) in the Hague in July 2003, following the Rome Treaty of July 1998, is the most significant development in this trajectory of international instruments to address war's violations. Although, the ICC does not have retrospective powers to address crimes committed in the past, it can prosecute war criminals who continue to act with impunity, for example, by violating peace agreements and threatening a transitional peace process.

There is a clear legal responsibility on states to address the perpetrators and victims of gross human rights abuses committed by prior regimes and war crimes perpetrated during war. The legal rationale for doing so rests on three clear arguments.[52] The first is state responsibility. Under international treaty law and international customary law, the duties of states to provide redress for specific violations committed during conflict are clearly established.[53] Successor states are expected to fulfil their duties even if violations were committed by a prior regime. Under international customary law, these duties apply even to states that are not parties to the specific treaty or treaties in application.[54] Second, victims' rights to compensation and redress are specified in human rights covenants and relevant treaties, and establish obligations on states.[55] Additionally, a strong legal case is made for establishing individual criminal accountability for certain crimes under international criminal law.[56] Third, international law strictly circumscribes the mitigating circumstances under which derogations are permissible. Article 4 of the International

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[50] See Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Clarendon Press, Oxford, 1997; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

[51] Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, Clarendon Press, Oxford, 1989; Ian Brownlie (ed.), *Basic Documents on Human Rights*, Clarendon Press, Oxford, 1995.

[52] These legal and other rationales are based on my study of the subject and are reproduced here from *Beyond Retribution*, op cit, (89-90).

[53] Ian Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford, 1990.

[54] Noami Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, Oxford University Press, 1995; Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', in Neil Kritz, *Transitional Justice*, USIP, Washington, D.C, 1995, 375-416.

[55] International Commission of Jurists, *The Right to Reparation for Victims of Human Rights Violations: A Compilation of Essential Documents*, ICJ, Geneva, 1998; UN Document, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Preliminary Report, UN Doc. No. E/CN.4/Sub.2/1990/10, 26 July 1990, and Final Report, 1993, UN Doc. No. E/CN.4/Sub.2/1993/8 July 1993.

[56] Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Clarendon Press, Oxford, 1997, 1-23.

Covenant on Civil and Political Rights discusses derogations during emergencies and section two states that no derogation is possible for the right to life, protection from torture, degrading punishment and slavery.

At the international level, the question of impunity for human rights abuses and war crimes is an important one. The UN has been seized recently of the importance of acting on the issue of impunity. The secretary-general has been tasked by the General Assembly and the UN Security Council (UNSC) to prepare a report on impunity. So far these consist only of reports to the UNSC on the written replies of member states. However, recent reports on impunity by UNSG and recent UN Human Rights Commission (HRC) resolutions on impunity commend the tribunals and truth commissions in Sierra Leone and East Timor for their contribution to fighting impunity.

Advances are also being made internationally in recognition of the rights of victims to redress. The report on the subject to the HRC prepared by Joinet establishing standard principles on the right to reparation of victims are an important step in the direction of international recognition of victims' rights.[57] The ICC is also in the process of establishing principles concerning reparation to victims, and setting up a trust fund to finance this.

[57] *Administration of Justice and the Human rights of Detainees*, Revised Final Report of Mr. Joinet, Human Rights Commission, E/CN.4/Sub.2/1997/20/Rev., 2 October 1997.

Appendix II: Transitional Justice and Global Trends

Since the 1980s there have been increasing attempts at the national level to deal with human rights violations in periods of political transition.[58] Successor regimes in Latin American countries emerging from brutal military dictatorships in the 1980s tried against the odds to deal with past violations, under intense public pressure.[59] These experiences of "transitional justice" often through a variety of truth commissions or commissions of enquiry as in Chile and Argentina had mixed results. They were often undermined by amnesties passed by departing military generals designed to protect themselves during their lifetimes from prosecution. It is only now that former generals are facing extradition and prosecution, such as Augusto Pinochet of Chile and Ricardo Cavallo of Argentina.[60]

When Central and Eastern Europe emerged from communist rule in the early 1990s, new and innovative attempts were made in some countries to deal with violators of human rights as also collaborators and informers, again with limited success and mixed results. Given the wide scale of collaboration with the communist regime, "lustration" or removal from public office was a preferred mechanism. Lustration punished recognised perpetrators by denying them the political power and authority they had abused. It respected the trauma and suffering of victims by public remedy and by ensuring they would not meet their abusers in public places or see them exercise state authority again. It also stabilised and strengthened the foundations of the state by ensuring that those who had threatened the state in the past could not do so again in the future.

Throughout this period of transitions in Latin America and Central and Eastern Europe, policy makers and political leaders were under no illusion that addressing this imperative task of dealing with the past was an easy one. Even while seized of the need to act, political leaders and human rights activists fully realised the enormous political risks of acting against former – or current - leaders for their violations and deliberated the options and risk exhaustively.[61]

By the early 1990s a new scenario emerged with the resolution of a number of long-lasting internal conflicts across the developing world, simultaneous with the outburst of new ones. For the first time, international attention focused more systematically on addressing the legacy, not just of state repression or dictatorship, but of outright war.

The rapid succession in the 1990s of the former Yugoslavia, Rwanda and South Africa entrenched the notion that transitions from violent political conflict, ethnic cleansing or genocide could not exclude some form of reckoning with past violations, as much for political expediency as social imperatives.[62] The political imperative of addressing the major grievances of the different parties to the conflict was recognised as an inevitable step to reach agreement between opposed parties to resolve conflict. The social imperative of dealing with public pressure for justice and redress, and the psycho-social imperative of healing the profound trauma of ever-larger numbers of civilian victims, received less attention from decision makers, but, nevertheless, could not be overlooked.

While Rwanda, former Yugoslavia and South Africa moved the issue out of the national sphere and put the question of dealing with past violations on the international agenda, they also created a kind of fad by the mid-1990s and popularised the term "transitional justice." It is not entirely

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[58] For a comprehensive compilation see Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, USIP, Washington, D.C., 1995. This does not include more recent case histories of post-conflict justice particularly in low-income societies.

[59] The most knowledgeable scholars on this subject are Guillermo O'Donnell and Philippe Schmitter whose work is worth consulting, particularly their concluding volume: *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, Johns Hopkins University Press, Baltimore, 1986.

[60] Jo Tuckman, "Alleged torturer sent to Spain," op cit.

[61] Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints," in Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, USIP, Washington, D.C., 1995, 203-216. His reflections on the subject are pertinent as he served as a member of Chile's Truth Commission and confronted these dilemmas himself.

[62] See my discussions of this subject in *Beyond Retribution*, Chapter One, where I argue that addressing justice is equally a political as a social imperative, and Chapter Four, where I deal comprehensively with the question of rectificatory or reparative justice for the past.

helpful to apply the very different experiences of transitions from repression to democracy to such war-torn societies, although there are certainly lessons to be learned.

A factor that is often overlooked is that while in Latin America and Central and Eastern Europe, civil society groups were able to make their voices heard and influence the outcome of the way in which past violations and victims' grievances would be addressed, this civic space is highly constrained if not non-existent in many more recent conflict settlement processes. Indeed, due to a combination of the level of intimidation and terror deployed in recent wars, and the elite and exclusive nature of mediation processes, usually with a significant international role, civil society's voice and pressure is near absent when agreements are hammered out. In the best of cases, as in Guatemala or Sierra Leone, civil society is able to demonstrate its distaste to amnesties declared by political leaders and international mediators in contravention of their wishes. In some cases, like El Salvador, civic activists are able to indirectly influence the negotiation process and include human rights clauses. Civic movements that mobilise during transition are not only important for the outcome of the peace settlement and their implementation, but also play an important role in the post-transition stabilisation processes. The continuing strength of the famous mothers of the Plaza de Mayo in Argentina, who demanded persistently to know where their children had been "disappeared" by the military regime, and the emergence of formalised civil society organisations from informal and spontaneous civic demonstrations in El Salvador or Guatemala are important.

Even while the trend in peacemaking seems to be towards negotiation and accommodation with all proclaimed parties to the conflict, there is a clear lesson that emerges from the experiences of the recent past. In cases where peacemakers have condoned leaders responsible for particularly egregious violations and accommodated them on the negotiating table in order to secure "negative" peace or an end to hostilities, despite the protests of war's victims, the consequences have very often been negative. When such notorious leaders were given a role in power sharing, such as in Cambodia, Angola and Sierra Leone, they used their new authority and international legitimacy to subvert the peace process, reassemble resources and return to war. In each of these cases, the calculation of peacemakers that the inclusion of such leaders in peace arrangements would buy their cooperation and avoid a relapse into conflict, backfired and produced the opposite result. Even the public legitimisation of elections has failed to prevent such subversive behaviour, as in Cambodia and Angola, and most recently Liberia. Charles Taylor intimidated the population to vote for him, threatening a return to war if he did not win the elections. Yet, after his "legitimate" democratic election, he not only continued to fuel war in Sierra Leone and Guinea, but brought it back to his own country.

Such relapses have not only plunged entire populations back into the terror of war, but have also cost the UN and international community their reputation and credibility. The UN suffered a humiliating disaster in Sierra Leone when Foday Sankoh violated the peace process and captured UN peacekeepers, signalling a return to war. There is a grave risk that the same mistake is being repeated yet again as Charles Taylor resides in exile in Nigeria with full impunity, although all observers recognise the strong likelihood that he will make a violent comeback.

There is, admittedly, a high potential risk in addressing the war crimes of the past, and taking action against the impunity of their perpetrators when they possess military or political power. Nevertheless, there is a proven high cost to ignoring them, and an even higher one to welcoming war criminals to the seats of power. This is a lesson that was ignored in Afghanistan, at high cost.

Appendix III: List of Interviewees

Afghanistan Transitional Administration

Jalali, Ali Ahmed
Minister of the Interior

Karimi, Abbas
Minister of Justice

Khalili, Karem
Vice President

Pashtun, Yousuf
Urban Affairs Minister

Judicial Reform Commission

Baha, Bahauddin
Chairperson

Hashimzai
Secretary

Sikander, Khaled
Consultant

Zakaria, Dr. Habiburrahman
Commission Member

Human Rights Commission

Anwari, Hangama
Women and Child Rights Unit

Hakim, Fahim
Deputy Chairperson

Nadari, Nadir
Transitional Justice Unit

Samar, Sima
Chairperson

Constitutional Commission

Azimi, Prof.
Deputy Chairperson

Wardak, Farooq
Secretary

Kakar, K.
Member of the Constitutional Drafting Committee

Kamali, Prof. Mohammed Hashim
Member of Constitutional Committee

Yoon, Mohammad
Secretary, Jalalabad Office of the Constitutional Commission

Police and Court System

Abdali, Amrullah
Provincial Chief Justice, Kunduz

District Chief Justice
Bagram District

Chief of Police and Police Officers
Shibergan, Jawzjan Province

Dalilawi, Abdullahi
Chief Prosecutor, Kunduz

General Salanghi
Chief of Police, Kabul

Isla, Luis Paswal Mohamed
Chief of Security Police, Balkh

Manawi
Supreme Court

Qazi Sulaiman
Judge, Mazar-e-Sharif

Civil Society, Academics

Ansari, Prof. Sultan
Institute of Pedagogy
Mazar-e-Sharif

Firouzi
Istalif ELJ Delegate
Institute of Archaeology

Hakimyar, Timor Shah
Chairman, Artists' Union Association of Afghanistan

Husseini, Sarwar
Director, Cooperation Centre for Afghansitan

Khurram, Abdul Karim
International Law Foundation

Kluyver, Robert
Foundation for Culture and Civil Society

Kabuli, Nafisa
Women and Children Legal Research Foundation

Langari, Zia
Afghan Independent Human Rights Commission

Sharif, Eng. Mohammad
Civil society, Mazar-e-Sharif

Siddiqi, Shirazuddin
Director of Afghan Projects
BBC World Service Trust

Suyawash, Dawood
Journalist and Editor

UNAMA and UN Agencies

Ammitzboell, Katarina
UNDP Associate Resident Representative

Arnault, Jean
Deputy SRSG

Aziz, Sultan
Senior Advisor to the SRSG on DDR

Bennett, Richard
Technical Advisor to the AIHRC

Brahimi, Lakhdar
SRSG

Cunliffe, James
Civil Military Advisor

Fejic, Goran
Senior Advisor, Human Rights Unit

Ghazialam, Ghotai
Head of Office Northern Region, IOM

Haeri, David
Special Assistant to the SRSG

Illianov, Sergei
Head of Office, Kunduz

Lipner, Michelle
Head of Office, Mazar-e-Sharif

Mahmoud, Zaved
Rule of Law Unit

Mohammed, Youssif
Senior Advisor Rule of Law Unit

Petrie, Charles
Director of Policy and Planning, UNAMA

Taylor, Annabel
Security Liaison Officer

Toscano-Rivalta, Marco
Rule of Law Unit

Wahlstrom, Margareta
Chief of Staff

Wisch, Elke
Senior Protection Officer, UNICEF

Bilateral and Multilateral Donors

Axell, Ingar
EU Human Rights Advisor

Borgert, Wilhelm
Training Advisor, German Police Training Unit

Fedele, Giuseppe
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Appendix V: Abbreviations and Acronyms

AIHRC	Afghan International Human Rights Commission
ANA	Afghan National Army
ANBP	Afghan New Beginnings Programme
ANP	Afghan National Police
ATA	Afghan Transitional Administration
CLJ	Constitutional *Loya Jirga*
DDR	Disarmament, Demobilisation and Reintegration
ELJ	Emergency *Loya Jirga*
ISAF	International Security Assistance Force
JRC	Judicial Reform Commission
MOD	Ministry of Defence
PRT	Provincial Reconstruction Team
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNSRSG	United Nations Special Representative of the Secretary-General

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Designed & Printed by The Army Press

Cover photo by Agnes Mueller
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