



Addressing Gender-specific Violations in Afghanistan

Fatima Ayub, Sari Kouvo and Yasmin Sooka

Afghanistan Program
International Center for Transitional Justice

February 2009

About the Authors

Fatima Ayub is a full-time consultant for ICTJ's Afghanistan program. She focuses on research and advocacy, working with local partners, developing trainings on transitional justice and providing general support to the program. She was previously employed at Amnesty International, Human Rights Watch and Search for Common Ground. She holds an MA in International Relations from the School of Advanced International Studies at Johns Hopkins University.

Dr. Sari Kouvo is head of ICTJ's Afghanistan program. Prior to joining ICTJ, she was Human Rights and Rule of Law Advisor to the European Union Special Representative for Afghanistan. She also served as researcher on Afghanistan at Amnesty International and a researcher and lecturer within the Department of Law at Gothenburg University. She is a member of the European Union's Civilian Response Teams for Multifunctional Crisis Management and is a founding member of both the Center for Global Gender Studies and the Center for the Study of Human Rights at Gothenburg University.

Yasmin Sooka is a prominent South African lawyer and human rights activist. She is the Executive Director of the Foundation for Human Rights and has served on the South African and Sierra Leone Truth and Reconciliation Commissions.

About ICTJ

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

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I. Introduction

For the field of transitional justice, which seeks mechanisms and processes to reestablish peace and encourage accountability for past crimes and reconciliation within conflict-ridden communities, questions of violations that women suffer during conflicts are especially pertinent. Decoding the gendered nature of conflict and violations committed during such an event is complicated by the fact that women are often overlooked as actors and victims. Furthermore the crimes against women during such circumstances are seldom specific to outbreaks of war; the conflict merely accentuates discrimination and violations that women suffer during peace.

In the context of post-conflict Afghanistan, the issue of past violations and gender is particularly vexing. The U.S.-led military intervention in Afghanistan was legitimized in part with the rationale of “saving Afghan women” from the oppressive Taliban regime, and a language of empowerment of women and mainstreaming of gender has been integral in the state-building process in Afghanistan.

At the formal level, Afghanistan has made some advances in the past eight years. Yet close observers realized that removing the Taliban from power was not the end of the struggle for women’s rights, or even the beginning. This was not a nation with a legacy of well-established, legally protected and socially accepted women’s rights. The crippling legacy of decades of fighting has strained many of Afghanistan’s social and political bonds. Little documented, the experience of Afghan women through the Soviet, civil and Taliban-era wars has been a particularly grueling one, and existing social biases and discrimination exacerbate the consequences of those conflicts. In addition, Afghanistan, especially outside its main urban centers, remains an intensely patriarchal society with complex tribal codes and customs circumscribing social interaction. The relationship between women’s and men’s roles is marked by these codes and patterns.

This four-part paper analyzes the relationship between transitional justice and gender in Afghanistan. First, it discusses transitional justice and gender in general, drawing on experiences from other post-conflict contexts. Second, it provides a brief overview of the three decades of conflict and the complex gender relations in Afghan society. Third, it discusses transitional justice and gender in the post-2001, state-building process in Afghanistan. And last it concludes with recommendations.

Research for this paper began in January 2007 and lasted through March 2008. The authors have benefited from extensive interviews and conversations conducted in the country, as well as outside its borders. The authors reviewed literature on gender issues in Afghanistan; a source list is appended for further reading. The International Center for Transitional Justice (ICTJ) also conducted training on documenting gender-specific violations in Kabul for the Afghan Independent Human Rights Commission (AIHRC) and United Nations Development Fund for Women (UNIFEM) in December 2007. We have included insights and commentary from those discussions here.

II. Gender and Transitions: Challenges and Lessons from Other Contexts

Gender and Transitional Justice

In recent decades there has been an increased focus on transitional justice and the rule of law in both conflict and post-conflict societies, with transitional justice strategies seen as a necessary step in promoting justice for past abuses and building national unity and reconciliation. Justice, peace and democracy should not be seen as mutually exclusive goals but rather as mutually reinforcing imperatives. Advancing all of these goals in fragile, post-conflict settings requires strategic planning, careful integration and sensible sequencing of events.¹

The challenges of dealing with post-conflict environments require an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation; the preservation of peace; and the building of genuine democracy and the rule of law.² Any transitional justice approach should include both judicial and nonjudicial mechanisms and should seek to encompass broadly the various dimensions of justice that can heal wounds and contribute to social reconstruction based on a fundamental belief in universal human rights.

While men's experiences of conflict have been well documented, women's experiences have often been overlooked. Until very recently many truth commission mandates, criminal justice approaches, judicial opinions, policy proposals for reparations and other transitional justice mechanisms have paid little or no attention to the suffering of women. Some progress has been made in the following areas: the use of thematic gender hearings in truth commissions; ensuring that data collected is disaggregated on the basis of gender; new jurisprudence on gendered crimes at an international level; and a greater focus on addressing specific gender crimes in reparations programs. Women have participated in transitional justice processes as victims and survivors of conflict, as well as witnesses, combatants, perpetrators and transitional justice activists. As victims and survivors, they are

¹ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary General, daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement, accessed Jan. 4, 2008.

² *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 25.

perceived traditionally as secondary victims or survivors of war. In reality, they are usually the primary victims. During conflicts, the physical crimes against women include death, sexual violence and harm to their reproductive systems through forced pregnancy and sterilization. The long-term consequences of conflict include economic hardship, health violations, fewer legal rights and questions of access to land.

The increased focus on gender and on women's experiences advance the rights of women and to advance gender justice by considering some pressing issues:

- Communities often stigmatize female ex-combatants both as part of conflict and for stepping out of traditional gender roles by taking up arms;
- Reintegration too often focuses on economic and social reintegration, and fails to address the psychological, social and medical needs of women;
- As principal caregivers in most societies especially where medical and other infrastructures have collapsed, women are often responsible for the reintegration of their kin, many of whom are injured and traumatized. Transitional justice measures need to examine the roles of women as agents of reintegration;
- Women and girls play multiple roles in combat that are not always recognized, from cooks and porters to guards and fighters. Seventy-two percent of the girls within the Lord's Resistance Army operating in Northern Uganda received weapons and military training. As a sign of their willingness to "talk peace," 1,000 of the LRA boys were released; only 15 girls were let go because they were seen as less valuable.

Prosecutions

Pursuing judicial accountability for human rights violations, either through domestic or international bodies, has been one avenue for establishing responsibility for and broadening awareness of massive and systematic crimes against women. Sexual violence during times of war and social upheaval has been rampant. Until recently, rape was not treated as a war crime against women or as the *actus reus* for genocide but rather as a crime against dignity and honor.³ This has changed in the last decade as the jurisprudence of the international tribunals have recognized that rape and other forms of sexual violence can constitute genocide, torture and other inhuman acts.

The prosecutor's office in the International Criminal Tribunal for Yugoslavia committed substantial resources to the question of gender and the prosecution of rape and sexual violence.⁴ This included

³ Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U. N. T. S. 287 (declaring that "women shall be especially protected against any attack on their honour, particular against rape, enforced prostitution, or any form of indecent assault") available at www.unhcr.ch/html/menu3/b/92.htm, accessed Feb. 18, 2008.

⁴ Kunarac, Kovac and Vukovic Judgement (Feb. 22, 2001), available at un.org/icty/foca/trialc2/judgement/index.htm, and the Akayesu Judgement (Sept. 2, 1998), available at 69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm, accessed Feb. 18, 2008.

appointing a legal advisor for gender-related crimes and developing special procedural protections, both in relation to evidentiary rules for prosecuting gender crimes and affording protective measures to safeguard the physical and mental wellbeing of victims and witnesses. The work of the ad hoc tribunals certainly influenced the mandate of the International Criminal Court. That court explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, gender-based persecution, enforced sterilization and sexual violence as war crimes and crimes against humanity.⁵

Despite the advances made by the ad hoc tribunals in prosecuting rape and sexual violence, many women say such changes have been more symbolic in nature because there has been very little follow-up in terms of prosecutions. In support of this critique, many scholars and activists argue that the rules of relevance, the establishment of culpability, the efficiency of judicial resources, and the protection of the due process rights of defendants influence against the right of victims and witnesses to tell their stories.⁶ They argue that this kind of truth-telling is not within the jurisdiction of formal legal forums and that the translation of human suffering into a vocabulary and form that is acceptable and appropriate to a judicial proceeding can be a dehumanizing experience for victims of sexual violence.⁷

The reduction of gender to simply sexual violence against women is to ignore the gendered dimensions of conflict. These criticisms of the work of the ad hoc tribunals are not intended to suggest that prosecutions should be abandoned. Instead, our intent is to raise awareness of the complexity of understanding the gendered dimensions of conflict and the need to ensure that we critically explore our methodology so that in future applications we can do better. In this regard the Special Court of Sierra Leone has been in the unique position of operating currently with the country's truth and reconciliation commission. The prosecutor made sexual violence one of the court's priorities and also identified in the indictments against the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) the crime of "forced marriage" as an inhuman act and crime against humanity under the court's statute.⁸

Truth Commissions

The work and reports of truth commissions have become valuable tools in dealing with gender and violence against women. Generally established as official state bodies that investigate and report on human rights abuses, truth commissions also seek to make recommendations to remedy and prevent similar crimes in the future. In the past, however, the mandates of most truth commissions have not explicitly addressed the question of gender-specific crimes. In South Africa, intense lobbying from

⁵ Rome Statute of the International Criminal Court, art. 27, July 17, 1998, U.N. Doc. A/CONF.183/9, available at www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf, accessed Feb. 18, 2008.

⁶ Katherine Franke, "Gendered Subjects of Transitional Justice," 15(3) *Columbia Law Journal*, 15(3), 2006, p. 818.

⁷ *Ibid.*, pp. 818-21.

⁸ May 17, 2004, press release from the Special Court for Sierra Leone, Office of the Prosecutor, "Prosecutor welcomes the Arraignment of the RUF and AFRC Indictees on Charges Related to Forced Marriage," available at www.sc-sl.org/Press/prosecutor-051704.html, accessed Feb. 18, 2008.

activists ensured that gender and the examination of the experience of women during the conflict was placed on the truth commission's agenda. As a result, the commission held special hearings for women and began to explore how the era of apartheid impacted women.

Part of the mandate of Sierra Leone's truth commission was to focus on the experiences of women and in particular, the sexual violence that occurred in the conflict period. However the commission went further and highlighted the structural injustices that women had experienced as a result of gender inequalities in Sierra Leone in the period before, during and after the conflict. The extensive findings provided an account of how social, legal, political and cultural forces conspired to render women more vulnerable during the conflict. The commission's recommendations, if implemented, should strengthen the position of women in Sierra Leonean society and make them less vulnerable to future victimization.⁹ The Liberian truth commission's mandate also requires that the commission explore gender and the experiences of women.

Reparations

Women have been known to play crucial roles during periods of violence and its aftermath in searching for victims or their remains, trying to sustain and reconstitute families and communities, and carrying on the tasks of unveiling the past and demanding justice. Yet reparations programs to help victims of human rights violations have not focused on the forms of victimization that women are more commonly subject to, nor are the programs designed with an explicit gender dimension in mind. This gap is noticeable in view of the different reparations programs¹⁰ that have been implemented around the world in transitional democracies including those in South Africa,¹¹ Germany,¹² Chile,¹³ Brazil¹⁴ and Argentina.¹⁵

Reparations refer to state-sponsored initiatives designed to compensate victims for the material and moral damages of past abuse. They typically distribute a mix of material and symbolic benefits to

⁹ Franke, "Gendered Subjects of Transitional Justice," 827.

¹⁰ The term reparations program broadly encompasses both systematic state initiatives (of the kind that truth commissions are increasingly including among their recommendations) as well as reparations efforts that consist of more isolated incremental initiatives.

¹¹ See Christopher J. Colvin, "Overview of the Reparations Program in South Africa," in Pablo De Grieff (ed.), *The Handbook for Reparations* (Oxford: Oxford University Press, 2006).

¹² See John Authers, "Making Good Again: Compensation for Nazi Concentration Camp Inmates," and Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews after World War Two: A Turning Point in the History of Reparations," in Pablo De Grieff (ed.), *The Handbook for Reparations*, (Oxford: Oxford University Press, 2006).

¹³ See Elizabeth Lira, "Reparations Policy," in Pablo De Grieff (ed.), *The Handbook for Reparations*, (Oxford: Oxford University Press, 2006).

¹⁴ See Ignacio Cano and Patricia Ferreira, "The Reparations Program in Brazil," in Pablo De Grieff (ed.), *The Handbook for Reparations*, (Oxford: Oxford University Press, 2006).

¹⁵ See Maria Jose Guembe, "Economic Reparations for Grave Human Rights Violations: The Argentinean Experience," in Pablo De Grieff (ed.), *The Handbook for Reparations*, (Oxford: Oxford University Press, 2006).

victims, which may include money and official apologies. The trend now has been an incipient trend to reverse the marginalization of victims in the discussions and practice of reparations. Sexual violence against women during times of conflict and authoritarianism is increasingly being discussed in relation to prosecutorial mechanisms¹⁶ and to reparations.¹⁷ There is a growing sense that including sexual violence among the violations deserving reparations is not the only issue; concerns with gender justice should somehow be “mainstreamed” in the discussions and design of reparations.¹⁸

Still, there is little general understanding of what this may require. The truth commissions in Sierra Leone, Timor-Leste and Morocco have been among the few to address the specific nature of gender in conflicts through their respective reparations programs and recommendations in their final reports. This is an area that needs more attention from all transitional justice structures.

Ultimately any transitional justice process adopted should aim to empower women and reverse a discriminatory environment. This requires a broader focus on systemic violations than is currently the norm. It also requires that those involved go beyond established dogmas regarding gender, justice and transition, and initiate innovative measures and practices to ensure inclusion. Furthermore, successful transitional justice priorities and approaches should ensure accountability for the victimized communities through local ownership supported by transnational solidarity. Any transitional justice approach adopted should pay attention to historical legacies and political contexts, taking into account that there are no universal solutions, only a series of past experiences and identified lessons that should be incorporated into the specific context of each transitioning society.

III. Conflict and Gender in Afghanistan

Afghanistan’s Legacy of Conflict and War

“Every conceivable human rights violation is occurring in Afghanistan, and on an enormous scale.”¹⁹ These words from a report in 1984 could be said of the country’s plight during the last three

¹⁶ See, for instance, Kelly Askin, *War Crimes against Women: Prosecution in International War Crime Tribunals* (The Hague: Martinus Nijhoff, 1997).

¹⁷ See Colleen Duggan and Adila Abusharaf, “Reparation of Sexual Violence in Democratic Transitions: In Search of Gender Justice,” in Pablo De Grieff (ed.), *The Handbook for Reparations*, (Oxford: Oxford University Press, 2006).

¹⁸ Thus, the reparations program recommended in the final report of Timor-Leste’s truth commission includes gender as one of five guiding principles that inspire its overall conception (handed down on Nov. 28, 2005). Similarly Morocco’s Equity and Reconciliation Commission, set up in 2004 with a mandate that lasted until December 2005, held a national forum on reparations in Rabat in October 2005 announcing that gender mainstreaming would be one of the priorities of its reparations policy. See the final report of the *Instance Équité et Réconciliation* (IER), available in Arabic, French and Spanish at www.ier.ma, accessed Feb. 18, 2008.

¹⁹ Helsinki Watch, *Tears, Blood and Death: Human Rights in Afghanistan since the Invasion* (New York, 2001), 4.

decades. The Afghan-Soviet war triggered a relentless cycle of violence and devastation that continued long after the last Soviet troops withdrew. Observers and analysts frequently mention of Afghanistan's "three eras of conflict"—the Soviet war, the civil war and the war with the Taliban. This unintentionally creates an impression of consistency and similarities between the different phases of conflict, hiding differences in types and magnitude of violations.

The immediate and long-term impact of the Afghan-Soviet war laid the groundwork for much of Afghanistan's later and ongoing conflict. The massive violations committed during this period remain largely undocumented. The few existing reports reveal a tragic picture of a civilian population that endured the excesses of a brutal war and occupation, including indiscriminate attacks, bombings and killings, and whose homes, land and property was destroyed or looted. Persecution on political and religious grounds was ubiquitous. Soviet officials and the Soviet-backed Afghan government routinely imprisoned people for political reasons, enforced disappearance torture, and summary executions were systematic practices. Afghanistan's intelligentsia and professional class were destroyed through imprisonment, execution or exile. Women were targeted for abduction, rape and other sexual violations, either randomly or during torture; they were often attacked and killed with their children because the men in many communities had to abandon their homes either to fight or avoid capture and execution. Villages and roads, once razed, were scattered with mines.²⁰ Between one to two million Afghans died, and another five to six million were displaced.²¹

The Soviet defeat and withdrawal gave Afghanistan only a short respite. Then civil war broke out. The civilian population in Kabul, which had been spared the worst excesses of the previous war, was now targeted by infighting among former *mujahidin* factions who turned their guns upon each other. By this time, the Cold War was over; hence Afghanistan retreated in the Western conscience and consciousness. As a result, most reporting of human rights violations in the course of the four-year civil war came after 2001, when interest in Afghanistan was rekindled after the fall of the Taliban. Tens of thousands of civilians died in indiscriminate bombings, rocket fire, executions and massacres. Torture was used often to coerce and terrorize the population, and rape became a systematic violation during the civil war.²²

The utter anarchy from 1992 to 1996 made even the Taliban a welcome force for stability, but not for long. A Pakistani-backed movement, the Taliban drew much support from Afghan refugee camps along the Afghan-Pakistani border and in *mudarris* (religious grammar schools). In the heavily factionalized and fragmented country, Taliban leaders demonstrated they could impose order, first

²⁰ Helsinki Watch, *To Die in Afghanistan*. (New York, 1985), 17. See also Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity*. (Afghanistan, 2005), 24.

²¹ Asia Watch, "Towards a Political Settlement in Afghanistan: The Need to Protect Human Rights" (New York: 1991), www.hrw.org/reports/1991/afghanistan2/, accessed Jan. 21, 2008.

²² Human Rights Watch, *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity* (New York, 2005). See also Amnesty International, "Afghanistan: Incommunicado detentions and disappearances," (Afghanistan, 1994), and Afghanistan Justice Project, *Castings Shadows* (Afghanistan, 2005).

taking control of Qandahar in the south and eventually proceeding to Kabul. Persistent fighting between the Taliban and the loosely grouped Northern Alliance resulted in numerous massacres of civilians throughout the country from 1996 to 2001.²³ Mass arrests, torture and extrajudicial executions were also common tactics, both among Taliban and Northern Alliance forces. In some areas, the Taliban adopted a scorched-earth policy, killing civilians, razing villages, looting property, and destroying land and crops. The Taliban pursued stringent policies toward women by restricting freedom of movement, prohibiting them from attending schools or getting jobs, and enforcing mandatory veiling through its Ministry of the Prevention of Vice and the Promotion of Virtue.

Women in Afghan Society: Tradition, Religion and Patriarchy

The different phases of the conflict and the ideologies of regimes in power have contributed to the suffering of Afghan women, as they have been the direct and indirect victims of all fighting in the country. However, describing the situation for women in Afghanistan through the lens of past and present conflict runs the risk of hiding the production of unequal gender relations through the complex web of conflict, religion, custom and poverty.

Afghan society remains largely pre-industrial, agrarian and impoverished. The Afghan-Soviet war destroyed the modest economic gains of the 1950s and 1960s, and unrelenting conflict from the 1980s onward continues to impede development. The link between industrial development, urbanization and gender dynamics is significant, as the demand for labor in industrial societies has often helped women shift from the private to the public sphere.²⁴ The earliest attempts to modernize Afghan society came in the early 20th century during the reign of King Amanullah, who, after Afghanistan's independence in 1919, sought sweeping reforms in constitutional law, trade and education. His equally ambitious efforts to restructure Afghanistan's social relations through legal reform — and more controversially, banning public veiling — were received much less enthusiastically. After Amanullah abdicated in 1929, most of his reforms were abandoned.

Several decades later in the 1970s, Communist governments put forward similar sweeping reforms, particularly in the area of education, in order to uproot what they considered to be backward traditional and religious norms and practices within Afghan society. This rise to power of the secular but brutal regime and its subsequent collapse drew a backlash from the most conservative elements of Afghan society. Savage infighting between former *mujahidin* who had fought Russia in the 1980s created more violence and chaos throughout the country, until the Taliban movement managed to push back and hold most other paramilitary groups to the north of the country. The Taliban regime

²³ Human Rights Watch, "Afghanistan: The Massacre in Mazar-e-Sharif" (New York, 1998) and Afghanistan Justice Project, *Casting Shadows*. See also the following Amnesty International publications: "Afghanistan: Grave abuses in the name of religion" (1996); "Afghanistan: Continuing atrocities against civilians," (1997); "Afghanistan: Reports of mass graves of Taliban militias," (1997); "Afghanistan: Cruel, inhuman or degrading treatment or punishment," (1999); "Afghanistan: Executions in Panjshir," (2001); and "Afghanistan: Massacres in Yakawlang," (2001).

²⁴ Valentine Moghadem, "Patriarchy and the Politics of Gender in Modernising Societies," *International Sociology* (Madrid: ISA, 1992), 37, DOI: 10.1177/026858092007001002.

proved particularly vicious to women, non-Pashtuns and urban dwellers who tended to disagree with the rigid tribal and religious customs the Taliban made law. In urban centers such as Kabul (the capital) women were barred from working, and girls' schools throughout the country were shut down.

Less comfortable for observers to acknowledge, perhaps, is that the Taliban's vision for social order was not entirely alien to large segments of Afghan society. Many of the government's laws, particularly with respect to women, were an extension of the complex tribal codes and social customs already in effect in the Pashtun south. Castigating the Taliban as the primary offenders of women's rights in Afghanistan is unhelpful and misleading, as it fails to confront the deeper social forces that produce and reinforce patriarchal norms that predate the Taliban movement.

Religion and custom define men's attitudes toward women in Afghan society, though with differing degrees of significance. In addition, socioeconomic class is a strong determinant of gender relations. Especially since the attacks on the United States in September 2001, perceived misogyny within Islam is often used to explain "the woman question."²⁵ In the Afghan context and on the face of it, the argument seems legitimate; literalist interpretations of religion are used to enforce rules and regulate social interactions, and to give the authority of men over women moral credibility. Certainly during Taliban rule, the sentences for "moral" and ordinary crimes — often manifesting in brutal and highly visible ways such as public stoning for adultery or amputation of limbs for theft — came from the harshest readings possible of *sharia* (Islamic law). Then and now, however, the Islamic legal system in Afghanistan reveals serious flaws, gaps in jurisprudential understanding, and a tenuous grasp of the vast, cumbersome body of law that constitutes sharia. Lack of access to basic and higher education, even for religious scholars or judges, has ensured the disintegration of most formal Islamic learning and has impoverished the debate over religious and legal issues in Afghanistan. The understanding of Islam and especially Islamic jurisprudence has also become intimately intertwined with the different customary frameworks of Afghanistan.

In Afghanistan, women activists argue that gender dynamics are better examined through prisms of custom and tradition than religion.²⁶ Afghanistan remains poor and rural, with most tribes, communities and villages observing the same patterns of daily life and interaction as they have for centuries, the upheavals of war notwithstanding. An evocative saying captures the Afghan attitude toward girls and young women: "Why tend flowers meant for someone else's garden?" In practice, this has meant that girls, once married, are not able to contribute to sustaining her parents' family. Since girls are not viewed as able to generate income even when unmarried, they are seen as economic burdens to be shifted to husbands as early as possible. Under these conditions, child marriages are practiced widely, particularly as poorer families can get sizeable dowries for their

²⁵ Saba Gul Khattak, "Afghan Women: Bombed to be Liberated?" *Middle East Report* (Washington, D.C.: MERIP, 2002), 19.

²⁶ Interviews during a one-day focus group with Afghan researchers and civil society activists from various provinces, Jan. 11, 2007.

daughters. Criminalization of child marriage has had little impact, in part because neither births nor marriages are routinely registered.²⁷

Viewing young girls as economic burdens (and also as financial leverage) effectively means they are ultimately no more than saleable, tradable property. Indeed, young and single women are frequently used to settle internecine conflict between families or tribes in a practice known as *baad* (literally, to trade).²⁸ Blood disputes, financial agreements, debts and almost any other kind of exchange can be transacted with women as currency. Because girls and women frequently have no means of securing financial independence, marriage is the safest bid for a stable future, though by no means a guarantee of it. Prioritizing male children within families, coupled with early marriages, high maternal mortality rates, low life expectancy, limited access to education and ongoing poverty ensures that from one generation to the next, women are not able improve their quality of life.²⁹

Intertwined with the view of women as passive objects rather than as individuals is the concept of honor and dignity. The patriarchal frameworks in Afghanistan paradoxically designate women (rather than men themselves) as the vessels of familial and communal honor. Gender segregation (which predates the Taliban) is a direct consequence of the need to protect women's honor from other men. Notions of honor, however, do not exist for their own sake; again, they are intimately tied to a girl's economic value. Girls who are not virgins, for example, are devalued and not eligible for marriage, even if they were victims of rape. Girls and women who flee their homes because they are subject to violence or domestic abuse are seen as equally tainted; no one can answer for a girl's honor if she was unsupervised outside the reach of her male family members. Indeed, women are frequently imprisoned for leaving their homes, even though it is not actually a crime.³⁰

In Afghanistan's main urban centers, some of the social constraints and norms that prevail in the provinces are less obvious. Women and girls work, attend schools and universities, and are permitted more freedom of movement. However, educated women remain open to varying levels of harassment and violence throughout the country, with numerous cases of female politicians, civil servants, activists and academics facing challenges within their professional and private lives.³¹ In previous decades, the contrast between urban and rural areas has been equally marked with respect to women's roles, and this divide remains entrenched. Socioeconomics played a critical role: in the 1960s and 1970s; families who were significantly richer or politically connected also espoused much

²⁷ Interview with Dr. Soraya Sobrang (Women's Rights Commissioner, Afghan Independent Human Rights Commission), Kabul, June 14, 2007.

²⁸ Matthew Waldman, *Community Peace-Building in Afghanistan: The Case for a National Strategy*. (London: Oxfam International, 2008), 11-15.

²⁹ United Nations Development Program, "Afghanistan 2007/2008 Report," *UNDP Human Development Reports*. (New York: 2008), hdrstats.undp.org/countries/data_sheets/cty_ds_AFG.html, accessed Feb. 29, 2008.

³⁰ Interview with representative of the Ministry of Women's Affairs, Kabul, Jan. 7, 2007.

³¹ Human Rights Watch, "Between Hope and Fear: Intimidation and Attacks against Women in Public Life in Afghanistan." (New York: 2004), hrw.org/backgrounders/asia/afghanistan1004, accessed Feb. 15, 2008.

freer social behavior to a degree unprecedented in Afghanistan.³² Access to education is also key because this usually provides women with greater opportunities to be employed and self-sufficient. As a rule, industrial and urban centers provide these prospects.³³

In examining the link between gender and development, consider some of the indicators for Afghanistan with respect to women. Afghan women have a life expectancy of 44 years. They face one of the highest maternal mortality rates in the world. Between 90 and 95 percent of all Afghan women are illiterate. Afghanistan's Gender Development Index is the third lowest in the world. Although primary school enrollment increased post-2001, the country's school enrollment rates are among the lowest globally, with half the number of girls enrolled as boys; in the southern provinces, only 15 percent of schoolchildren are female.³⁴

IV. Transitional Justice and Gender in Afghanistan

Transitional Justice in Afghanistan

The international military intervention in Afghanistan in 2001 and the following democratization process gave the country an opportunity to address its violent past and to break with gender-based discrimination and abuse. While the majority of Afghans have welcomed the end of the Taliban regime, the transition in 2001 fell short of being a fresh start for the Afghan people. Security, poverty and lack of economic development remain major concerns for most Afghans. Compromised governance, rule of law and security-sector reforms have eroded support for President Hamid Karzai's government and for the international presence in Afghanistan.

The Bonn Agreement, the roadmap for the first five years of the state-building process, did not include a framework for transitional justice. However, it established the AIHRC that was later mandated to address past crimes. In a nationwide survey the AIHRC conducted in 2004, Afghans voiced overwhelming support for a comprehensive political accountability process to prosecute people widely suspected of mass human rights abuses and crimes against humanity over the past 30 years. Encompassing views and findings from 4,000 interviews with people from every province, the report conveys a strong demand for accountability for the crimes of each previous regime.³⁵ Though men and women were included in focus groups and interviews, and notable differences in responses were found between the sexes, the interviews and findings do not contain specific sections that address gender-related crimes or the views of the women who responded.

³² Valetine Moghadem, "Patriarchy and the Politics of Gender," 47.

³³ Deniz Kandiyoti, "The Politics of Gender and Reconstruction in Afghanistan," *Occasional Paper 4, United Nations Research Institutes for Social Development* (New York: UNRISD, 2005), 8.

³⁴ Yakin Ertük, *Integration of the Human Rights of Women*, 7. See also: World Bank, *National Reconstruction and Poverty Reduction: the Role of Women in Afghanistan's Future*. (Washington, D.C.: World Bank, 2005).

³⁵ Afghan Independent Human Rights Commission. *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*. (Kabul: AIHRC, 2004), 28.

In December 2005, the Afghan government signed the Action Plan for Peace, Reconciliation and Justice (hereafter the Action Plan). This is structured around five key action points,³⁶ the most contentious of which calls for the establishment of “effective and reasonable accountability mechanisms” to end and prevent further impunity by ensuring war criminals and perpetrators of human rights abuses do not get amnesty. While the plan makes passing reference to the question of gender-based violations,³⁷ it has made little substantive headway in addressing the fundamental social and political imbalances that have permitted abuses against women. The Action Plan received a boost in January 2006 when the Afghan government and the international community made its implementation a condition of the Afghanistan Compact and the ensuing Afghan National Development Strategy (ANDS); this incorporated the plan into one of its three central pillars, that of Governance, Rule of Law, and Human Rights, and aims for its completion by the end of 2008. Corruption control and gender equality are cross-sector issues within this ANDS pillar,³⁸ but corruption remains a central concern to the donor community and governance specialists.³⁹

Documentation of violations against women in Afghanistan from the various periods of conflict exists from various sources. Most recently, the AIHRC is conducting a human rights mapping exercise that aims to produce a comprehensive overview of the last three eras of conflict in Afghanistan and constitutes a central pillar within the transitional justice process. Other efforts to document human rights violations include an unpublished conflict mapping report from the Office of the High Commissioner for Human Rights. Organizations such as the Afghanistan Justice Project, Amnesty International, Human Rights Watch and the Human Rights Research and

³⁶ The plan’s five key action points are listed here: “(i) acknowledgment of suffering of the Afghan people, including the designation of a national Remembrance Day; the establishment of national memorial sites, and a national museum to commemorate victims; (ii) strengthening state institutions through: the reform of the Civil Service Commission and introduction of an appointments mechanism to ensure the integrity of civil servants; establishing a mechanism to advise the President on senior political appointments and ensure that individuals with records of human rights violations do not hold public office, and the reform of the judiciary; (iii) truth-seeking and documentation to: establish the facts of the past conflict and atrocities, establish accountability and contribute to ending impunity and promoting reconciliation; (iv) promoting reconciliation and national unity through: initiating a public debate on reconciliation; supporting conflict resolution initiatives and exploring the establishment of reconciliation committees, incorporating peace and reconciliation message in the education curriculum, and encouraging the return and reintegration into society of all Afghans; and (v) establishment of effective accountability mechanism: to bring to justice those responsible for grave human rights abuses through establishing a Task Force to provide recommendations to the President on the legal, procedural and instructional framework for addressing crimes against humanity, war crimes and other gross human rights violations.”

³⁷ Key Action III of the Action Plan (addressing truth-seeking activities) makes mention of the need to give “special consideration to the participation of women” during consultations for potential truth-seeking mechanisms and on dealing with “gender-based violence and other crimes against women.”

³⁸ Islamic Republic of Afghanistan. *Interim Afghanistan National Development Strategy*. (2005), 90, 103.

³⁹ For example, see Dexter Filkins, “Bribes Corrode Afghans’ Trust in Government,” *New York Times*, Jan. 1, 2009, www.nytimes.com/2009/01/02/world/asia/02kabul.html?_r=1 or “Afghanistan held back by weak leadership: NATO,” Reuters, Jan. 18, 2009, uk.reuters.com/article/usTopNews/idUKTRE50H23D20090118.

Advocacy Consortium⁴⁰ have also tried to shed light on violations against women from a factual perspective rather than one incorporating a gendered analysis.

The transitional justice process in Afghanistan now runs the risk of total political marginalization. Officials within the Afghan government and international community as well as civil society organizations agree that the momentum and political will needed to implement the Action Plan no longer exist. In March 2007, the Afghan parliament passed a law extending amnesty to all armed groups and leaders who have operated in the country over the last 25 years. The implementation of this law could consolidate the culture of impunity that pervades the highest level of Afghanistan's government. Indeed, in the months following, many individuals and groups have found themselves at a loss as to how they could take concrete action within the transitional justice process. In an environment where transitional justice remains highly politicized and little official will exists, the burden for action has been taken up by extremely nascent and vulnerable civil society organizations.

Mainstreaming of Gender and Women's Rights

The rights of Afghan women served as the *cause célèbre* of many organizations during Taliban rule, rising to a fever pitch after the U.S.-led invasion in 2001. Afghan women and the international public, the thinking went, needed protection from radical Islamic fundamentalism; overthrowing the Taliban would serve both purposes. The years between the Taliban's ascent to and fall from power saw a veritable frenzy of literature, academic writing and films about the plight of Afghan women.⁴¹

In 2005 the United Nations Special Rapporteur (UNSR) on Violence Against Women, Yakin Ertük, conducted a mission to Afghanistan. Her report concluded that four major dynamics are at the root of the "dramatic and severe violence" Afghan women face: Afghanistan's patriarchal social order, the erosion of protective social mechanisms, the absence of rule of law and poverty and insecurity.⁴² The report highlighted a series of ongoing, widespread violations such as domestic violence, rape, trafficking, abduction, forced marriage, selling or trading girls to settle debts, "honor killings" and lack of access to education, health services and due process.

⁴⁰ Please see source list for full citation details for reports from these organizations.

⁴¹ See for example: *My Forbidden Face: Growing Up under the Taliban* (Latifa, 2002), *Lifting the Veil: The World of Muslim Women* (Parshall and Parshall, 2003), *Voices Behind the Veil: The World of Islam Through the Eyes of Women* (Caner, 2003), *Unveiled: Voices of Women in Afghanistan* (Logan, 2002), *Rage Against the Veil: The Courageous Life and Death of an Islamic Dissident* (Darabi and Thompson, 1999), *Behind the Burqa: Our Life In Afghanistan and How we Escaped to Freedom* (Yasgur et al, 2002). Fictional films such as *Kandahar* and *Osama*, as well as tenuously factual documentaries and journalism also sought to highlight the difficulties of being female under Taliban rule. The Nov. 26, 2001, issue of *Newsweek* featured the headline "Liberation" across a front cover photograph of an Afghan woman lifting her veil. In 1996, broadcast journalist Diane Sawyer traveled to Afghanistan to record "Behind the Veil," a special report on the deplorable condition of Afghan women under the Taliban.

⁴² Yakin Ertük, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women*. (New York: United Nations Commission on Human Rights, 2006), E/CN.4/2006/61/Add.5, 2.

Since 2001, the Afghan government has taken several steps at the highest levels to promote the rights of women. Constitutional reform, the creation of ministry to deal with women's issues, and attempts to mainstream gender into the country's development strategies are the Karzai administration's most high-profile endeavors.

The creation of the Ministry of Women's Affairs (MoWA) was an acknowledgment that gender issues in Afghanistan needed attention and oversight at the highest levels. As the central policymaking unit that would uphold women's rights and mainstream women's involvement in every aspect of the national and provincial governments, the ministry faces crippling difficulties beyond the resource and capacity constraints that hamstringing all Afghan government agencies. As one official said, a silent political resistance surrounds every issue as well as any organization that seeks to work on any aspect of gender issues; the resistance becomes vocal and violent when members of parliament call for MoWA to be closed, or a provincial representative of the ministry is gunned down.

Frequent changes in the ministry's leadership (four ministers in the past five years) undermine the agency's work and institutional memory. MoWA is not yet able to fulfill its role as the main policy driver on women's issues and has instead devolved into a secondary role, providing a range of resources and support services to women that, while badly needed, distort the ministry's ability to build its expertise and consolidate its function as a government body that keeps women's issues at the top of the policy agenda. So, while the intentions behind creating the ministry were good, MoWA has had the unintended effect of allowing policymakers to marginalize gender as being the problem of just one government office, rather than an issue that needs to be integrated into all departments.⁴³

The National Action Plan for the Women of Afghanistan (NAPWA)—developed under MoWA leadership—is included as a benchmark in ANDS. Gender mainstreaming has its own component within ANDS' Governance, Rule of Law, and Human Rights pillar and is moreover a theme throughout the entire strategy. However, the gap between ANDS' objectives and current progress in the area of gender rights is staggering. The Joint Consultation and Monitoring Board (JCMB), the high-level panel charged with overseeing the implementation of ANDS, has consistently neglected the activities and benchmarks within the gender mainstreaming agenda. None of recent quarterly JCMB meetings have discussed or inquired about NAPWA's progress.

Article 22 of the Afghan Constitution declares: "Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan—whether man or woman—have equal rights and duties before the law." Article 44 states that: "The state shall devise and implement effective programs for balancing and promoting of education for women, improving of education of nomads and elimination of illiteracy in the country." Other clauses on the National Assembly establish quotas for female representation in the upper and lower houses of the legislature.

⁴³ Interview with Mazari Safa, former deputy minister at the Ministry of Women's Affairs, Kabul, March 24, 2008.

Limited efforts have been made to put the values and rights of the Constitution into practice. For example, the inclusion of the equal rights clause in the Afghan Constitution in 2004 was not predated or followed by a comprehensive review to identify whether the laws existing in Afghanistan conform with the equal rights guarantee.⁴⁴ The domestic legal framework does not provide adequate protection for women and girls from gender-based crimes. Rape is not a codified offense under Afghan law, and rape victims are often prosecuted under the adultery provisions of the Penal Code of 1976. Article 77 of the Civil Laws allows marriages to be contracted without the woman's consent, and Article 517 of the Penal Code criminalizes the practice of "giving" females for marriage or *baad* only when the party is a widow or at least 18 years old.

The judicial system needs systematic rebuilding at every level.⁴⁵ Strategies and plans have been put forward for its reform, yet as a whole, the reform of the justice sector lags behind. The confusion, inefficiency and corruption of the formal justice systems mean that the majority of Afghans turn to it as a last resort; most cases, whether civil or criminal, are considered and settled within customary tribal mechanisms. At the risk of simplification, it may be fair to say that Afghan police fail to recognize crimes against women, or detain women for activities that are not crimes at all (as mentioned, when women flee their homes, they are often arrested even though no such crime exists in any of Afghanistan's legal codes).⁴⁶

ICTJ has conducted assessments on the complementary, but separate issue of developments and difficulties in the area of women's rights. It also has examined the links between the lack of access of justice for women and the past and present impunity for government officials that continue to erode security, stability and the rule of law. Women continue to face the same patterns and sorts of abuse as in previous decades; longstanding and deeply prejudiced cultural mores, conflation of religious and tribal practices, an almost nonexistent legal system, and law enforcement officials who give violations of women's rights short shrift doubly exacerbate the situation. The constant refrain from Afghans is that the processes to institute and maintain the rule of law in the provinces are faltering. The population's confidence in the government to deliver basic necessities and ensure a modicum of stability and access to justice is slipping dangerously, in part because of a sense that the current government cares neither for redressing abuses of the past nor for preventing abuses of the present.

⁴⁴ UNIFEM has conducted a law map comparing Afghan legislation to international law and other relevant legal sources. For UNIFEM's programs in Afghanistan, see afghanistan.unifem.org, accessed April 19, 2008.

⁴⁵ For a deeper analysis of the Afghan justice sector, see United Nations Development Program, *Afghanistan Human Development Report: Bridging Modernity and Tradition; Rule of Law and the Search for Justice*. (Kabul: CPHD, 2007). See also Norwegian Refugee Council, "Position Paper on July 2007 Rome Conference on Rule of Law in Afghanistan". (Kabul: 2007), www.rolafghanistan.esteri.it/NR/rdonlyres/5C5153EF-E1E0-42CD-B143-1B1B3CF1F379/0/Norwegian_refugeecouncilRoLpositionpaper270607_2_.pdf, accessed Feb. 10, 2008.

⁴⁶ Deniz Kandiyoti, "The Politics of Gender and Reconstruction in Afghanistan," 25.

V. Conclusion and Recommendations

Considerations of gender and women's experiences of conflict have not been a dominant thread in the nascent transitional justice process in Afghanistan. Although other initiatives have sought to focus equally on women and men, women's experiences of the conflict remain marginalized. At the same time, gender policies designed and implemented by the Afghan government and its international partners tend to limit their analyses of legacies of the past, and in doing so overlook its significance in their plans for the future. As a result, there is limited understanding of how the manifold legacies of the past have affected the lives of Afghan women and gender relations in Afghanistan today.

No monolithic classification of women exists in Afghanistan. Women's experiences differ depending on geography, ethnicity and social class. However, analyzing gender relations in Afghanistan demands multiple layers of knowledge, in particular about the ways in which the legacies of conflict, poverty and illiteracy interact and affect the lives of families and communities. Understanding gender in Afghanistan requires grasping the continuum of violations and deprivations that shape women's lives. This area of inquiry is not well understood because most data and information is anecdotal, incomplete or simply nonexistent. For example, what is the situation of women forced into marriage during previous conflict? What is the situation of their children? How do women who have experienced sexual violence during the conflict cope? How do their families and communities address these issues?

This briefing does not address gender and transitional justice in Afghanistan at a detailed level; it is an overview of challenges and considerations. ICTJ puts forward the following recommendations to deepen the understandings of the interplay between considerations of gender and past and ongoing violations:

1. **Furthering research:** Through our research, we have realized that very limited resources and information currently exist on gender and transitional justice in Afghanistan. One major example of an unexamined issue (but by no means the only one) is that of researching and distinguishing between those gender-based violations that stem directly from conflict and violations that occur during peacetime or as indirect products of conflict. Another major analytical weakness is the failure of many to consider violations against women within the continuum of conflict and against the background of poverty, illiteracy and entrenched patriarchal systems. A critical need remains for further research that takes into account women's experiences of conflict and of how the country's broader experience with conflict continues to affect gender relations in Afghanistan.
2. **Analyzing and drawing upon comparative experiences:** Afghanistan can learn from the experiences of other countries where gender considerations have been taken into account when addressing legacies of the past. As described, there has been a learning curve in other

countries with respect to including women's experiences and gender dimensions in documentation, victims' advocacy and in more formal transitional justice mechanisms, such as truth commissions. It is vital to relate and contextualize these experiences in Afghanistan.

3. Pursuing documentation: As certain elements of this paper have suggested, the transitional justice process in Afghanistan must pay special attention to the country's women, particularly in documentation, research and truth-seeking efforts, an endeavor that has been minimal to date. Though anecdotal data suggests the scale and nature of violations that women face, very little qualitative or quantitative research or trend analysis exists on past violence against women, whether domestic violence or war crimes. In this vacuum, information collected on gender-based violence becomes more significant in establishing a historical record of women's experiences. Documentation then forms a critical element of the transitional justice process for Afghanistan. Though the country remains in a state of conflict, an immediate, urgent need exists to document widely and accurately the testimonies and accounts of what the population has witnessed in the last three decades of war.
4. Encouraging the growth and capacity of victims' groups: In the absence of formal or state-led transitional justice processes, civil society has frequently played a central role in fostering and enriching discussions of accountability and reconciliation within society at large and advocating for the rights of the survivors of conflict. Nascent organizations in Afghanistan are attempting to do the same and often find themselves in a difficult position when dealing with questions of gender. Many human rights or victims' organizations find themselves at a loss when addressing gender-based violations, because the definition of victimization is unclear (are women victimized by conflict or by broader socioeconomic conditions?), the stigma of being the victim of sexual violations (whether female or male) is so large, and so few support services exist.

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