



ICTJ Briefing Note

Afghanistan: Addressing the Past

Introduction

Afghanistan has suffered nearly three decades of conflict. The conflicts and the continuum of violence in Afghanistan have had devastating consequences for the country and its people. The state-building process, launched in 2001 after the ousting of the Taliban regime, has been slow and cumbersome. Nonetheless, important political milestones have been reached, including the adoption of a new constitution (2004), holding of presidential (2004) and parliamentary (2005) elections, the establishment of a government, and ongoing development of reform agendas for the governmental, justice, and security sectors.

The challenges faced in Afghanistan remain enormous, including lack of good governance and rule of law, corruption and lack of licit economic opportunities, a flourishing drug trade, and a declining security situation. In the meantime Afghan communities continue to live with the memories and effects of illegal arrests, torture, summary executions, rape, massacres, and random bombings. According to national consultations conducted by the Afghanistan Independent Human Rights Commission (AIHRC), 70 percent of Afghans consulted perceived that they or their family members had suffered serious human rights violations during the years of conflict.¹

Tired of conflict and hungry for peace, the Afghan people have placed considerable expectations on the new government and its international partners. Afghans have given these actors the benefit of the doubt and thus far have accepted shortfalls and failures. Ensuring that those who committed crimes and benefited from the conflict cannot take advantage of the ongoing state-building and democratization process to consolidate their impunity is one of the ways the Afghan government and its international partners can earn legitimacy and trust.

The AIHRC consultations showed that Afghans view justice as a prerequisite for sustainable peace and perceive a close link between the absence of accountability and the lack of security. Although it has been necessary to balance short-term stability with long-term peace and justice in Afghanistan, the political strategy of integrating and accommodating some of the major culprits of the conflicts has helped undermine the public's trust in the international community's intervention in Afghanistan and in the Afghan government. The question is how to build a viable Afghan state and what its future composition should be.

An international human rights organization founded in 2001, the ICTJ works in about 30 transitional societies. Our primary aim is to promote accountability by helping countries develop effective responses to human rights abuse arising from repressive rule, mass atrocity, or armed conflict. Depending on the context, the ICTJ focuses on strategies to document abuse or establish truth commissions, prosecute perpetrators, reform abusive institutions, provide reparation to victims of violence, or promote reconciliation. The ICTJ has an in-country approach, working in cooperation with local partners including governments, nongovernmental organizations, and other key actors. We have been working in Afghanistan with Afghan and international partners since early 2002. The ICTJ's work there has concentrated on supporting efforts to come to terms with past human rights violations.

¹ *A Call for Justice: A Consultation on Past Human Rights Violations in Afghanistan*, AIHRC 2005.

This ICTJ Briefing Note on the nascent transitional justice process in Afghanistan provides a short overview of the recent history of the Afghan conflict and the ongoing discussions and initiatives to address past human rights violations and war crimes in Afghanistan. It is not exhaustive but sets the stage for further discussion and initiatives.

Conflict and State Building in Afghanistan²

The Afghan nation state emerged in the late nineteenth century as part of the British colonial empire. Britain set up Afghanistan as a buffer state between Russia on one hand and British interests in India and Central Asia on the other.³ Afghanistan became independent in 1919. Governance ever since has been characterized by attempts to balance power between central governments based in Kabul against regional power holders on one hand, and movements to modernize against efforts to maintain customary systems on the other. Poverty and lack of education have further complicated the situation. Throughout its modern history, these internal tensions, which often manifest themselves along regional, ethnic, and tribal lines, have been further compounded and manipulated by external actors. Afghanistan's relationship with its neighbors, and especially the controversy over the Durand Line that crosses through the Pashtun areas of Afghanistan and Pakistan, is a continuing source of unrest and conflict. Afghanistan has been a battleground on which several international conflicts, including the Cold War and the war on terror, have been fought.

The recent history of conflict in Afghanistan can be divided into five major phases: (1) the communist revolution and Peoples Democratic Party of Afghanistan (PDPA) government (1978–79); (2) the Soviet invasion and rule of Afghanistan (1979–89); (3) the fall of the Najibullah government and the civil-war period (1989–96); (4) the Taliban regime (1996–2001); and (5) the post-Taliban transitional period (2001–present).

(1) The modern conflict in Afghanistan started with the communist revolution of April 27, 1978. The communist politics of the PDPA/Khalq resonated poorly in Afghanistan, a country of intensely traditional and religious values. In response to the PDPA, anti-communist guerilla groups emerged from training camps in Pakistan. The PDPA responded by arresting and torturing alleged opposition members. The period of PDPA rule remains poorly documented, but the existing evidence suggests that disappearances, summary executions, and massacres were widespread.

(2) To avoid increasing anarchy and conflict at its southern border and to support the communist movement, the Soviet Union invaded Afghanistan on December 24, 1979. Under a Soviet-led and supported PDPA/Parchami government, summary executions diminished; but arrests, disappearances, massacres, and indiscriminate bombings of rural areas continued. The KHAD, the notorious Afghan intelligence service, was established during the Soviet period and was responsible for many arrests, torture, and executions.

Resistance to the Soviet invasion was largely organized along regional, and therefore ethnic, lines. The most successful leaders fighting “holy war” for the liberation of Afghanistan, the *mujahidin*, gained legitimacy during this period, and many of them remain important figures in Afghan politics today. By channeling funds and support to the mujahidin, Pakistan, Iran, Saudi Arabia, and the United States managed to inject their agendas into the Afghan resistance. The end of the Cold War and the Geneva Accords of 1988 forced Soviet forces to withdraw by the following year, but by 1989 the war had left a million dead and created the world's largest refugee crisis, with around 6 million refugees in Iran and Pakistan.

(3) The government established after the Soviet withdrawal survived for three years, at which point President Najibullah was overthrown. He was eventually executed by the Taliban. When the Cold War

² For further reading see *Casting Shadows—War Crimes and Crimes against Humanity 1978–2001: Documentation and Analysis of Major Patterns of Abuse in Afghanistan*. The Afghan Justice Project, 2005.

³ Rubin, Barnett R. *The Fragmentation of Afghanistan* (second edition). New Haven, Conn.: Yale University Press, 2002, 19.

ended the United States and the West lost interest in Afghanistan. Civil war and a state of near-anarchy ensued as Afghanistan divided into a number of semi-autonomous regions along mainly ethnic lines, and different factions fought for control of Kabul. In 1994, 10,000 people in Kabul died from direct shelling by warlords trying to gain control of the capital.

(4) The Taliban, mostly Pashtuns from the Afghan refugee camps in Pakistan, formed in reaction to the lawlessness and abuses of the civil-war period. Pakistan played a critical role in building the Taliban into a formidable military force. Their aim was to establish a fundamentalist Islamic government in Afghanistan. Taliban ideology resonated with the religious and cultural mores of the Pashtuns in southern Afghanistan. By 1998 the Taliban controlled 90 percent of Afghanistan. Although the Taliban brought much-craved security to the rural population (albeit through harsh diktat), their policies were vehemently anti-Shia and their behavior in most areas was that of an occupying force. The hard-line Taliban government progressively limited rights and freedoms of Afghans, partly by enforcing strict dress codes for women and men, forbidding various forms of cultural expression, and barring women from education and employment. The Taliban enforced their decrees through the Department for Promotion of Virtue and Prevention of Vice with punishments that included floggings and public executions. Fighting continued throughout the country between the Taliban and other ethnic factions, resulting in widespread civilian casualties and numerous massacres.

The Taliban also provided a refuge for Osama bin Laden and al-Qaeda. The attacks on New York and Washington, D.C., on September 11, 2001, refocused world attention on Afghanistan. The United States launched the war on terror by attacking Afghanistan with the aim of overthrowing the Taliban regime and its terrorist allies. Coalition attacks from the air were supported by various Afghan factions on the ground known as the Northern Alliance (many of whom were former mujahidin leaders).

(5) While the United States and its allies were fighting the Taliban, and with much of Afghanistan's territory falling under control of the Northern Alliance, international actors, along with select Afghan delegates, convened in Bonn to establish the Afghan Interim Authority (AIA) and draw a road map for state building. The Bonn Agreement set benchmarks to establish key institutions of a sovereign and democratic state, including a transitional government, a new constitution, presidential elections by September 2004, and parliamentary and provincial council elections by October 2005. The Taliban were not included in these talks.

To contribute to security and state building the United Nations set up a mission to assist Afghanistan, the UN Assistance Mission in Afghanistan (UNAMA). The International Stabilization Assistance Force (ISAF) also deployed, although its numbers were originally small and it was not permitted to deploy outside Kabul until 2004. The United States-led coalition forces have gradually handed over the security mandate to NATO's ISAF. The U.S. Operation Enduring Freedom (OEF) continues war-on-terror operations in Afghanistan.

The Bonn process came to an end with the establishment of the Afghan Parliament in December 2005. In January 2006 representatives of the Afghan government and the international community met in London to sign the Afghanistan Compact, which outlined benchmarks for state building from 2006 until 2010.

Security has remained a vital concern during the past six years of state building. In late 2005 and throughout 2006 security deteriorated rapidly in the south and southeast of the country. Driven out by U.S. forces and their allies in 2001, the Taliban regained strength with support from Pakistan, regrouped, and increased their attacks against Afghan government and international agencies in Afghanistan. In 2007 security incidents, including roadside bombs and suicide attacks, have increased in the Kabul region and in the north and west of the country. The detention practices of U.S. forces and civilian casualties and destruction of property as a result of international military operations are also negatively affecting the perception of the international military presence.

Transitional Justice in Afghanistan

The fragile peace that prevailed between the various phases of the conflicts in Afghanistan has never led to accountability for past crimes. The Bonn Agreement of 2001 was not a peace agreement, but rather an

agreement between selected Afghan leaders, including the Northern Alliance commanders who had supported the United States-led military intervention in Afghanistan. As a result, many known human rights abusers were brought into the political fold. Nevertheless, the fall of the Taliban regime and the establishment of a transitional government in late 2001 made it possible to start discussion of Afghanistan's brutal history of conflict and human rights abuse. The Bonn Agreement left this possibility open by avoiding an amnesty provision and creating a national human rights body, the AIHRC. The Afghanistan Compact includes building blocks for a transitional justice process.

A mechanism for transitional justice in Afghanistan was not established as part of the Bonn Agreement. Instead, nascent attempts to develop a transitional justice process in Afghanistan have included (1) national consultations by the AIHRC and limited documentation of human rights violations and war crimes committed during the phases of the Afghan conflict; (2) the development of the National Action Plan for Peace, Reconciliation, and Justice (the Transitional Justice Action Plan); and (3) limited mobilization of civil society. In addition, (4) some of the vetting processes have included criteria relating to past crimes, and a few trials have been conducted under the banner of transitional justice.

(1) The AIHRC has been a driving force behind transitional justice in Afghanistan. It was given a mandate to address transitional justice both through the Bonn Agreement and the presidential decree establishing the Commission. The AIHRC is one of the ICTJ's main partners in Afghanistan, and the ICTJ was involved in making the recommendation to delegate transitional justice issues to the Commission and in building its capacity to work on transitional justice.

In 2004 the AIHRC conducted national consultations to identify how Afghans wanted past violations to be addressed. Through its central and regional offices the AIHRC documented the views of more than 6,000 ordinary Afghans from 32 of 34 provinces and from refugee populations in Iran and Pakistan. Its report, entitled *A Call for Justice*, was published in January 2005. The ICTJ provided support and technical assistance to the Commission on drafting the *Call for Justice* report.

The consultation showed that ordinary people perceive that impunity is entrenched in Afghanistan, and perpetrators have attained positions of power despite their continued involvement in violations. The report suggests an urgent need to break with the past and recommends a way forward, including an integrated approach to build trust in Afghanistan's institutions and recognize victims' needs and wishes. The consultation showed strong public support for holding criminals accountable for past crimes through prosecution. Removing war criminals from positions of power (vetting) was highlighted as the next-best option.

In the interim, attempts to document violations went forward. Early suggestions for the establishment of a commission of inquiry did not take hold. In support of the AIHRC's consultation process and future documentation efforts, the OHCHR undertook mapping of gross human rights violations and war crimes in Afghanistan from 1978 to 2001, based on existing UN documents and other documentation from outside Afghanistan. In January 2005 High Commissioner for Human Rights Louise Arbour traveled to Kabul to support the launch of the AIHRC's *Call for Justice* report. During the visit Arbour met with President Karzai and gave a copy of the OHCHR's mapping report to the president. The report, which has never been published, was also given to the AIHRC as a resource for future Afghan documentation. The existing documentation has since been complemented by the Afghan Justice Project's comprehensive report, *Casting Shadows*.

In support of an Afghan transitional justice agenda the OHCHR organized a national conference on truth seeking and reconciliation in December 2005. The ICTJ provided technical assistance to the conference, which drew delegates from all regions of Afghanistan. The conclusions from the conference showed support for a broad-based transitional justice process in Afghanistan that would include truth seeking, accountability, and reconciliation. However, they noted that the process should be Afghan-led and in accordance with Islam and Afghan values. The conference also reiterated opposition to amnesties.

The Afghanistan Justice Project (AJP) and the AIHRC have both undertaken further documentation efforts in Afghanistan, the latter in the form of a conflict mapping exercise. Over the past year, Afghan and

international media has given much attention to identify mass-graves sites (many known to local communities). The focus on mass-graves has resulted in a realization of the lack of accurate data on disappearances and other violations, as well as the lack of capacity in forensic skills and techniques. Unlike in other transitional contexts, victims' groups working on issues such as disappearances are nonexistent in Afghanistan.

(2) The Action Plan for Peace, Reconciliation, and Justice was drafted on the basis of the recommendations included in the *Call for Justice* report. The drafting committee included representatives of the president's office, the AIHRC, and UNAMA and was supported by the EU and the Netherlands. ICTJ acted as a technical adviser. The Action Plan was hotly debated and narrowly adopted. The government adopted it in December 2005, just days before the OHCHR national conference on truth seeking and reconciliation. Included as a benchmark in the Afghanistan Compact and the Afghanistan National Development Strategy (ANDS), it has become one of the most important guidelines for Afghanistan's transitional justice process.

The Action Plan includes five measures aimed at ensuring that Afghanistan becomes a stable, lawful, and democratic state: (1) according dignity to victims, including through commemoration and the building of memorials; (2) vetting human rights abusers from positions of power and encouraging institutional reform; (3) truth seeking; (4) reconciliation; and (5) expressing opposition to an amnesty and establishing a task force to make recommendations for an accountability mechanism.

December 2007 marked the second anniversary of the Action Plan, and little progress had been made in its implementation. Adopting and publicly launching it ran into significant delays. Although the president and the cabinet favored some elements, action 5 (criminal accountability) was controversial. Although widely favored by international actors, establishment of an advisory panel on senior appointments received little support from within the government. ICTJ provided advice on the design of the panel. Awareness of the plan within the ministries responsible for its implementation remains weak. Finally, passage of the amnesty resolution in Parliament in March 2007 was a severe political blow to the Action Plan, even if all the legal implications remain unclear.

Although the implementation of the Action Plan has faced and will continue to face challenges, the fact that the Afghan government has made a formal commitment to transitional justice is important. The Action Plan will continue to provide a framework for civil society and the international community's support for transitional justice, and it is a tool that civil society can use to pressure the government.

(3) The AIHRC has become the informal lead on transitional justice and has developed its work in the area of transitional justice with considerable success. Its transitional justice unit has about 30 staff in 11 offices. However, it has focused more on high-level political actors than on grassroots work. For instance, it has not concentrated much on partnership or capacity building of civil society and media organizations interested in and pursuing transitional justice issues.

Interest and engagement in promoting transitional justice by civil society organizations, networks, and media is continuously growing and is becoming increasingly diversified. Civil society networks such as the Civil Society and Human Rights Network, the Afghan Civil Society Forum, and the Foundation for Culture and Civil Society have coordinated activities and responses to specific transitional justice issues. The ICTJ has been involved in several civil society workshops on transitional justice, including a six-day workshop organized with CSHRN for around 70 activists. However, unlike in many other transitional contexts, the capacity of individual organizations to address transitional justice remains weak; so far only a few organizations have sought to develop expertise on specific issues, such as victims' mobilization, documentation, awareness raising, and training. Most civil society initiatives remain centered in Kabul, and outreach to the sub-national level has been limited. In cooperation with other organizations the ICTJ is seeking ways to mobilize civil society and ensure outreach on transitional justice issues.

(4) Since 2001 several vetting initiatives have been attempted for candidates for the parliamentary elections, provincial chiefs of police, and senior political appointments. Only the vetting of provincial chiefs of police has included vetting on the grounds of the candidate's human rights record. Vetting

parliamentary candidates on the basis of their human rights records was discussed but considered unconstitutional. A complaints procedure was established but did not result in the removal of candidates. Efforts to establish a panel to advise President Karzai on his senior political appointments have largely stalled.

Criminal accountability for past human rights violations and war crimes has been a contested topic in Afghanistan. National courts currently do not have capacity to conduct trials of major human rights violators, and the international community has shown no appetite for an international tribunal. However, a number of criminal proceedings have already taken place for crimes committed during the years of conflict. In 2004 low-level commander Abdullah Shah was found guilty of killing more than 20 people and sentenced to death. The UN Special Rapporteur on extrajudicial killing, Asma Jahangir, and others extensively criticized his execution because of lack of due process. In 2005 Asadullah Sarwary, the head of the Afghan intelligence service (KHAD) during the Soviet era, was sentenced to death by Afghanistan's Primary Court of National and International Security. Sarwary's appeal is pending. The principle of universal jurisdiction has also provided limited opportunities for trials against Afghans residing abroad. Prosecutions have resulted in convictions in the UK in one case and in the Netherlands in two cases, and a third case is currently on appeal.

There are several reasons for the slow progress in developing mechanisms to address the legacies of the conflict in Afghanistan. The inclusion of former commanders in the government and the failure to vet parliamentary candidates have resulted in the presence of many individuals with questionable human rights records in the Afghan political elite and this has had a considerable effect on the political climate in Afghanistan. For example, after the launch of the Action Plan a handful of parliamentary members—former commanders—managed to mobilize support for a self-amnesty. In March 2007 the Afghan Parliament passed a resolution that amounted to self-amnesty, reasoning that Afghanistan should seek a path toward reconciliation. This will obviously complicate the implementation of transitional justice politically, although the legal validity of the amnesty resolution is debated. The conflicting agendas of the international actors add challenges to the slow process: The UN, the EU, EU member states, and Canada have strongly supported the AIHRC and transitional justice in Afghanistan, while the United States agenda on human rights and transitional justice has been less clear.

The completed Disarmament, Demobilization, and Reintegration (DDR) process and ongoing Disarmament of Illegal Armed Groups (DIAG) have failed to ensure disarmament and demobilization. An ample supply of men still can be enticed to fight and weapons abound in Afghanistan. The lack of reform of the justice and security sectors, coupled with an expanding drug trade, is an additional challenge.

The way forward

Afghanistan's nascent efforts to come to terms with the past remain centralized, and too little has been done to promote awareness and engage broader sectors of Afghan society, including community leaders and civil society at the sub-national level. At the same time the notion of transitional justice is publicly associated with criminal proceedings against a handful of Afghan decision-makers and former commanders. The lack of awareness of the wide range of transitional justice mechanisms, coupled with inadequate efforts to identify Afghan responses to the past, has led former commanders to challenge the AIHRC's and civil society organizations' transitional justice agenda as biased against them. They claim that its western supporters are on a crusade against those who have fought for Afghanistan's independence.

The ICTJ is convinced that addressing the past is necessary to promote a sustainable peace in Afghanistan. The work of the AIHRC and the adoption of the government's Action Plan for Transitional Justice provide a foundation for a transitional justice process. However, we believe that further actions are needed to ensure that

- The concepts and processes of transitional justice are Afghan-owned and Afghan-led. Further research, analysis, and consultations with the Afghan public to find solutions are needed;
- The Afghan government moves forward on implementing the Action Plan, ensuring that government institutions and the Afghan justice sector are aware of it and of their responsibility to implement it;

- The international community, especially the members of the Joint Coordination and Monitoring Board (JCMB), recognize the importance of transitional justice for the political process and the ongoing reforms in justice, security, and governance sectors;
- The AIHRC, Afghan civil society, and the media receive adequate support and can operate independently without fear of violence.

Resources on Transitional Justice in Afghanistan

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