

Discussion Paper

The State of Transitional Justice in Afghanistan

Actors, Approaches and Challenges



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About the Afghanistan Research and Evaluation Unit

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Acronyms

AHRDO	Afghanistan Human Rights and Democracy Organisation
AIHRC	Afghanistan Independent Human Rights Commission
AJP	Afghanistan Justice Project
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
ANPA	Afghanistan National Participation Association
ASP	Assembly of State Parties
CIA	Central Intelligence Agency
CICC	Coalition for the International Criminal Court
CSO	civil society organisation
DC-Cam	Documentation Centre of Cambodia
ECC	Electoral Complaints Commission
ELJ	Emergency Loya Jirga
EU	European Union
EUSR	European Union Special Representative
FES	Friedrich Ebert Stiftung
FSFJ	Foundation for Solidarity for Justice
GoA	Government of the Islamic Republic of Afghanistan
HRW	Human Rights Watch
ICC	International Criminal Court
ICTJ	International Centre for Transitional Justice
MoI	Ministry of Interior
MoJ	Ministry of Justice
MoLSAMD	Ministry of Labour, Social Affairs, Martyrs and Disabled
NGO	nongovernmental organisation
OHCHR	Office of the High Commissioner for Human Rights
OSI	Open Society Institute
PHR	Physicians for Human Rights
TJCG	Transitional Justice Coordination Group
TRC	Truth and Reconciliation Commission
UNAMA	United Nations Assistance Mission in Afghanistan
UNSC	United Nations Security Council
USIP	United States Institute of Peace

*Peacebuilding without justice is only building.*¹

1. Introduction and Background

The past 30 years have left a physical and emotional scar on Afghanistan and its people. The country has experienced disappearances, torture, mass executions, ethnic persecution, internal displacement and the mass migration of Afghans to Pakistan, Iran and elsewhere. Almost every Afghan has a story of struggle, suffering and loss to tell.² How do people deal with these legacies in order to move forward and achieve genuine and long-lasting peace? This question becomes more complex and contentious in an environment where armed conflict and human rights violations continue; government institutions are weak and lack credibility and legitimacy; and the alleged perpetrators of some of these crimes are among the political elite.

After the fall of the Taliban in 2001, many Afghans were hopeful that violence would end. Although the violence has slowed, it has not yet ended. Since 2006, the security situation has deteriorated and violence is now at its highest levels since 2001. Over a third of the population continues to live in poverty,³ more than a quarter of a million individuals remain displaced inside the country while an additional three million are in Pakistan and Iran.⁴

In many countries, once violence has ended, societies have confronted the dilemma of how to deal with the legacies of atrocities, where in many cases former enemies still occupy the same geographical space.⁵ These decisions have gained greater meaning over time due to extraordinary developments in international law: the creation by the UN of ad hoc war crimes tribunals, the establishment of the International Criminal Court (ICC) and the disposition of the judiciaries of some countries to act extraterritorially by applying universal jurisdiction.⁶ These all reflect a growing international consensus that individual human rights be upheld and that genocide, war crimes and crimes against humanity do not go unpunished.

Diplomats and negotiators involved in ending violent disputes have increasingly considered the dangers of doing nothing to address the legacies of these conflicts;

1 As stated by Alex Borraïne, President of the International Centre for Transitional Justice (ICTJ), in his opening speech at the conference, "Beyond Peace Versus Justice: Fighting Impunity in Peacebuilding Contexts," (Outcome document from 2009 conference, Netherlands Ministry of Foreign Affairs, The Hague, 16-17 September 2009).

2 During the nationwide consultations conducted by the Afghanistan Independent Human Rights Commission (AIHRC), nearly 70% of those interviewed said they or their immediate families had been direct victims of serious human rights violations during war. Afghanistan Independent Human Rights Commission, *A Call for Justice: National Consultation on Past Human Rights Violations in Afghanistan*, (Kabul: AIHRC, 2005), 4. The report can be downloaded at: http://www.aihrc.org.af/rep_Eng_29_01_05.htm (accessed 25 January 2009).

3 Central Statistics Organisation, "National Risk and Vulnerability Assessment 2007/08, available at: <http://www.nrva.cso.gov.af/poverty.html>. Many of the current statistics available on even Afghanistan's most basic indicators, such as poverty or infant mortality, should be considered estimates.

4 Office for the Coordination of Humanitarian Affairs, "Afghanistan 2009 Humanitarian Action Plan," (Kabul: OCHA, 2009) available online at: <http://ochaonline.un.org/afghanistan/AppealsFunding/HAP2009/tabid/5477/language/en-US/Default.aspx>.

5 For example: the creation of an International Criminal Tribunal for the former Yugoslavia by a 1993 UN Security Council Resolution, followed by the establishment of the International Criminal Tribunal for Rwanda in 1994. Sierra Leone built on these previous international tribunals to form a new hybrid model of international criminal justice with the creation of the Special Court for Sierra Leone.

6 Juan E. Mendez, "National Reconciliation, Transitional Justice, and the International Criminal Court," in *Ethics & International Affairs* (Review of the Carnegie Council on International Affairs) 15, no. 1 (2001).

perpetuating a culture of impunity that can encourage future abuses.⁷ 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.⁸ Consequently, during transitions from authoritarian to democratic regimes or from conflict to peace, nations and international actors typically confront the challenge of “transitional justice”: an umbrella term used to describe measures associated with a society’s attempts to come to terms with a legacy of large-scale abuses, so as to ensure accountability, serve justice, reconcile former enemies and achieve peace.

Despite the scale and length of the violence, there has been no accountability for past crimes in Afghanistan between any of the phases of war.⁹ Since the signing of the Bonn Agreement in 2001, no concerted efforts have been made by the Afghan government (GoA) to implement a process of transitional justice. There has been limited action to address the culture of impunity in Afghanistan and alleged perpetrators of some of the worst human rights abuses have retained positions of power. The GoA and some of the most influential international actors have instead argued that implementing justice could disrupt the uneasy peace.¹⁰ The short-term logic of ignoring the past to bring an end to violence and conflict at any price can perhaps be appreciated. It is moreover acknowledged that there is no easy solution in such a complex environment. Nevertheless, the simple truth is that the conflict has not ended and the uneasy peace established after the fall of the Taliban and the Bonn process is looking increasingly precarious. The continued failure to address issues of impunity and implement a comprehensive process of transitional justice has shaped how Afghanistan looks today.

In Afghanistan, as Rama Mani argues, dealing with impunity does not require only confronting the past. It is a question of addressing the present in order to safeguard an endangered future. Dealing with impunity in Afghanistan presents the challenge of breaking the cycle of actions resulting from the power and misconduct of various actors—both internal and external—who shaped Afghanistan’s turbulent history and continue to affect the prospects for its peace.¹¹ It is for this reason that appropriately handling Afghanistan’s past takes on particular urgency, as its shadows continue to impinge upon and compromise the present and the future.

This discussion paper provides an overview of the current state of transitional justice in Afghanistan. It is not intended to be exhaustive but attempts to establish a picture of transitional justice activities in Afghanistan today, raising the key challenges and debates involved.¹² Section 2 explores the policymaking environment in relation to transitional justice discussing the Action Plan for Peace Justice and Reconciliation,¹³ the

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

8 Rama Mani, *Ending Impunity and Building Justice in Afghanistan*, (Kabul: Afghanistan Research and Evaluation Unit, 2003).

9 Trials have, however, been held outside Afghanistan in the United Kingdom and the Netherlands, discussed in Section 4.1. The trial of the aged communist intelligence chief Assadullah Sarwari is excluded because it is seen as a parody of the transitional justice process, violating basic standards of due process for a fair trial. For more information, see Sippi Azarbaijanni Moghaddam, “On Living With Negative Peace and a Half-Built State: Gender and Human Rights,” *International Peacekeeping* 14, no. 1 (2007): 133-4.

10 Author interview, ICTJ representative, Kabul, 23 November 2009, “2002-05, the view among key policy actors was that any focus on justice and the rule of law would undermine security.”

11 Mani, *Ending Impunity and Building Justice in Afghanistan*.

12 The paper does not intend to provide an entire list of all ongoing transitional justice activities or explore in any great depth the valuable work of many organisations. Instead it aims to highlight key processes and initiatives.

13 Government of the Islamic Republic of Afghanistan, *The Action Plan for Peace, Reconciliation and*

law on Amnesty, National Reconciliation and Stability¹⁴ and the Peace and Reintegration programme. Section 3 outlines the roles, in theory and in practice, of three key actors: the GoA, the international community (diplomatic and civil society) and Afghan civil society. Section 4 explores the recent policies of these actors in relation to three key thematic areas: judicial accountability for war crimes; policies that “confront the past”; and reparative policies that work toward acknowledging the victims of Afghanistan’s wars. The paper concludes with some reflections on some considerations for ways forward.

The information and analyses presented in the paper is largely based on data collected through semi-structured interviews, informal conversations and personal correspondence with key informants in Kabul from national and international bodies and organisations between October 2009 and March 2010. It is supplemented by desk research and the author’s observations during meetings, conferences and discussions in Kabul concerning transitional justice.

The paper is the first in a series from AREU’s research project titled “Legacies of Conflict: Justice, Reconciliation and Ways Forward.” Fieldwork, which began in late 2009, is taking place in four provinces (Kabul, Bamiyan, Badakhshan and Ghazni) until the end of 2011. The project is inspired by ongoing efforts to promote transitional justice in Afghanistan. It seeks to contribute to the debate by developing qualitative, in-depth knowledge about the legacies of conflict and perceptions of and desires for justice, peace and reconciliation among Afghans in local communities. In doing so, it aims to create space for previously unexplored ideas, including perhaps locally-based initiatives for achieving justice and reconciliation. It ultimately hopes to identify strategies and mechanisms that allow communities to move forward. The project aims to ensure that policymakers are aware and informed of the desires and demands of different communities in Afghanistan in relation to transitional justice, reconciliation and peace. As such, it aims to contribute to processes that ensure that “ordinary” Afghans, who are the people who have been most affected by Afghanistan’s conflicts, are the key actors in future accountability and reconciliation activities.

Justice (Kabul: GoA, 2005), a copy can be downloaded at http://www.aihrc.org.af/actionplan_af.htm (accessed 24 January 2009).

14 Government of the Islamic Republic of Afghanistan, *Law on Amnesty, National Reconciliation and Stability*, (Official Gazette no. 965), 3 December 2008, available for download at http://www.moj.gov.af/OGs/OfficialGazette/Browse/Dari/OG_0965.htm.

2. The Policymaking Environment

2.1 The entrenchment of impunity

The 2001 Bonn Agreement marked the beginning of what many hoped would be a transition from Taliban rule and ongoing conflict to peace. However, in an attempt to avoid upsetting faction leaders present at the Bonn Conference, some of whom were implicated in human rights abuses but whose cooperation was considered vital to secure an agreement, the UN mediating team dropped all attempts to include references to dealing with war crimes and human rights violations.¹⁵ The final agreement also left out many standard parts of UN mediated peace agreements, including commitments to disarmament or demobilisation.¹⁶ Ultimately, no attempt was made to address either the underlying causes or the consequences of the war on millions of Afghan victims.

In reality, however, Bonn was not a peace agreement between warring groups, but an agreement between selected Afghan leaders of four anti-Taliban groups, who had been fundamental to the coalition that overthrew the Taliban regime.¹⁷ Throughout the negotiations, one side of the armed conflict, the Taliban and al-Qaeda, were still being bombarded by the United States and the agreement ignored them, although they were a significant party to the conflict.

Afghan signatories of the Bonn Agreement consequently included a number of alleged human rights abusers with no attempt to extract any significant commitments to justice from them.¹⁸ This subsequently allowed well-known commanders to reestablish power bases around the country. Mani argues that this was one of the central causes of insecurity in the country as 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.¹⁹ The only openings for transitional justice were that the Bonn Agreement avoided an amnesty provision and created a national human rights body.²⁰ It also bound the country to international legal obligations on human rights.²¹

Similar behaviour at the Emergency Loyal Jirga (ELJ) in June 2002 entrenched impunity further. Vetting criteria required candidates to sign a statement swearing they had not killed innocent people or engaged in drug trafficking or terrorism. Despite this, in the event, many known to have violated these conditions served without obstacle.²² Ultimately, the Bonn Agreement and the ELJ focused on stopping hostilities and securing agreement, however minimal, between parties through a power-sharing deal. In the

15 An attempt by UN drafters to include a paragraph stating that the interim administration should decree no amnesty for war crimes or crimes against humanity was ignored. See Rubin, "Transitional Justice and Human Rights in Afghanistan," for more information.

16 Rubin, "Transitional Justice and Human Rights in Afghanistan," 572.

17 Rubin, "Transitional Justice and Human Rights in Afghanistan," 571.

18 Mani, *Ending Impunity and Building Justice in Afghanistan*.

19 Bonn instead called for all armed groups to come under the command of the new administration and be integrated into national armed forces. The Afghanistan New Beginnings Programme (ANBP), which began after several delays in 2003, did not promise to provide complete disarmament. For more information see Mani, *Ending Impunity and Building Justice in Afghanistan*.

20 ICTJ, "Transitional Justice in Afghanistan" (ICTJ, 2007), 4.

21 Afghanistan has ratified and is bound by the Geneva Conventions of 1949, the Genocide Convention of 1948 and the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968; Convention on the Elimination of Rights of 1966; Forms of Discrimination Against Women of 1979; International Covenant on Civil and Political Rights; Convention on Elimination of All Forms of Racial Discrimination of 1966; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the Convention on the Rights of the Child.

22 Rubin, "Transitional Justice and Human Rights in Afghanistan," 573-4.

process, the parallel need to identify and implement the necessary structural, systemic and institutional changes to consolidate peace and avert a relapse into conflict were overlooked.²³

2.2 An Action Plan for transitional justice and the backlash

Afghanistan has a national Action Plan for Peace, Reconciliation and Justice in Afghanistan (2005) and a law on Amnesty, National Reconciliation and Stability (2007). Hotly debated, the Action Plan was narrowly adopted by the Cabinet in December 2005, pushing transitional justice onto the political agenda of the time.²⁴ The plan included recommendations from the Afghanistan Independent Human Rights Commission's (AIHRC) 2005 *A Call for Justice* report. This report remains a key document stating the wide demand for

“In my experience, amnesty is one way of healing the wounds of a country. But those wounds cannot be healed if there is no accountability... if it means the sanctioning of impunity and atrocities committed.”

– Kai Eide, Special Representative of the UN Secretary-General (2008-10), during his last speech in Afghanistan

“justice” in Afghan society and the scale of human rights abuses throughout the country.²⁵ The Action Plan laid out five key activities including: symbolic measures, institutional reform, truth-seeking, reconciliation, and accountability measures. It also categorically rejected amnesty, stating that neither Islam nor international law provides amnesty for crimes, including crimes against humanity. President Hamid Karzai officially launched it on 10 December 2006 to coincide with International Human Rights Day. The year-long delay in the launch of the Action Plan is perhaps indicative of the significant opposition to it from within government. An international respondent involved in the plan's creation highlighted this was particularly strong among Karzai's trusted advisors. The Action Plan was also included as a benchmark in both the 2006 Afghanistan Compact²⁶ and the 2008 Afghanistan National Development Strategy (ANDS).²⁷

The Action Plan set an ambitious timeline to achieve the activities outlined, which expired in March 2009. President Karzai subsequently refused a request from the AIHRC and civil society for its extension.²⁸ To date, the only activities that have been implemented are the creation of a Victim's Day and the establishment of the Presidential Special Advisory Board for Senior Appointments (both are discussed in more detail in Sections 3 and 4). Interviews demonstrated that awareness of the plan within the ministries²⁹ responsible for its implementation and among some members of the international diplomatic community is weak. Although the ANDS reemphasised the responsibility of the Ministry of Justice (MoJ) to implement the plan,³⁰ government officials working in the justice

23 Mani, *Ending Impunity and Building Justice in Afghanistan*, 2.

24 Author interview, ICTJ representative, Kabul, 23 November 2009.

25 AIHRC, *A Call for Justice*.

26 *The Afghanistan Compact*, (Building on Success: 2006 The London Conference on Afghanistan, 31 January to 1 February 2009). Available for download at: http://www.ands.gov.af/admin/ands/ands_docs/upload/UploadFolder/The%20Afghanistan%20Compact%20-%20Final%20English.pdf

27 Government of the Islamic Republic of Afghanistan, *Afghanistan National Development Strategy*, (ANDS), (Kabul: GoA, 2008).

28 Discussion at the Transitional Justice Coordination Group meeting, March 2009.

29 Seven focal points were also established in seven ministries (Ministry of Justice, Ministry of Interior, Ministry of Defence, Ministry of Culture and Information, Ministry of Housing and Urban Development, and the Ministry of Women's Affairs) to lead the implementation of the actions. All of them were identified and appointed by their respective ministries in August 2007.

30 Government of the Islamic Republic of Afghanistan, “Pillar II, Good Governance, Justice and the Rule of Law,” *Afghanistan National Development Strategy*.

field said they were unaware of the plan's existence.

The GoA's half-hearted attitude prompted the director of an international NGO to comment that the Action Plan was "just words." A representative of ICTJ, who was involved in its creation, said that the "wool was pulled over our eyes."³¹ Nevertheless, many international and national respondents still consider it as a framework for civil society and the international community's support for transitional justice. As one UNAMA human rights officer explained:

It is not certain that another document or political commitment would be signed by the government. We are not expecting to see a commitment to anything else; the Action Plan is the only document we have.

Moreover, as another representative of ICTJ stated, "As long as the activities are not enforced, the Action Plan is still relevant."³² The same respondent remarked that since the Action Plan forms part of ANDS it should perhaps have the same lifespan. In fact, the United Nations Security Council (UNSC) appeared to deliberately ignore the fact that the Action Plan was due to expire in its March 2009 resolution, when it called on the GoA to "ensure the full implementation of the Action Plan on Peace, Justice and Reconciliation in accordance with the Afghanistan Compact."³³

On 17 December 2006, seven days after the launch of the Action Plan, Human Rights Watch published a list of accused perpetrators of human rights violations initially named in their 2005 report, *Blood Stained Hands*.³⁴ In reaction to these events, in January 2007, the *Wolesi Jirga* (lower house of parliament) followed by the *Meshrano Jirga* (Council of Elders) passed a *National Stability and Reconciliation Resolution*. The law granted blanket amnesty to "All the political wings and hostile parties who had been in conflict before the formation of the interim administration." At the time of drafting, Afghanistan's highest body of Islamic mullahs criticised the legislation stating that, under Islamic law, only the victims of crimes, not the state, can forgive the perpetrators.³⁵

On receiving the bill, Karzai made revisions to recognise the individual rights of war victims to seek justice and bring complaints against those who are alleged to have committed war crimes. The revised bill (commonly known as the Amnesty Law), however, places the responsibility to bring charges before court on individuals, which is unlikely given the victim/perpetrator power dynamics. Consequently, in the absence of complaint by a victim, Afghan authorities are prohibited from prosecuting accused war criminals on their own, allowing the government to deflect its responsibility for investigating and prosecuting perpetrators. Moreover, in other countries where amnesty was granted, such as South Africa, perpetrators of human rights violations were expected to contribute toward accountability by disclosing information on their participation in politically motivated crimes. This legislation contravenes Afghanistan's international legal obligations to pursue accountability for serious human rights abuses. Significantly, when Afghanistan ratified the Rome Statute in February 2003, it assumed a duty to exercise criminal jurisdiction over those responsible for international crimes.³⁶ It also runs counter to Karzai's commitment

31 Author interview, ICTJ representative, 23 November 2009.

32 Author interview, ICTJ representative, 17 November 2009.

33 United Nations Security Council Resolution 1868, Paragraph 30, 23 March 2009.

34 Human Rights Watch, "Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity" (Kabul: Human Rights Watch, 2005).

35 Author interview, USIP representative, Kabul, 2 December 2009.

36 Rome Statute of the International Criminal Court, <http://untreaty.un.org/cod/icc/statute/romefra.htm>. The ICC has two limitations in its jurisdiction. Firstly, it does not take primacy over domestic courts unless the respective national court can be proven to be unwilling or unable to prosecute the potential defendant. Secondly, it will only have prospective jurisdiction starting on the date in which the treaty

to pursue justice and fight impunity as outlined in the Action Plan.

It is not actually clear, however, whether President Karzai signed the law. In 2008, David Wisner stated that Karzai signed the bill in March 2007.³⁷ However, when Afghan representatives were questioned about the legal status of the Amnesty Law at the 2009 United Nations Universal Periodic Review, they responded with, “Although the National Assembly approved the National Reconciliation Bill, the president did not sign the bill.”³⁸ This actually failed to answer the question. Under the terms of the Constitution, Karzai’s signature is not needed for bills to pass. Instead, if the president disagrees with what the National Assembly approves, he can send it back to the *Wolesi Jirga* in 15 days. On receiving the first draft of the Amnesty Bill, Karzai did make substantial changes, which were, according to parliamentary legislative sources, subsequently accepted by both the *Wolesi Jirga* and the *Meshrano Jirga*. Once the bill is returned to the president it is considered endorsed and enforced after 15 days, regardless of whether he actually signs the document.³⁹ The focus at the Universal Periodic Review on Karzai’s signature was perhaps an attempt to side-step the issue of its legality.

Since the start of 2010—nearly three years after it was passed—the Amnesty Law has garnered international attention. Until the appearance of the Amnesty, National Reconciliation and Stability Law in the *Official Gazette* (no. 965) around December 2009⁴⁰ some people were unsure about the bill’s legal status. One district judge interviewed before the law appeared in the *Official Gazette* said:

We do not know if it is in force or not...When laws are passed by Parliament they are gazetted by the Supreme Court and the Ministry of Justice. We have not received any such law from them.

With the appearance of the law in the *Official Gazette*, the doubt over the legal status of the bill has been removed. However, its sudden appearance has spurred statements opposing amnesty from Afghan civil society organisations (CSOs) and several international NGOs, such as Amnesty International, ICTJ and Human Rights Watch (HRW). Moreover, the then-Special Representative of the UN Secretary General, Kai Eide, raised concerns about the Amnesty Law in his last speech in Afghanistan:

Two months ago, we all discovered that an Amnesty Law had been gazetted and apparently kept away from the attention of the public for over a year. The process itself gives reason for serious concerns. So does the content. In my experience, amnesty is one way of healing the wounds of a country. But those wounds cannot be healed if there is no accountability... if it means the sanctioning of impunity and atrocities committed...⁴¹

Many CSOs (Afghan and international) question the timing of the publication of law in the month leading up to the announcement of the national “Peace and Reintegration

entered into effect in the relevant country.

37 David Wisner, “Is Time Ripe for Transitional Justice in Afghanistan?” (Medford, MA: The Fletcher School - al Nakhlah - Tufts University, 2008), 5; and author interview, Nader Nadery, Chairperson, Afghanistan Independent Human Rights Commission, Kabul, 16 November 2009.

38 United Nations, General Assembly, Human Rights Council Working Group on the Universal Periodic Review 5th Session, Geneva, 4-15 May 2009, “National Report submitted in Accordance with Paragraph 15 (A) of Annex to Human Rights Council Res 5/1, paragraph 43.

39 Islamic Republic of Afghanistan, *The Constitution of Afghanistan*, (Kabul: GoA, 2004).

40 Islamic Republic of Afghanistan Ministry of Justice, *Official Gazette*, Issue No. 965, (Kabul: GoA, December 2008). The PDF copy of this law dates it as the 2 December 2008 while the hard copy dates it as 3 December 2008. AREU found the Amnesty Law on the Ministry of Justice website at the end of December 2009. The best guess is that it appeared around that time, but could have been a few weeks earlier.

41 Statement by SRSK Kai Eide “Legislation for women,” Kabul, 6 March 2010.

Programme.”⁴² Significantly, Section 3, Clause 2, extends immunity from prosecution by the government to:

armed people who are against the government of Afghanistan, after the passing of this law, if they cease from their objections, join the national reconciliation process, and respect constitutional law and other regulations of the Islamic Republic of Afghanistan. They will have all the perquisites of this law.

The timely appearance prompted some human rights activists to suggest that it was designed to incentivise the Taliban to reconcile. However, Karzai’s spokesman, Waheed Omar, claimed there was “no link” between the gazetting of the law and reconciliation plans.⁴³ Regardless of the intent behind the publication, the law could perhaps be used to demonstrate to Taliban insurgents that they will not face criminal prosecutions if they lay down arms. It is worth noting that in the aforementioned clause, there is no mention of any time limitations on the benefits of amnesty. Theoretically, this could mean that amnesty could be granted for an indefinite time.

The Amnesty Law has already had enormous political significance, serving as a clear signal of the power alleged human rights violators continued to wield in government. The law, furthermore, complicates the implementation of transitional justice, as stated at the Universal Periodic Review, “The bill has caused some misunderstandings and as a result this project (Action Plan) was not implemented in 2008.”⁴⁴ As one representative of an international organisation remarked, “That piece of paper is a problem. The challenge of overcoming amnesty laws has been seen in other countries. There is a need to change this law or declare it invalid.”

2.3 National reintegration

The Amnesty Law potentially provides the legal basis for the government’s recent emphasis on reintegration and reconciliation of Taliban followers. President Karzai unveiled a new “effective, inclusive, transparent and sustainable national Peace and Reintegration Programme” at the January 2010 London Conference offering work, education, pensions and land to Taliban insurgents who defect.⁴⁵ Government representatives present at the London Conference stated they would back the plan. A Grand Peace Jirga is also planned for the 2-4 May, followed by the Kabul Conference shortly thereafter.⁴⁶ What repercussions could this programme have for transitional justice? At present, it appears to ignore justice and, as such, fails to acknowledge the dangerous legacy of impunity in Afghanistan.

This programme could allow Taliban perpetrators of war crimes back into communities with no attempt to hold them to account and little concern for its impact on respect for the rule of law. In September 2009, the ICC announced that the scale of atrocities committed in Afghanistan since 2003 by the Taliban and foreign forces warrant enquiry.⁴⁷ The programme has consequently raised fears among some human rights activists that the government will ignore victims’ rights for the sake of a quick peace deal with insurgents. Although it may help end the current round of violence, what impact could it have on lasting peace in Afghanistan? As one a representative of Afghanistan Watch, an Afghan

42 2010 London Conference communiqué, <http://afghanistan.hmg.gov.uk/en/conference/communique>

43 Jon Boone, “Afghanistan Quietly Brings Into Force Taliban Amnesty Law,” *The Guardian*, 11 February 2009, <http://www.guardian.co.uk/world/2010/feb/11/taliban-amnesty-law-enacted>.

44 “National Report,” Universal Periodic Review, paragraph 43.

45 London Conference communiqué.

46 London Conference communiqué.

47 James Reinf, “ICC Investigates War Crimes in Afghanistan,” *United Nations Press*, (New York, 10 September 2009).

CSO, argued:

We need to ask people why they have committed crimes. Otherwise reintegrating them won't work for stability, transitional justice or anything. If we have reconciliation with the Taliban, we need to filterise them with a transitional justice mechanism.

Furthermore, what impact could this process have on the already slim prospects of holding non-Taliban perpetrators of war crimes to account?

Despite the programme's emphasis on achieving reconciliation in Afghanistan, one must ask if this type of policy is even capable of engendering reconciliation. "Reconciliation" is often recognised as the transforming of the behaviour and attitudes of former enemies in order to create new relationships based on mutual trust.⁴⁸ According to this reading, justice constitutes a fundamental dimension of genuine reconciliation. Reconciliation, then, is a process that might last decades. Lederach describes the process as the shared space interdependently occupied by four social energies, "Truth, Mercy, Justice, and Peace."⁴⁹ Can mercy without truth and justice ever lead to either reconciliation or lasting peace?

Thus, the current approach is perhaps better explained as part of a conflict resolution strategy. It could be a *starting point* to create the conditions for peace and reconciliation, but envisaging that in itself could "create" reconciliation could mean the sweeping aside of longer-term policies that work toward creating mutual trust and forming new beliefs and understanding between communities. Perhaps reconceptualising the current programme as part of an ongoing conflict resolution strategy might help build a clearer picture of what the intentions of this policy are.

For this policy to help create the conditions for sustainable peace, it ultimately needs to have legitimacy in the eyes of the Afghan population. Further, expectations about what it is meant to achieve need to be managed. One aim of AREU's research on transitional justice aims is exploring what Afghans in communities feel specifically about this programme as well as more general issues of reintegration and reconciliation in Afghanistan.

48 Daniel Bar-Tal and Gemma Bennink, "The Nature of Reconciliation as an Outcome and as a Process," in Y. Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation*, Oxford: Oxford University Press, 2004), 11-38.

49 John Paul Lederach, "Civil Society and Reconciliation," in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds.), *Turbulent Peace: the Challenges of Managing International Conflict*, (Washington DC: United States Institute of Peace), 848.

3. The Actors

Actors interested in pursuing a transitional justice agenda are working in an increasingly constrained space. Since 2006, the deteriorating security situation has pushed transitional justice and the Action Plan off the agenda in favour of arguments of peace before justice. Nearly nine years after Bonn was signed, the same alleged perpetrators of gross human rights violations still dominate government structures. The disarmament of militias has been insufficient and incomplete, creating an environment in which victims feel insecure and unable to challenge offenders.⁵⁰

Some people suggest that impunity and lack of trust in the formal justice system and frustration over its lengthy legal processes partially fuels the insurgency. Indeed, some Afghans in insecure areas in the South turn to the Taliban for the quick dispensation of justice.⁵¹ Ruttig argues that when the US-led coalition allowed the warlords and commanders—whose atrocities had made the Taliban a viable alternative in the eyes of many Afghans in the mid-1990s—to return to power, the insurgency, as a whole, grew in strength every year from 2002 onwards.⁵² Moreover, while the attitude toward human rights has evolved to some extent, the link between present and past violations does not seem to have been conclusively acknowledged and there has been no parallel change in the approach to dealing with past violations. It is in this environment that the three key actors—the Afghan government, the international community, and Afghan civil society—operate.

3.1 The Government of Afghanistan (GoA)

Through ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The Afghan government has ratified a number of relevant treaties (see footnote 21) and consequently should bear the primary responsibility for implementing transitional justice in Afghanistan. However, the only group that demonstrates a desire to pursue issues of accountability and tackle impunity is a small faction in parliament calling itself the “Third Way,” led by Shukria Barakzai. This group uses international conferences and Afghan and international media to encourage people to demand their rights, but their voice is weak among the many dissenting ones.⁵³

During the 2009 presidential elections, aside from Ramazan Basherdest, none of the main presidential candidates paid little more than lip service to issues of accountability for past crimes.⁵⁴ Despite approving and launching the Action Plan, President Karzai also appears increasingly reluctant to address the past. Recently, he called the criticisms about the presence of war criminals in his government an “outdated issue,” claiming these were a “conspiracy” by the enemies of Afghanistan.⁵⁵ As one representative of

50 Wisner, “Is Time Ripe for Transitional Justice in Afghanistan?,” 6.

51 See Frank Ledwidge, “Justice and Counter-insurgency in Afghanistan: A Missing Link” *RUSI Journal* 154, no. 1, (Feb 2009): 7.; and ICTJ, “Afghanistan: Submission to the Universal Periodic Review of the UN Human Rights Council Fifth Session,” May 4-15, (ICTJ: November 3, 2008); and The Tribal Liaison Office, “Three Years Later: A Socio-Political Assessment of Uruzgan Province 2006-2009,” (Kabul: TLO, 18 September 2009).

52 Thomas Ruttig, “The Other Side: Dimensions of the Afghan Insurgency: Causes, Actors and Approaches to ‘Talks’” (Kabul: Afghanistan Analysts Network, July 2009).

53 Author interview, Shukria Barakzai, Kabul, 22 October 2009.

54 Afghanistan Watch, “A short report on a televised debate between Ramazan Basherdest, Hamid Karzai and Ashraf Ghani Ahmadzai, “No Security in the Absence of Justice,” *Afghanistan Watch*, 16 August 2009, Kabul.

55 Afghanistan Watch, *Afghan Media Monitoring Newsletter*, No. 6, 31 September 2009. This statement was made in a news conference held following the declaration of preliminary election results in Kabul. See

Afghanistan Watch, an Afghan civil society organisation, said:

We do not have the same President we had two years back. Karzai was crying in 2006 on Human Rights Day. Then in 2007, he announced that transitional justice is harmful to reconciliation and this year said it was an outsider's process.

This is perhaps unsurprising: the inclusion of “former” commanders accused of human rights violations in government and the failure to vet parliamentary candidates⁵⁶ have resulted in many individuals with dubious human rights records entering the Afghan political elite. According to Neil Kritz, policies that support the removal or exclusion of certain individuals from power recognise that although it is not necessary or possible to prosecute everybody, “What confidence can returning refugees be expected to have in the new order if the current mayor personally helped torch their homes in the campaign of ethnic cleansing?”⁵⁷ A comprehensive vetting process consequently can provide society with a sense that justice and accountability have been established and can generate greater confidence in the credibility of institutions. It can also give victims the knowledge that those responsible for their suffering will not be permitted to remain in positions of influence.⁵⁸ The failure to exclude certain individuals from such positions has affected the political climate of Afghanistan, as was witnessed with the passing of the Amnesty Law.

Several human rights activists criticised the vetting process during the 2009 presidential and provincial council elections for failing to dismiss candidates suspected of human rights abuses.⁵⁹ The Electoral Complaints Commission (ECC) was entrusted with correcting and sanctioning electoral offences, including ensuring candidates who did not meet the Election Law requirements were removed from the ballot.⁶⁰ Compared to the last elections, almost twice as many people (57)⁶¹ were kept off the ballots, prompting a United States Institute of Peace (USIP) representative to suggest that there was some success in the vetting process. However, several international respondents criticised the GoA and accused the international community of not putting enough pressure on the government. As one respondent explained, the vetting process received little international attention until very late in the day.

Afghanistan's Electoral Law bars those who have been “convicted of crimes against humanity, criminal activity or deprivation of the civil rights by a court”⁶² or those belonging to unofficial military forces or armed groups from running as election candidates.⁶³ It is important to note that it cannot prevent those who are only *suspected* of war crimes and human rights violations from running as election candidates. Consequently, a

http://www.watchafghanistan.org/files/Newsletter_06_English.pdf

56 The 2005 parliamentary election is widely recognised as failing to fulfill minimal vetting standards.

57 Kritz, “Coming to Terms with Atrocities,” 139.

58 Kritz, “Coming to Terms with Atrocities,” 139-140.

59 Dr Sima Samar, speaking at a seminar of Theoretical Foundations and Approaches to Human Rights held at the Ministry of Foreign Affairs,” *Afghanistan Watch* No 2, 31 July 2009, 4. She said: “Those who are accused of committing war crimes and violating human rights...have nominated themselves as candidates or deputies for the presidential elections.” An AIHRC Commissioner reiterated this, author interview.

60 Islamic Republic of Afghanistan Electoral Complaints Commission, “Adjudicating complaints related to polling and counting - 2009 ECC operation plan,” (Kabul: ECC, 9 August 2009).

61 Three presidential candidates were disqualified and a further 54 names were dropped from the register (of over 3,000 participants) in the provincial council elections held concurrently to the presidential poll. Out of the 57 disqualified, 55 were reportedly struck off because of ties to illegal armed groups.

62 President of the Transitional Islamic State of Afghanistan, Hamid Karzai, *Decree of the President of the Islamic State of Afghanistan on the Adoption of Electoral Law*, (Kabul: GoA, 2004). Conditions of eligibility are set out under Article 62 of the Constitution.

63 Government of Afghanistan, *Electoral Law*, Article 15.3.

Commissioner from AIHRC representative argued that the Election Law itself should be reformed to allow people to be vetted on human rights violations using public and non-public credible documentation.

Ultimately, the 2009 presidential elections further entrenched the position of several alleged perpetrators of human rights abuses among the political elite. Karzai's choice of running mate, Mohammad Qasim Fahim, implicated in both war crimes and drug trafficking, was consequently described by one respondent as a "huge setback to the transitional justice initiative." The election process also occasioned the return to Kabul of Abdul Rashid Dostum, leader of Junbish-i-Milli, believed to be guilty of many crimes, including the massacre at Dasht-i-Leili in 2001.⁶⁴

The creation of the Presidential Special Advisory Board for Senior Appointments is one move toward encouraging more credible and accountable state institutions and ensuring that more individuals with dubious human rights credentials do not obtain positions of authority. AIHRC sits on the panel. Included in the Action Plan and formally established in January 2007, the board vets candidates from the central government, the judiciary, provincial governors, chiefs of police, district administrators and provincial heads of security on the grounds of involvement with past crimes and human rights abuses.⁶⁵ The board was initially restricted by lack of political, technical or financial resources. This delayed the genuine vetting of a number of political posts until early 2009.⁶⁶ However, since its creation 268 people have been vetted and 58 excluded.⁶⁷ Although its success and robustness is yet to be proven, the panel is operational.

Initiatives such as this could promote legitimate governance that respects and upholds human rights. It could potentially create an environment in which transitional justice policies might be considered. As a UNAMA human rights officer stated, "The independence of the advisory panel needs to be enforced. It is a flower in a desert."⁶⁸ Greater attention also needs to be paid to vetting ahead of the 2010 parliamentary elections. However, with the continued dominance of alleged human rights abusers in government and the emphasis on reintegration of the Taliban, with no apparent attempt to hold them accountable, it is unlikely that transitional justice will feature highly on the GoA's priorities in the coming years. In the words of an international respondent it appears that, "The new government will find it harder to talk about transitional justice or any kind of justice."

3.2 The international community

Many countries involved in Afghanistan are also signatories to international treaties protecting the rights of victims and to the ICC, which signifies, at least in theory, if not in practice, the will of the international community to prevent impunity for genocide, war crimes and crimes against humanity.⁶⁹ Moreover, the international community has, on several occasions, acknowledged the dangers of doing nothing in response to war crimes

64 James Risen, "US Inaction Seen After Taliban P. O. W.'s Died" *New York Times*, 10 July 2009.

65 The Islamic Republic of Afghanistan and the international community, *The Afghanistan Compact*. The board is composed of two people from civil society and government, appointed by the President; one person from the AIHRC, one person by the Joint Coordination and Monitoring Board and one person selected from prominent Afghans and nominated by the four panel members.

66 ICTJ, "Chronology of Transitional Justice Activities in Afghanistan 2001-2009," Unpublished Document.

67 Panel member, pers. comm., 24 March 2009.

68 Author interview, UNAMA Human Rights Officer/Transitional Justice Focal Point.

69 Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001,) 336-7.

and related atrocities in other countries.⁷⁰ The international community consequently has a responsibility to urge the GoA not to forget its commitments to implement the Action Plan and to the victims of the Afghan wars. Nevertheless, many of Afghanistan's major international partners remain conspicuously silent on issues of accountability for war crimes.

It is important, however, to acknowledge that the "international community" encompasses many governments, multilateral and nongovernmental organisations all with their individual policies. Several governments and international NGOs can be singled out for working to keep transitional justice on the political agenda. At the 2009 Human Rights Council's Universal Periodic Review, Norway, Mexico and Morocco specifically requested that the GoA implement the Action Plan, while the Netherlands and the Czech Republic highlighted the importance of transitional justice.⁷¹ In October 2008, the Dutch Government even withdrew roughly €10 million in funds in support of the justice sector, citing insufficient progress on implementing the Action Plan.⁷² However, according to a Dutch Embassy official, this gesture, in reality, had minimal impact. The Netherlands was not a significant donor to the justice sector at the time; their funding mostly concentrated on supporting human rights organisations. Additionally, the funds concerned were pledged to be invested for the development of the justice sector, meaning no programme activities had yet been targeted. In the event, while the decision, according to the same embassy official, was welcomed by some international actors, it garnered no official GoA response.

International civil society has also been working to keep the issue of transitional justice alive among media, civil society and Afghan civilians. For example, Friedrich Ebert Stiftung (FES) holds workshops, panels and guest lectures on transitional justice.⁷³ To commemorate 2008 Victim's Day, UNAMA made a video ("Healing Tears") that was broadcast by national networks all over the country. The video was geared to helping Afghan people discuss ways of addressing the past.⁷⁴ USIP has also produced and dubbed into Dari a film on "Confronting the Truth," which deals with the role of truth commissions. The film was shown in Kabul and Bamiyan provinces in 2009.⁷⁵ As will be discussed in Section 4, international civil society is also involved in ongoing efforts to support processes documenting war crimes and human rights abuses and on identifying and preserving mass graves.

The impact of these efforts is hard to assess. According to a UNAMA human rights officer, some MPs said that their video was able to re-open the debate on the need to address the past. Afghan NGOs also apparently expressed appreciation for the initiative. However, given the official silence and ignorance that has surrounded transitional justice it is doubtful whether these efforts have had any great impact on the wider Afghan population. A representative of USIP said that following the film's showing in Bamiyan, a discussion with viewers focused on whether it was relevant to Afghanistan and specifically to their area. The context of the video was so different from Afghanistan that the viewers could not see how it applied to them. It was, however, suggested that the video did build an

70 Examples can be seen in the creation of an International Criminal Tribunal for the former Yugoslavia by a UN Security Council Resolution in 1993, followed by the establishment of the International Criminal Tribunal for Rwanda in 1994. Sierra Leone built on these to form a new hybrid model of international criminal justice with the Special Court for Sierra Leone.

71 United Nations Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review*, 12th session (20 July 2009), 23.

72 EU-Transitional Justice meeting, Kabul, August 2009.

73 FES representative, pers. comm.

74 Author interview, Human Rights Officer/Transitional Justice Focal Point.

75 Author interview, USIP representative.

understanding of transitional justice and its application in other countries. Although the immediate benefits of these types of knowledge-building efforts are not immediately apparent, over time they can perhaps contribute toward empowering victims.

The 2009 presidential elections influenced international actors' priorities. The prospect of a new government and the politicisation and marginalisation of transitional justice suggested that there was little to be expected from the existing government in its final six months. Actors interested in pushing a transitional justice agenda instead decided to use the time to build networks, plan activities and to ensure that civil society could be in a stronger position to pressure the next government.⁷⁶ One development was the international collaboration initiated by the European Union's Special Representative Office (EUSR). This brought together representatives of embassies and civil society to increase cooperation, share knowledge, and strategise on how to work on the transitional justice sector.⁷⁷ However, meetings of this working group ended at the end of summer 2009. Resuming meetings between international actors might help strengthen transitional justice activity at this level.

International respondents explained how the Afghan government's disinterest in transitional justice prompted international energy to shift its focus toward Afghan civil society. UNAMA, the Delegation of the European Union and a range of international NGOs conduct and support a variety of capacity-building workshops, discussions and training sessions for Afghan organisations in advocacy, media awareness and transitional justice related issues. These organisations also provide funding and logistical support. The European Union, which is once again making transitional justice a focal area, funds international and Afghan CSOs.⁷⁸ UNAMA continues to support the development of victims groups in Afghanistan⁷⁹ while Open Society Institute (OSI) provides core funds for victims groups, such as the Foundation for Solidarity for Justice (FSFJ).⁸⁰

“[The international community] picks up certain ideas, dances with them, and then gets tired.”

– ICTJ representative

These international actors, however, are still subject to criticisms from Afghan civil society of insufficient support. An ICTJ representative acknowledged these criticisms, observing that the international community “picks up certain ideas, dances with them, and then gets tired.”⁸¹ This so-called “seasonal approach” to transitional justice is, in the opinion of one international actor, weakening CSOs and reducing their trust in the process. When interviewed, representatives of two Afghan organisations expressed disappointment at the level of support, particularly financial, provided by international organisations. Although, an international respondent highlighted that it is not always easy to provide financial support to Afghan organisations with weak capacity, and questioned whether many CSOs could even manage donors relations.

Moreover, in general, the GoA and most other foreign governments continue to remain silent on transitional justice issues. The new US rule of law strategy does include an aim to “help the Afghan government to redesign and implement a constructive action plan

76 Final report on civil society, “Transitional Justice and Documentation Workshop,” Kabul, 17-19 February 2009. The workshop was organised by the AIHRC and supported by the ICTJ, OSI and USIP.

77 Information from attendance of meetings.

78 Author interview, member of international community, Kabul, 26 November 2009.

79 Author interview, UNAMA Human Rights Officer/Transitional Justice Focal Point.

80 Author interview, Country Director, OSI Afghanistan, Kabul, 30 November 2009.

81 Author interview, ICTJ representative, 17 November 2009.

for transitional justice.”⁸² However, it is not clear how much effort will be expended in this area considering the current international support for the Peace and Reintegration Programme. If transitional justice is seen as an obstacle to peace with the Taliban, the majority of the international community is unlikely to push for accountability for war crimes, regardless of the consequences for genuine, long-lasting peace.

3.3 Afghan civil society

The fragile transitional justice process in Afghanistan has been led by AIHRC, which was established by presidential decree in 2002 with a mandate to address human rights abuses.⁸³ However, interest and engagement in promoting transitional justice by Afghan civil society and the media is growing and becoming increasingly diversified. The creation of the Afghan Transitional Justice Coordination Group (TJCG) in February 2009, bringing together over 20 representatives of Afghan CSOs, backed by AIHRC, UNAMA, ICTJ and other international organisations, has helped to strengthen the individual voices of organisations; facilitate information sharing; and coordinate transitional justice activity.

Afghan CSOs have grown increasingly confident and strategic, using media and key events as a platform to raise transitional justice issues. At the 2010 London Conference, they prepared a united statement of suggestions and demands to the GoA and the international community. Most recently, the TJCG prepared a statement in opposition to the Amnesty Law. The accompanying press conference was covered by Afghan TV and print media (such as Ariana, and Channel One TV and 8 Sobh newspaper). Several Afghan NGOs and the AIHRC have raised awareness about transitional justice, documented past and present human rights violations, and have tried to ensure the conflicts and victims’ suffering is not forgotten. Victims’ support networks build communities of interest, a travelling theatre elicits reflection on the legacy of impunity, and victims have related their personal stories and testimonials, which have appeared in some newspapers and been aired on radio programmes.

Despite these efforts, civil society’s capacity to address issues of transitional justice and to influence policymakers remains weak. Only a few organisations have sought to develop expertise on specific issues like victims’ mobilisation, documentation, awareness-raising and training.⁸⁴ Moreover, Afghan media remains largely quiet about transitional justice.⁸⁵ Furthermore, some civil society respondents described how internal divisions and lack of coordination is weakening the effectiveness of civil society, specifically the TJCG. An international respondent commented that it was “still amazing how little trust and information sharing there is within the group.” One TJCG member commented there was not enough serious activity and that people do not regularly participate in meetings. The group has recently tried to overcome these shortcomings by restructuring itself: creating aims and objectives; establishing a core group of participants; and creating a media strategy to inform the public about injustices.⁸⁶ Its international supporters (UNAMA,

82 “US Rule of Law Strategy, First Pillar,” 6. Although Pillar II has not yet been signed by the Pentagon, the other three have been agreed to.

83 International Crisis Group, “Afghanistan Judicial Reform and Transitional Justice” Asia Report No 45, (Kabul/Brussels: ICG, January 2003), 13. AIHRC is aided by quasi-judicial power, including the ability to summon anyone living in Afghanistan, to examine such persons as witnesses and to “compel them to produce documentary evidence in their possession or under their control.”

84 ICTJ, “Submission to the Universal Periodic Review.”

85 Afghanistan Watch, through ICTJ funding, produces a bimonthly media monitoring newsletter. This monitors a range of issues discussed in Afghan newspapers, from negotiations with the Taliban to transitional justice. The newsletter is consequently a useful indicator of the current coverage awarded to transitional justice.

86 TJCG meeting, Kabul, 16 November 2009.

ICTJ, OSI, USIP, etc.) will need to continue to support and strengthen TJCG's capacity to ensure momentum is not lost and the group continues functioning.

Most civil society initiatives remain restricted to Kabul and outreach to the regions has been limited.⁸⁷ Security and funding are the main reasons for this, as an ICTJ respondent explained, "When we do training, it is never a problem finding people in the provinces. But funding doesn't necessarily get out there and if something happens they are less protected."⁸⁸ According to the Director of OSI, the significant security risk that is present in the provinces has stalled plans to expand transitional justice projects there. An ongoing challenge will be for Afghan and international actors to find ways to connect regionally and in the provinces.

Of further concern is the lack of interaction between both Afghan and international CSOs and the government. Another ICTJ respondent explained that "the problem is that the silence of the government makes it difficult for civil society to play a role."⁸⁹ However, as one international expert pointed out, in Guatemala, human rights organisations continually consulted the government even though the latter was responsible for the disappearances and executions. In Argentina, the government was reluctant but civil society kept pressing. To substantively address the past, political will needs to be developed and political institutions need to be involved. It will be important to bring the government back into the dialogue even if it means only first putting on paper what its responsibilities are. The challenge is to find ways of doing so.

87 Results of OSI's mapping project, author interview, Country Director OSI.

88 Author interview, ICTJ representative, 23 November 2009.

89 Author interview, ICTJ representative, 23 November 2009.

4. Transitional Justice Activities and Processes

Despite the challenges and shortcomings of actors working on transitional justice, international and national actors have continued to pursue several valuable processes that support accountability for war crimes, confront the past and help repair the damage done to the victims of Afghanistan's conflicts. This section addresses some of these, exploring their benefits and weaknesses.

4.1 Judicial accountability

Despite some developments, in Afghanistan there has been a lack of a substantive process in security sector and rule of law reform. The Afghan National Police (ANP) and formal justice sector institutions are considered corrupt and enjoy limited public confidence.⁹⁰ Judges and lawyers still lack adequate education and training in both Islamic and secular Afghan law. Wisner argues that militia commanders control various judges and attorneys in certain areas while judges' insufficient salaries leave them open to bribery and corruption.⁹¹ An Afghan judicial respondent consequently expressed the opinion that the time was not right for prosecutions of war crimes. He argued, "If the judicial system in Afghanistan does not have jurisdiction over the other crimes that have happened, then how can it over war crimes?"

"If the judicial system in Afghanistan does not have jurisdiction over the other crimes that have happened, then how can it be over war crimes?"

– Afghan judicial respondent

If accountability for war crimes cannot be secured through domestic courts, is there a role for the ICC? The ICC creates an opportunity for redress for the victims of conflict if the national state is unwilling or unable to do so appropriately.⁹² By ratifying the Rome Statute in February 2003, Afghanistan falls under its jurisdiction.⁹³ Renewed

interest in the potential role of the ICC in Afghanistan was sparked by the announcement in September 2009 by the Chief Prosecutor, Luis Moreno-Ocampo, that war crimes investigators were in the early stages of an enquiry into "massive attacks, collateral damage exceeding what is considered proper and torture" committed in Afghanistan since the US-led invasion in 2001. This opened the possibility of prosecutions by the international court.⁹⁴

What role could the ICC play in Afghanistan? The ICC only has prospective jurisdiction starting on the date in which the treaty enters into effect.⁹⁵ This means that crimes committed before 2003, when Afghanistan ratified the Court, are not within its

90 ICTJ, "Submission to the Universal Periodic Review"; AREU's work on community-based dispute resolution also found evidence of corruption in relation to district-level justice officials, see in particular, Deborah Smith, "Community-Based Dispute Resolution in Nangarhar," (Kabul: AREU, 2009).

91 Wisner, "Is Time Ripe for Traditional Justice in Afghanistan?," 6-7.

92 Mendez, *International Criminal Court*, 39-43. The Rome Statute creating the ICC is dated from 17 July 1998. Sixty countries were needed to ratify the Rome Statute before it entered into force in 2002.

93 Mendez, *International Criminal Court*, 39-43. The ICC has two limitations in its jurisdiction. Firstly, it does not take primacy over domestic courts unless the respective national court can be proven to be unwilling or unable to prosecute the potential defendant. Secondly, it will only have prospective jurisdiction starting on the date in which the treaty entered into effect in the relevant country.

94 James Reinl, "ICC Investigates War Crimes in Afghanistan," *United Nations Press*, (New York, 10 September 2009).

95 Mendez, *International Criminal Court* 39.

jurisdiction. At a conference on the ICC held in October 2009,⁹⁶ it was highlighted that during the past six years aerial bombardments by international forces, armed attacks, roadside explosions and suicide attacks have caused heavy civilian casualties.⁹⁷ While these amount to numerous violations of human rights, an ICTJ respondent questioned whether they are sufficient to benefit from ICC involvement.⁹⁸ Investigation and potential prosecution by the ICC would necessarily ignore the two and a half decades of conflicts and abuses committed before the signing of the Rome Statute. The impact on dealing with the past and of satisfying victims' demands for justice is therefore questionable. More dangerously, by placing emphasis on crimes committed after 2003, some of the worst perpetrators of human rights abuses would consequently be ignored.

Investigations by the ICC could, however, act as a threat to many abusers of human rights, past and present. Mani suggests that indication that the ICC's Chief Prosecutor intends to investigate a particular case or country sometimes has a deterrent effect on violators.⁹⁹ An ICTJ respondent said that in Afghanistan, ICC investigations could present a threat to people who do not understand the court's temporal jurisdiction and this could give hope to Afghan actors that there are some countries and organisations that support accountability.¹⁰⁰ Investigations by the ICC could help create an environment in which impunity is harder to defend and domestic interest in pursuing accountability is revived.¹⁰¹ However, it should also be noted that in Sudan, the ICC indictment of President Omar Bashir failed to have any impact on the continuation of conflict or its accompanying violations.

Is there political will for the ICC? To date, the GoA has not invited the court to address crimes and the general consensus in the government and justice sectors appears to be to avoid ICC involvement. Article 68 of the Rome Statute requires member states to fully cooperate with the Court regarding investigation and prosecution of international crimes within its jurisdiction.¹⁰² Most other member states drafted their ICC cooperation laws within months of joining the ICC. Nearly seven years after accession to the ICC, Afghanistan has yet to draft these cooperation laws. In fact, according to an AIHRC Commissioner, the MoJ ignored a draft law prepared by the AIHRC.¹⁰³ Perhaps the clearest indication of the government's disinterest is its vacant seat at the Assembly of State Parties (ASP) to the ICC.¹⁰⁴ As an Afghanistan Watch representative said, "This is regrettably a sign of how much Afghanistan is committed to fulfilling its international obligations and participating in the fight against impunity at the national and international level."¹⁰⁵

There could also be a lack of will for ICC investigations among Afghanistan's international

96 The Conference was organised by the CICC's representative in Kabul, Afghanistan Watch, on 24 October 2009. A wide range of participants was invited from the government, international community and civil society.

97 Husain Moen and Ahmad Zia Mohamaddi, "International Criminal Court (ICC) in Afghanistan: Outcome of the Consultative Meeting on Obligations of Afghanistan under ICC," (Kabul: Afghanistan Watch, 24 October 2009), 8.

98 Author interview, representative ICTJ, 17 November 2009.

99 Mani, *Ending Impunity and Building Justice in Afghanistan*, 23.

100 Author interview, ICTJ representative, 17 November 2009.

101 ICTJ, "Beyond Peace Versus Justice: Fighting Impunity in Peacebuilding Contexts."

102 Mendez, *International Criminal Court*, 39-43.

103 Nader Nadery, speaking at Consultative Meeting on the Obligations of Afghanistan under the ICC, Kabul, 24 October 2009.

104 The Assembly of State Parties has met every year since it was first convened in September 2002.

105 Niamatullah Ibrahim, "The Vacant Seat of Afghanistan at the ICC: A Short Report on the ICC Assembly of States Parties (ASP)", The Hague, Netherlands, November 2009, available at: <http://www.watchafghanistan.org/article017.html>

partners. Currently, 43 countries have a military presence in Afghanistan.¹⁰⁶ The ICC can investigate and prosecute crimes committed by foreign forces. In fact, the ICC Chief Prosecutor specifically mentioned that enquiries could lead to arrest warrants for both the Taliban *and* members of coalition forces.¹⁰⁷ Whether the ICC would actually decide to undertake investigations in Afghanistan in face of likely opposition from major world players is, however, uncertain. The Court is often criticised for its neocolonial system of justice that only launches investigations that suit the interests of the five permanent members of the UN Security Council.¹⁰⁸ Weight to this claim is found in a 2003 agreement signed between the United States and the GoA. Using provisions outlined in Article 98 of the Rome Statute, this prohibits the ICC from investigating crimes committed by the United States.¹⁰⁹ Any process aimed at transitional justice ought not to give the impression that only Afghans should answer for their crimes.¹¹⁰ A process that ignored concrete evidence of violations by international actors, in particular the largest troop-contributing nation, could weaken the legitimacy of the Court (and by extension, international justice), and could incite resentment and hostility among the Afghans.

Afghan civil society can play a role in building support for this type of international justice process by pressuring government cooperation with the ICC as well as by assisting the Court with information collection. Afghanistan Watch intends to do this in its new role as the Afghan member of the Coalition for the ICC (CICC).¹¹¹ In October 2009, they organised a consultative conference on the ICC bringing together senior Afghanistan state officials, international diplomats and experts, and members of Afghan civil society and academia. It is, however, important not to raise expectations about what the Court can or will achieve. The ICC is currently only enquiring about crimes and might choose not to launch an investigation. Moreover, it is unclear what impact the ongoing talks with the Taliban and the coming into force of the Amnesty Law could have on the direction of these enquiries.

Another accountability mechanism available 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 one country.¹¹² In July 2005, Zardad Faryadi Sarwar, a former Hezb-i-Islami commander, was sentenced to 20 years in prison in the United Kingdom for conducting a campaign of torture and hostage-taking in Afghanistan between 1992 and 1996. This was the first trial of its kind in the United Kingdom under the UN Convention Against Torture.¹¹³ On the 14 October 2005, the Netherlands sentenced two Afghan asylum seekers who had held senior positions in the secret police in the 1980s with torture.¹¹⁴ The Netherlands has continued to investigate Afghans believed to be guilty of war crimes.

106 Figure from ISAF website, <http://www.isaf.nato.int/en/troop-contributing-nations/index.php>.

107 Reinl, "ICC Investigates War Crimes in Afghanistan."

108 Reinl, "ICC Investigates War Crimes in Afghanistan."

109 The agreement prohibits the GoA from referring American citizens who commit international crimes on Afghanistan's territory to the ICC for prosecution. Article 98 of the Rome Statute entitles world powers to enter into such agreements with countries, see the link for details of the agreement: <http://www.ll.georgetown.edu/guides/documents/Afghanistan03-119.pdf>.

110 Nadery, "ICC consultative meeting."

111 Author interview, Jalil Benish.

112 Mani, *Ending Impunity and Building Justice in Afghanistan*, 24.

113 Sandra Laville, "UK court convicts Afghan warlord," *The Guardian*, 19 July 2005, available at: <http://www.guardian.co.uk/uk/2005/jul/19/afghanistan.world>.

114 Liesbeth Zegveld, "Dutch cases on torture committed in Afghanistan: the relevance of the distinction between internal and international armed conflict," *Journal of International Criminal Justice*, No. 4 (2006), 1.

What is the impact of these trials? Although knowledge about them is sometimes weak, the prosecution of Afghans abroad can send a powerful signal to others in hiding, or in power, that there is no safe haven. Moreover, the news that a known war criminal was to be held to account in the UK was received positively inside Afghanistan. It also prompted many Afghans to suggest others (including those still inside the country) who ought to face similar charges.¹¹⁵ Afghan civil society could perhaps play a role in publicising these events and give hope to Afghan victims that some countries are willing to hold to account perpetrators of serious wartime violations. However, although respondents interviewed believed there was no official reaction from the GoA to these earlier universal jurisdiction trials, raising the profile of these cases could potentially incite opposition in the future and could threaten the continuation of these types of trials.

Ideally, the ICC and courts of universal jurisdiction would have little or no business. If societies confront their past effectively, there should be no need for the international community to step in. However, since the GoA looks increasingly unlikely to address impunity, international mechanisms could be one way of pursuing accountability for war crimes. However, even if civil society is able to raise awareness and build understanding about international justice mechanisms among the people of Afghanistan, it is uncertain whether large-scale, internationally-directed prosecutions would be legitimate in the eyes of the Afghan population. While the prosecution of Zardad Faryadi Sarwar in the UK was welcomed by Afghans, the trial was a unique occasion. Findings from *A Call for Justice* highlighted that if prosecutions were to happen, they should be Afghan-led and held in Afghanistan in order to be acceptable to most citizens.¹¹⁶ Even if the ICC chose to operate in Afghanistan, would trials that were internationally-led rather than domestically-driven, have any legitimacy with the people of Afghanistan?

4.2 Confronting the past: Mass graves and documentation

Processes that identify and preserve mass graves and document war crimes and human rights abuses are part of policies that are intended to confront the past. An accurate record of past crimes can make it embarrassing and difficult for official actors to deny them, apply pressure to remove perpetrators from power, and raise awareness toward preventing future abuse.¹¹⁷

“Once you open a mass grave, you start to open the space for the truth to be told.”

– UNAMA Human Rights Officer

When a mass grave is exhumed, it becomes harder for the government or anyone else to deny or ignore the crimes that have been committed. As a UNAMA human rights officer said, “Once you open a mass grave, you start to open the space for truth to be told.” The

same respondent explained how mass graves are consequently linked to truth-telling, creating a list of missing persons and sometimes prosecutions. Investigations of mass graves can also assist reconciliation processes. In Bosnia, uncertainty over the fate of a loved one was found to be one of the major obstacles to reconciliation.¹¹⁸

Mass graves are crime scenes and disappearance is a continued crime. An ICTJ

115 Patricia Gossman, “Truth, Justice and Stability in Afghanistan,” in Naomi Roht-Arriaza (ed.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006), 22-3.

116 AIHRC, “A Call for Justice.”

117 Final report on civil society, “Transitional Justice and Documentation Workshop.”

118 Isabelle Wesselingh and Arnould Vaulerin, *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing* (London: Saqi Books, 2005), 108.

representative therefore argues that this makes it the obligation of the government to investigate.¹¹⁹ In Afghanistan, however, an international expert explained that there is neither a formal government policy on mass graves nor government legislation protecting grave sites. On a practical level, the same expert highlighted there is currently no local capacity to conduct forensic investigations according to accepted international standards. Major obstacles consequently need to be overcome before mass graves can even hope to contribute to processes of confronting the past.

Physicians for Human Rights (PHR) and UNAMA/Office of the High Commissioner for Human Rights (OHCHR), which funded PHR until 2009, have been driving this process.¹²⁰ PHR is trying to engage Afghan civil society with the GoA to identify and build Afghanistan's forensic capabilities.¹²¹ PHR is also training Afghans—including Ministry of the Interior (MoI) officials, members of the AIHRC and other civil society actors—to document and register mass graves in an effort to secure and investigate graves and to stop, where possible, the unprofessional destruction of evidence documenting past abuses. An international expert described how a mass grave believed to contain the bodies of 300 victims of the communist regime was discovered in Badakhshan. Due to a lack of experience, it was excavated improperly by the local community, making forensic analysis impossible. Properly securing mass grave sites is vital, as the same international expert explained, "We need to secure the evidence and avoid it being destroyed and then at a later date we might be able to establish facts." In a country where there has been little effort to create credible truth-finding efforts, providing national stakeholders with a clear set of tools to develop forensic capacity to address human rights violations in Afghanistan is a fundamental part of transitional justice.

The great challenge in investigating mass graves in Afghanistan is an environment in which many of those suspected of war crimes continue to dominate government structures. For example, a mass grave at Dasht-i-Leili apparently contains the remains of as many as 2,000 Taliban (Afghan and Pakistani) prisoners, as well as perhaps some al-Qaeda militants, who surrendered to the Northern Alliance and US Special Forces in November 2001 after the fall of Kunduz.¹²² PHR researchers (in a mission organised, sponsored and financed by UNAMA/OHCHR) discovered the mass grave in January 2002 and examined the site in May 2002. Subsequently, PHR experts exhumed the remains of fifteen individuals, and conducted autopsies on three of these, determining that the deaths were homicides.¹²³

A full exhumation was, however, never conducted. The former American ambassador for war crimes issues, Pierre Prosper, explained how his office dropped its enquiry due to resistance from American and Afghan officials. Bush administration officials were apparently concerned that an investigation could undermine Karzai's government.¹²⁴ Fears that an investigation might reveal US complicity in Dasht-i-Leili might also have been involved. In 2001, the chief suspect, General Rashid Dostum, was on the payroll

119 Author interview, ICTJ representative, 23 November 2009.

120 This cooperation was established under a Memorandum of Understanding between UNAMA, PHR and the Ministry of Interior (MoI) in 2007.

121 Author interview, international expert, 6 December 2009. Up until 2009, UNAMA/OHCHR funded PHR's presence in Afghanistan. In 2009, PHR's funding proposal was approved by the US State Department and starting from 2010, PHR will no longer be working under UNAMA/OHCHR.

122 According to reports, forces led by General Rashid Dostum, former defence official and current military chief of staff in Karzai's government, suffocated the prisoners in sealed cargo containers during transport from Kunduz to Sheberghan, and then buried them at the site. See Physicians for Human Rights, "PHR Calls for Probe into Removal of Mass Grave in Afghanistan," 12 December 2008, available at <http://physiciansforhumanrights.org/library/news-2008-12-12.html>.

123 Physicians for Human Rights, "PHR Calls for Probe into Removal of Mass Grave in Afghanistan."

124 Rubin, "Transitional Justice and Human Rights in Afghanistan," 574-5.

of the CIA and his militia worked closely with US Special Forces. Witnesses also place US soldiers at the scene of the alleged massacre.¹²⁵ Subsequently, although the State Department mentioned the episode in its annual human rights report for 2002, it took no further action. In 2008, PHR discovered excavations that suggested that the grave at Dasht-i-Leili had been tampered with, prompting concerns that evidence had been destroyed.¹²⁶

How will actors involved in investigating mass graves confront the obstacles presented by those in positions of power? One source of hope is the inclusive approach of the PHR. The training of Mol officials alongside civil society actors is the first step toward bringing the two together in an effort to build dialogue, understanding and support for the investigation of mass graves on all sides. The nature of forensic work, which frequently concentrates on specific grave sites, as well as Afghanistan's capacity for it means some grave sites will inevitably remain undiscovered or unexplored.¹²⁷ An ICTJ representative argued that expectations over what the process can do must therefore be carefully managed. There is currently little understanding of the population's expectations and their demands for exhumation.¹²⁸ An inclusive dialogue that includes a cross-section of society can help manage these expectations and build an understanding of the objectives of a mass graves policy. PHR is consequently promoting discussion on mass graves between civil society, prosecutors, judges, mullahs and academia.¹²⁹ AREU's ongoing research on the "Legacies of War" will also explore demands of Afghan communities for mass grave exhumation and hopes to contribute to the discussion on this issue.

Since forensic evidence in Afghanistan will necessarily be restricted to limited events, documentation will therefore consist largely of compiling witness testimonies. The purpose of documentation is ultimately to enable survivors to tell and share stories and build a picture of what happened during conflict. A sound documentation process makes it embarrassing and difficult for official actors to deny the past.¹³⁰ Moreover, as Worden and Steele argue, when stories are not told and past abuses are not acknowledged, a permissive environment can develop, encouraging additional abuses by current leaders.¹³¹

One of the best options in terms of documentation is the AIHRC, which is mandated to investigate and document human rights violations.¹³² In 2004, AIHRC carried out nationwide consultations and in 2005 released the report, *A Call for Justice*.¹³³ Its most recent documentation project has mapped human rights violations in Afghanistan, 1978-2001, in each province. Consequently, it stresses the extent and commonality of victims' experiences throughout the country; and the scope of perpetration of these crimes, which cannot just be ignored or amnestied. This research has the potential to make a real difference. A conflict overview can allow prosecutors to investigate and mapping is a common tool prior to investigations. However, a representative of ICTJ emphasises

125 Rubin, "Transitional Justice and Human Rights in Afghanistan," 574-5.

126 Physicians for Human Rights, "PHR Calls for Probe into Removal of Mass Grave in Afghanistan."

127 International Crisis Group, "Afghanistan Judicial Reform and Transitional Justice," 18.

128 Author interview, ICTJ representative, 23 November 2009.

129 Author interview, international expert, 6 December 2009.

130 Observation based on authors interviews conducted in Bosnia-Herzegovina for MSc dissertation: "Can International Criminal Trials Pave the Way toward Reconciliation in the Aftermath of 'New Wars'?: Coming to Terms with the Past in Bosnia-Herzegovina."

131 Worden and Steele, "Telling the Story: Lessons for Afghanistan from the Cambodian Experience," USIP Peace Briefing, December 2008, 4-5, available for download at: <http://www.usip.org/resources/telling-story-documentation-lessons-afghanistan-cambodian-experience>.

132 International Crisis Group, "Afghanistan Judicial Reform and Transitional Justice," 13.

133 AIHRC, *A Call for Justice*.

that it is just a preliminary step and it is necessary to keep expectations realistic about what the mapping project could do and how it is presented.¹³⁴

Several other notable documentation processes have taken place in Afghanistan. In support of AIHRC's consultations in 2004, the OHCHR undertook a mapping of gross human rights violations and war crimes in Afghanistan from 1978-2001, based on existing UN documents and other documentation from outside the country. The understanding was

A sound documentation process makes it embarrassing and difficult for official actors to deny the past... When stories are not told and past abuses are not acknowledged, a permissive environment can develop, encouraging additional abuses by current leaders.

that the reports would be released simultaneously because UN reports could do what AIHRC could not do for security reasons: describe specific incidents, and identify the perpetrators.¹³⁵ In the event, the UN report was never published.¹³⁶

The Afghanistan Justice Project (AJP) holds some of the most extensive documentation of past war crimes in Afghanistan. In 2005, it published a report titled *Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001*.¹³⁷ The report documented a number of key incidents that are important because of the magnitude of the crime or because of the involvement of people who continue to wield power. Further documentation has been undertaken by Human Rights Watch. The 133-page document *Blood Stained Hands* was the result of a two-year study and contained interviews with more than 150 eyewitnesses, survivors and government authorities.¹³⁸

Several other organisations also work to preserve evidence and record memories about the conflict in innovative ways. FSFJ has documented some victim's stories¹³⁹ and UNIFEM has collected women's oral testimonies of war from throughout Afghanistan.¹⁴⁰ Killid¹⁴¹ also produced a book, funded by OSI, called "Crimes of War," which consisted of 25 reports on crimes of war committed by commanders, war lords and foreign troops.¹⁴² These activities not only add to the body of documentation on violations committed in Afghanistan but can help satisfy a demand for recognition by victims.

There is, however, no precedent for systematic documentation in Afghanistan and to date these documentation efforts have been largely uncoordinated. Worden and Steele argue that perpetrators of crimes in Afghanistan have sought to fill this vacuum by promoting

134 Author interview, ICTJ Representative, 23 November 2009.

135 Gossman, "Truth, Justice and Stability in Afghanistan," 20.

136 Gossman, "Truth, Justice and Stability in Afghanistan": The report remained unpublished due to fears that it could "endanger UN staff and complicate negotiations surrounding the planned demobilisation of several powerful militias, including the Tenth Division loyal to Sayyaf. They also argued that as a "shaming exercise," the report raised expectations that neither the UN nor the Afghan government could meet: namely, that something would be done about the individuals named in the report.

137 The Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001*, (Kabul: Afghanistan Justice Project, 2005).

138 Human Rights Watch, "Blood-Stained Hands Past Atrocities in Kabul and Afghanistan's Legacy of Impunity."

139 Author interview, FSFJ Representative, 18 December 2009.

140 UNIFEM representative, pers. comm.

141 The Killid Group is a not-for-profit public media initiative of Development & Humanitarian Services for Afghanistan (DHSA). TKG is the only Afghan media with a presence in all 34 provinces of the country as well as a distribution reach within neighbouring Pakistan and Iran.

142 Killid representative, pers. comm., 13 January 2010. This was translated into Dari and Pashto and is awaiting publication.

their self-serving visions of the past.¹⁴³ Most notably, the amnesty resolution, in part, justified abuses on the grounds that mujahiddin soldiers fought a holy war.¹⁴⁴ Others, including some in high-level positions in the Afghan government, deny any responsibility for past war crimes despite overwhelming evidence to the contrary.¹⁴⁵ Moreover, the conflict in Afghanistan has in reality been several conflicts, each with multiple phases and actors, making it difficult to write a comprehensive story.¹⁴⁶

International experts can help build domestic capacity in documentation and to coordinate individual documentation processes to strengthen their effectiveness. USIP together with American University is developing a documentation database framework to organise information on past crimes and intends to establish a war crimes documentation centre in Afghanistan.¹⁴⁷ A respondent working on the project said that this will pull together published reports and unpublished material, such as from AJP's database, and ensure coverage of war crimes from all relevant periods. Because the server is outside Afghanistan, it is a secure backup for sensitive material. USIP is liaising with different NGOs to persuade them to use this database as both a backup for material they want to keep encrypted and private, and to share any material they want to. These documents may be indispensable for any government vetting process. It is also worth noting that this type of database was used to generate reports and produce evidence used in the trials of those accused of war crimes during the Bosnian war.¹⁴⁸

A further challenge is that witnesses may be reluctant to give testimony so long as those responsible remain in positions of power. Witness testimonies can also be unreliable. Due to a lack of experience, those collecting documentation are sometimes unable to differentiate between eyewitness accounts and hearsay. This complicates truth-finding and compromises accuracy, credibility and contribution toward the processes mentioned in this section. Again international support is crucial. In October 2008, USIP co-hosted with the Documentation Centre of Cambodia (DC-Cam) and OSI a five-day training workshop bringing together leading Afghan nongovernmental organisations with experts from around the world to observe Cambodia's past-crimes documentation efforts, build a better understanding of documentation purposes and practices and discuss related models and activities that might be used in Afghanistan.¹⁴⁹

4.3 Repairing the past

International law¹⁵⁰ recognises that a reparatory approach is an important way of acknowledging the collective societal responsibility that is owed to victims. Reparations can take many forms to compensate for harm and to rehabilitate the mind, body and status—property restitutions, monetary payments, education vouchers, memorials,

143 Worden and Steele, "Telling the Story: Lessons for Afghanistan from the Cambodian Experience."

144 The preamble to the Amnesty Resolution states of the fighting that led to numerous atrocities: "jihad, resistance and the rightful struggles of our people to defend the religion and country is the splendid achievement in the history of the country and are considered our distinguished national glories."

145 Dostum has previously said the deaths of Taliban prisoners buried at Dasht-i-Leili were unintentional, claiming only 200 prisoners died, blaming combat wounds and disease for most of the deaths.

146 ICG, "International Crisis Group, Afghanistan Judicial Reform and Transitional Justice," 2003, 18.

147 Author interview, USIP representative, 2 December 2009.

148 Final report on Civil Society, Transitional Justice and Documentation Workshop, 17-19 February 2009.

149 Worden and Steele, "Telling the Story: Lessons for Afghanistan from the Cambodian Experience."

150 The right to reparation in the form of restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition was set forth in the United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147 of 16 December 2005

legislation rehabilitation, apologies, or even the return of a loved one's body for burial.¹⁵¹ While it may be impossible to fully repair the damage done to victims or make individual assessments of the harm suffered by each victim, a reparations programme can provide solutions to some of the problems derived from the harm suffered. Sierra Leone's Truth and Reconciliation Commission (TRC), in its final report, recognised that reparations are a primary tool for rebuilding national trust and encouraging reconciliation.¹⁵²

In Afghanistan, reparation for past or present war crimes in Afghanistan are defined and applied in an inconsistent manner and do not amount to a comprehensive reparation programme. For example, the GoA, the coalition forces and NATO troop-contributing nations have different reparation schemes for destroyed property or civilian casualties. This prompted AIHRC to recently ask the Supreme Court to provide an opinion on adequate reparations. ICTJ suggested that the Afghan government should insist that international military forces adhere to the ruling of the Supreme Court.¹⁵³

Another financial compensatory policy is the pensions for the disabled and survivors of martyrs organised through the Ministry of Labour, Social Affairs, Martyrs and Disabled (MoLSAMD).¹⁵⁴ Eligibility for disability and survivorship is war-related. Moreover, there are no robust mechanisms to substantiate evidence of war-related casualties, which leaves it open not only to fraudulent claims but to the discretion of the community or authorities to direct the eligibility assessment process.¹⁵⁵ As such, it is questionable whether this policy could be considered part of a genuine reparative transitional justice policy designed to acknowledge the suffering of *all* victims. Although, it must be acknowledged that in an environment where so many people can claim to be victims, a comprehensive reparation policy would be an enormous task for any government.

In general, the government has failed to live up to its responsibilities, outlined in the Action Plan, to acknowledge the suffering of the Afghan people. President Karzai's public launch of the Action Plan on International Human Rights Day (Victim's Day) in 2006 and his reemphasis on recognising victims the following year were symbolic markers.¹⁵⁶ In subsequent years, Afghanistan's victims have been largely ignored by the government and initiatives to create symbolic memorials recognising their

In general, the government has failed to live up to its responsibilities, outlined in the Action Plan, to acknowledge the suffering of the Afghan people.

suffering have been limited. Several CSOs have expressed support for an official process to commemorate the victims of the conflict. After the discovery of the mass grave in Badakhshan in 2007, Karzai publically promised to erect a memorial at the site, but this never materialised.¹⁵⁷ This behaviour stands in stark contrast to the government's memorialisation of the mujahiddin through public holidays—Celebration of the Islamic Revolution in Afghanistan and The Great Ahmad Shah Masood Day—and memorials, such as Massoud Circle in central Kabul.

151 Ruth Teitel, *Transitional Justice*, (Oxford, New York: Oxford University Press, 2000), 137.

152 Mohamad Suma and Cristián Correa, "Report and Proposals for the Implementation of Reparations in Sierra Leone," (ICTJ: December 2009).

153 ICTJ, "Submission to the Universal Periodic Review," 5.

154 Independent expert and ex-ANDS adviser responsible for preparation for Social Protection Sector Strategy, pers. comm., Kabul, 13 January 2009.

155 World Bank, *Afghanistan Public Sector Pension Scheme: From Crisis Management to Comprehensive Reform Strategy* (Report No. 44408-AF, Human Development Unit, South Asia Region, 2008).

156 ICTJ, "Submission to the Universal Periodic Review," 3.

157 Author interview, AIHRC Commissioner.

Instead, the responsibility of commemorating victims has fallen largely on Afghan civil society. On 2008 Victim's Day, a monument was erected in Badakhshan to mark the communist grave there.¹⁵⁸ The following year, AIHRC inaugurated the country's first war museum in Badakhshan. The museum commemorates the deaths of tens of thousands of people and includes displays of remnants from war—torn pieces of cloth, mangled shoes, handcuffs, prayer beads—and hundreds of photos and names of victims. The land for the museum was donated by the community and victims were involved in the process. An AIHRC Commissioner said there are further plans for memorials in Herat and Kunar.

ICTJ suggests that opportunities to memorialise the victims of Afghanistan's ongoing conflict may represent possibilities for civil society engagement with the government.¹⁵⁹ However, it is important to acknowledge that memorialisation in Afghanistan is mired in political problems. Without a comprehensive examination of the causes and consequences of the conflict, various groups may contest the symbolism of different memorial plans. If a monument highlights communist-era atrocities, Taliban victims may take offence. If it hails the mujahiddin, victimised ethnic minorities may protest.¹⁶⁰ Actors working in this area should bear in mind that if memorialisation is not treated with great care, it can increase resentment over the disproportionate representation of one group over others and can be used as a divisive political tool. An integrated memorialisation process between a cross section of society might help to avoid some of these tensions. Moreover, ICTJ is considering bringing in a memorial expert to do an assessment and start thinking about what can be done in terms of memorials.¹⁶¹

Another important dimension of ensuring that the suffering of victims does not go unacknowledged is providing them with the space where they can find channels for their grief and connect with other victims. A variety of CSOs employ dynamic mechanisms to give victims a voice for their pain. FSFJ is Afghanistan's first Victims' Network. They have established three victims' *shuras*¹⁶² in Kabul. Listening groups bring together the victims of different *shuras* once a month to share experiences and stories of war and conflict. These groups give a voice to the victims and increase the level of understanding about the context of the war. FSFJ also provides psychological and neurological services for victims, although this is limited to Kabul.¹⁶³

Currently, FSFJ operates only in Kabul, but it aims to take the *shuras* to other provinces and is establishing an office in Herat; an office in Mazar also planned.¹⁶⁴ AIHRC also encourages victims' networks across Afghanistan (together with UNAMA) and has recently supported the creation of Victims' Groups in Kabul, Bamiyan and Jalalabad, taking the total number to six. A representative of AIHRC closely involved with this work suggested that the growing membership of the Afghan Victims' Social Association in Yakowlang District, Bamiyan Province, which now numbers close to 100, and the high attendance of workshops organised by the organisation reflects the popularity of these associations. The same respondent said that, "Although we are still in the early stages, already we can see the very positive effect that the existence of this association is having upon the people of Yakowlang." Continued efforts to support victims throughout Afghanistan should be supported, financially and logistically.

158 Ahmad Sardad, "Afghanistan War Museum Displays Past Horror," *Agence France-Presse*, 9 December 2009.

159 ICTJ, "Submission to the Universal Periodic Review," 4.

160 Worden and Steele, "Telling the Story: Lessons for Afghanistan from the Cambodian Experience."

161 Author interview, ICTJ representative, 17 November 2009.

162 A *shura* is a village council comprised of a group of elders.

163 Author interview, FSFJ Representative.

164 Author interview, FSFJ Representative, Kabul, 18 December 2009.

The Afghanistan Human Rights and Democracy Organisation (AHRDO) works with victims in Kabul, employing arts and culture-based methodologies to deal with the past and explore issues of human rights and transitional justice. AHRDO hopes to strengthen the link between theatre and transitional justice, while simultaneously giving voice to the victims of Afghanistan and exploring grassroots solutions for dealing with Afghanistan's painful present and past.¹⁶⁵ One example of their work was reviving the play *AH-7808* with the support of ICTJ. Backed by AIHRC and UNAMA, the play, which elicits reflection on the legacy of impunity, first toured the country in 2008 and attracted international media attention.¹⁶⁶ The director of the play, Hjalmar Joffre-Eichhorn, explained that AHRDO re-launched it because, "The victims really appreciated it—the creation of the space for discussion."

Victims have also found channels for their suffering in the media. FSFJ, supported by OSI, has produced a series of stories of the victims of conflict in an Afghan newspaper. These stories are also broadcast by a radio station in Kunduz and Takhar.¹⁶⁷ The Afghanistan National Participation Association (ANPA), with AIHRC assistance, produces three radio packages per week exploring victims' stories and the meaning and experience of transitional justice in other countries. These are then disseminated to over 40 local FM radio stations.¹⁶⁸ The Killid Group regularly covers human rights violations and war crimes in its magazine. In early 2009, Killid Radio held roundtable discussions addressing the crimes of war and transitional justice.

Despite the initiatives mentioned above, Afghan media has been largely quiet on issues of transitional justice, and its capacity to research, understand, and inform the public about the nation's experiences during wartime remains limited. An international respondent remarked that civil society still finds it difficult to approach media in the Afghan context. A recent collaboration to build media capacity between Killid and USIP could help in this regard. The project's overall goal is to empower the nascent Afghan media to inform the public on human rights abuses, transitional justice and ending impunity through research and investigations; and publication and distribution. In doing so, it also aims to further develop an historical record of past and ongoing conflicts.¹⁶⁹ Media can play a crucial role in communicating the truth about past crimes and can empower victims, giving them a voice for their grief that reaches across the country. International actors emphasised that the abovementioned activities are promising start and more training would be provided in these areas.

165 Khudadad Bisharat, AHRDO Director, pers. comm., 15 November 2009.

166 For more information see, Emily Winterbotham, "Ghosts of War," *Afghan Scene* 62, September 2009.

167 Author interview, FSFJ representative, Kabul, 18 November 2009.

168 Author interview, AIHRC Commissioner.

169 USIP representative, pers. comm., 13 January 2010.

5. Conclusion: Looking ahead

In negotiations to end conflicts as well as in post-conflict agendas, victims' needs are often low on the priority list. As ICTJ highlights, victims groups do not possess the sort of weight that parties to negotiations usually hold and they may not, moreover, be seen as an immediate threat to stability. Yet, in the longer-term, putting victims and victims' rights firmly on the post-conflict agenda is essential to building trust in the state. Responding to victims' needs has both value in itself, in terms of ethics and law, as well as a strategic value, in terms of long-term political advantages and producing a sustainable peace.¹⁷⁰ Indeed, in Afghanistan the failure to address victims' concerns and tackle ongoing impunity can be seen to have contributed to the insurgency.¹⁷¹

This paper has described some efforts conducted by a range of international and Afghan organisations that can help address the past in Afghanistan. "Transitional justice" encompasses a range of processes available to a country to deal with the legacy of the past. Each context is, however, unique and the relevant transitional justice mechanism or mechanisms should reflect that reality. Transitional justice in Afghanistan is often misunderstood and conflated to mean addressing questions of criminal responsibility only.¹⁷² While criminal justice is not always possible, or even desirable, decision-makers and the population must be aware of the possibility of adapting the full range of choices available to the given situation without succumbing to pressures for impunity.¹⁷³

Policies that work toward "confronting" and "repairing" the past can help people cope with legacies of conflict and violence. In other countries, such as Peru and Bosnia, not knowing what had happened to a loved one was discovered to be an obstacle to people's ability to deal with the past and consequently to the country's ability to move forward and work toward reconciliation.¹⁷⁴ It is important that the international community and, in particular, the GoA support the PHR in identifying, protecting and securing mass graves in Afghanistan. The destruction of grave sites would prevent any future exhumation and identification processes that are not only necessary for people's individual healing, but help uncover the truth about past crimes. Helping Afghans to build their capacity in documentation and collecting and preserving evidence can ensure that this information is not lost if, and when, Afghans themselves are ready to decide what should be done. While the GoA has a responsibility to acknowledge the suffering of the victims of Afghanistan's conflicts, financial or material reparations can be contentious due to the heavy financial implications involved and the fact that they might be perceived as amounting to an admission of guilt. However, symbolic gestures, such as the official commemoration of Victim's Day, may demonstrate to victims that their experiences are not forgotten. Members of the TJCG when interviewed expressed their disappointment that the GoA ignored opportunities to formally acknowledge victims' suffering. All of these processes are, however, fragile and need support.

170 Mohamad Suma and Cristián Correa, "Report and Proposals for the Implementation of Reparations in Sierra Leone," (ICTJ: December 2009).

171 See Ledwidge, "Justice and counter-insurgency in Afghanistan: a missing link," The Tribal Liaison Office, "A Socio-Political Assessment of Uruzgan Province 2006-2009" and Ruttig, "Dimensions of the Afghan Insurgency."

172 This finding is based on interviews with national actors in Afghanistan.

173 Mani, 26.

174 For further information on this in relation to Bosnia, see Wesselingh and Vaulerin, *Raw Memory*. For further information on Peru, see Lisa Magarrell and Leonardo Filippini (eds.) "The Legacy of Truth: Criminal Justice in the Peruvian Transition" (ICTJ: 2006), available at: <http://www.ictj.org/static/Americas/Peru/LegacyofTruth.eng.pdf>.

It is important that the international community continues to support the development of organisations working on transitional justice. Concerted efforts to build civil society's capacity, specifically the TJCG, to advocate effectively for transitional justice can help ensure that their voices reach those in power. Expanding the geographical reach of Kabul-based organisations and supporting the creation of groups throughout the provinces can help to create nationwide understanding about the significance of transitional justice. A powerful, active and national civil society can help to push policies of accountability and make it more difficult for the government to allow impunity to prevail.

It is important to recognise another reality: in an environment that is hostile to transitional justice of any form, any initiative—no matter how well conducted—will struggle. For a substantive process of dealing with the past to persevere, political leadership and institutions will ultimately need to be involved. The international community, which has acknowledged the significance of transitional justice in other countries and through its acceptance of international treaties, has the moral and legal responsibility to ensure that the Afghan government does not forget the millions of “ordinary” Afghans who have suffered, and are continuing to suffer, from conflict.

Victims' voices need to be brought back into the discussion and their needs acknowledged. More understanding is required about what Afghans really need and want. AREU's research hopes to contribute to the development of this knowledge and inform policymakers about what Afghans themselves mean by “justice,” “reconciliation” and “peace.” One thing remains clear: identifying ways to move forward requires ongoing consultation with the wider Afghan population and not just with Afghan and international actors who hold positions of power.

As tempting as it may be for policymakers to sweep the past under the rug after so many decades of war, the failure to address the legacy of impunity in Afghanistan is contributing to ongoing insecurity. Transitional justice is not only about addressing past crimes, but about dealing with continuing impunity, which delegitimises and hinders governance and counterinsurgency efforts. Almost nine years after Bonn, for Afghanistan to move forward, it should perhaps not look only to the experiences of other countries, but also observe its own history. The significance of dealing with the past and its relation to the present should be carefully considered in discussions surrounding Afghanistan's future.

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