

Charting a Course for a Sustainable Peace:

Linking Transitional Justice and Reconciliation in Afghanistan

May 2010

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Acknowledgements:

Afghanistan Watch wishes to express its gratitude to the International Centre for Transitional Justice (ICTJ) for its financial support for this study and also for the comments and helpful suggestions that it provided on earlier drafts of this paper. The organization would also like to thank all those who generously shared their views during the interviews and officials and members of the Afghanistan Independent Human Rights Commission (AIHRC) and civil society organizations that shared their resources with the author of the paper.

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Acronyms

AIHRC: Afghanistan Independent Human Rights Commission

AREU: Afghanistan Research and Evaluation Unit

ASP: Assembly of States Parties

TJ: Transitional Justice

GoA: Government of Afghanistan

ICC: International Criminal Court

ICTJ: International Center for Transitional Justice

PTS: Program Tahkim-e-Solh

TJCG: Transitional Justice Coordination Group

Introduction:

After nine years of international intervention and support for economic reconstruction political stabilization, Afghanistan remains at a precarious juncture. A growing insurgency in the past years threatens the fragile peace, the nascent democratic political system and other achievements of the last years. Sustainable peace and long-term stability in the absence of an international political and military presence still looks illusive.

How can Afghanistan overcome its war-prone tendencies, resolve its conflicts and transform into a stable, peaceful and democratic country? In spite of the US military surge in the 2009, negotiation and reconciliation with the insurgents is becoming high on the agenda of international community and the Afghan government. This marks the acknowledgement of the fact that long-term peace cannot be achieved by military means alone. While reconciliation is increasingly attracting the support of both national and international players in the country, the approaches and issues involved are strongly contested. At the heart of this debate is the question of if and how justice and accountability can be achieved for atrocities and human rights

abuses perpetrated by the warring factions in the last thirty years of history of the country.

In December 2006 the Government of Afghanistan announced the Action Plan for Peace, Justice and Reconciliation that included measures and mechanisms for promoting reconciliation between the warring factions as well as between the perpetrators and the victims. The key objective of the initiative was to overcome the legacies of past injustices and atrocities as a way of building the basic foundations of sustainable peace and political stability. However, in absence of political will and commitment, the Plan largely remained on the paper and reconciliation, one of its key and overriding objectives, has attracted widespread support in the context of the war against the insurgents.

This paper looks at transitional justice (hereinafter TJ) and reconciliation in Afghanistan. Their main objective is to link debates concerning TJ and reconciliation as a vehicle to transform the conflict-ridden society of Afghanistan to a secure, stable, democratic and progressive society. It aims to show despite fundamental interconnectedness the two processes are often perceived by the political elites to be undermining one another.

The study is based on variety of sources which fall into three categories:

a) field research and interviews conducted during July-December 2009. During this period, 32 detailed interviews were conducted with candidates of the August 2009 presidential elections, officials of the Government of Afghanistan (GoA), members of the National Assembly, human rights, and TJ and reconciliation activists, ensuring a large spectrum of views. Group discussions were held in which representa-

tives of Afghan civil society organizations discussed and raised issues related to the TJ and reconciliation.¹

b) available resources from the existing libraries, and from the published resources of human rights organizations and activists;

c) legal and official documents on TJ and reconciliation.

This paper is divided into three parts. The first part looks at the TJ process and the challenges ahead of it. The second provides a brief overview of conciliatory initiatives in Afghanistan and shows how short-term political undertakings to stabilize the country have failed. The third and final part discusses the fragility of peace without justice. It concludes that the prevailing culture of impunity combined with a failure to address past abuses and injustices threatens state-building, the rule of law, and the ability to foster a durable peace and a democratic government in Afghanistan.

The central argument of this paper is that justice and reconciliation are the two sides of the same coin and can only be achieved if pursued together as key elements of stabilization of the country after three decades of violence and instability. It thus stressed the need for connecting the processes and debates on transitional justice and reconciliation in the country.

1- The texts of many of these interviews are available at the website of Afghanistan Watch: <http://watchafghanistan.org/>

I: Transitional Justice, the Process and Challenges Ahead

Understanding Transitional Justice

Efforts to address atrocious crimes committed during periods of war and conflict is not so new. During the past centuries, international law has steadily evolved to respond to horrors and atrocities committed during the wars and conflicts between and within nations. However, the concept of TJ emerged in the 1990's when several countries around the world were moving from war to peace and from dictatorship to democracy.² It was during those years that new mechanisms were explored to address the crimes and injustices that took place during the conflict and to ensure a sustainable peace. However, the approaches and mechanism in countries differ from one another. Some countries have, for example, have stressed one aspect of the process more than the others. Central to all diverse approaches in these countries is the recognition that peace can best be sustained if it is founded on justice and accountability and perpetrators of horrors and atrocities are held accountable. The International Centre for Transitional Justice, an international organization that specializes in and advocates such transitional measures defines it as:

“Justice adapted to societies transforming themselves after a period of pervasive human rights abuse. It refers to the range of approaches used by states to address past human rights violations.”³

In view of the complexities and diverse contexts and nature of the post-conflict

transition processes, TJ has overtime gained multiple dimensions. It encompasses much more than the trial of alleged perpetrators; judicial prosecution is only one element of the process and the larger elements include reconciliation, and reintegration. Therefore, it is a legal, political, social, historical and psychological process. The goal of TJ is to promote a reconciliatory culture, strengthen national solidarity, and improve respect to human rights, and accountability by various social groupings of the present and future generations of Afghanistan.

In addition to TJ's legal dimension which is accompanied by robust operational benchmarks; it also encompasses historical, political, social, cultural and psychological processes. Lessons learnt from other countries indicate that this process is effectively more political than legal. The social and cultural dimension is demonstrated in the need to choose a National

Memorial Day, National Human Rights and War Crimes' Victims Day as well as the construction of National Monuments and National Museum. Legally, it includes formation of accountable government institutions and reforming the judiciary, the police and the military and detention facilities, and the training legal aides to reconciliatory gatherings, mediations, conflict resolution, reparation and disarmament and reintegration of armed groups. Documenting the events of the years of war, forming truth-finding commissions reflect the historical and aspects of the process.

Transitional Justice encompasses much more than the trial of alleged perpetrators; judicial prosecution is only one element of the process and the larger elements include reconciliation, and reintegration.

2- Sareer Ahmad, Understanding Transitional Justice in Afghanistan, Paymane Meli Daily, Kabul, 15 February 2007

3- <http://www.ictj.org/en/tj/>. Last checked 16/3/10

Subordination of TJ to Politics in Afghanistan

In the case of Afghanistan, the key architects and players that dominated the transitional process subordinated the question of accountability and justice to the imperatives of political stability and peace-making amongst the various groups. In other words, in the often repeated dichotomy between peace and justice, the former prevailed over the later and the task of implementing justice and meeting the demands of victims of the war were postponed to an indefinite future.

As a consequence, the Bonn Agreement which was adopted in the Bonn city of Germany in December 2001 by Afghan political groups under the UN auspice and provided the basic framework for the country's transitional process failed to explicitly include accountability for the past as a key element of transition. Article 6 of the Agreement provided for establishment of a Human Rights Commission that would monitor human rights, investigate human rights violations and develop domestic human rights institutions. The new post-Taliban constitution adopted in 2004 makes no direct reference to TJ; however it does emphasize reconciliation and justice. In its preamble the constitution acknowledges "[t]he previous injustices, miseries and innumerable disasters which have befallen our country",⁴ and establishes the Independent Human Rights Commission of Afghanistan. Article 58 sets out the aim,

"to monitor respect for human rights in Afghanistan as well as foster and protect it the state shall establish the Independent Human Rights Commission of Afghanistan. To monitor respect for human rights in Afghanistan as well as to foster and pro-

tect it, the state shall establish the Independent Human Rights Commission of Afghanistan. Every individual shall complain to this Commission about the violation of personal human rights. The Commission shall refer human rights violations of individuals to legal authorities and assist them in defense of their rights."⁵

Once established, the AIHRC was also mandated to explore a national strategy for tackling with past abuses. Article 9 of the President of the Interim Administration that established the Commission in June 2002, tasked the Commission to undertake national consultations and propose a national strategy for transitional justice and for addressing the abuses of the past. The constitution also stipulates that individuals that are convicted of crimes against humanity or deprivation from civil rights by a court can not stand for public offices such as the Presidency and membership of the National Assembly of the country. Though in reality and in absence of a political commitment to investigate and prosecute atrocities of the past, attempts to bar alleged perpetrators of human rights, these constitutional provisions do imply the unlawfulness of appointments of war criminals in the public positions.⁶

Afghanistan's International Obligations

Afghanistan has also international obligations to promote and protect human rights and prosecute the most serious crimes under international law. The country's record in signing and acceding to international conventions and treaties is impressive.⁷

5- Afghanistan's Constitution, Article 58

6- Ibid Articles 62 and 85

7- See the list of human rights treaties ratified by Afghanistan at the Website of the AIHRC: http://www.aihrc.org.af/English/Eng_pages/X_pages/conventions_af_z_party.html

4- Afghanistan's Constitution, preamble

In February 2003, she ratified the Rome Statute of the International Criminal Court (ICC) becoming one of the first few Asian nations to commit to the international campaign against the most horrendous international crimes. Under the Statute of the Court, the country has the primary responsibility to prosecute war crimes, crimes against humanity and the genocide. Though, the Court's jurisdiction does not apply in retrospect to the crimes committed before its establishment, it obliges Afghanistan to prosecute these crimes of international concern that might have occurred in its territory after 2003. Whether

Thousands of Afghan civilians have died during the past years and patterns of human rights violations have continued unabated by the both the GoA and its national and international allies.

or not the crimes under the ICC jurisdiction have been committed in Afghanistan since 2003 is difficult to establish in the absence of formal investigations. Nonetheless, the country has been experiencing an escalating insurgency the brunt of which is born by the Afghan civilians. Thousands of Afghan civilians have died during the past years and patterns of human rights violations

have continued unabated by the both the GoA and its national and international allies.⁸ In September 2009 Moreno-Ocampo the chief Prosecutor of the Court said he had received allegation of war crimes committed in Afghanistan and that his office had began a preliminary examination into these allegations. If the during the preliminary examination the Court prosecutors found evidences that support, a full investigation might be launched.⁹

8- "Prosecuting Taliban War Criminals", Nick Grono and Candace Rondeaux, 23 March 2010 International Herald Tribune

9- ICC prosecutor eyes possible Afghanistan war crimes, Louis Charbonneau, 9 September 2009 (Reuters)

Under Statute of the Court, Afghanistan as a member state has a number of responsibilities that so far remains unfulfilled. These include reforms in its legal and judicial system to bring it in line with the ICC standards and requirements and adoption of necessary laws and regulations that facilitates and ensures full cooperation with the Court. These reforms are necessary for the country to be able to fulfill its primary national responsibility for investigation and prosecution of war crimes, crimes against humanity and genocide. Nonetheless, seven years after Afghanistan became a member state, the country is yet to undertake these measures. Similar to its declining commitment to TJ, the GoA has steadily lost its interest in the ICC. It even declined to participate in the General Assembly of the ICC in The Hague in November 2009.¹⁰

The Action Plan for Peace Justice and Reconciliation and the Law on Amnesty, National Reconciliation and Stability

It was only in the January 2005 when the question of accountability for the past gained prominence after the Afghanistan Independent Human Rights Commission (AIHRC) published the "Call for Justice" report, that resulted from a national survey conducted across the country. The survey demonstrated that 86.8% of those consulted demanded accountability for past war crimes and human rights violations.

In December 2006 President Karzai officially launched the Action for Peace Justice and Reconciliation that was to take forward

10- For detailed discussion of obligations of Afghanistan under the ICC see the Husain Moen and Ahmad Zia Mohammadi, "International Criminal Court (ICC) in Afghanistan: Outcome of the Consultative Meeting on Obligations of Afghanistan under ICC," (Kabul: Afghanistan Watch, 24 October 2009) and also 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>



Within these five actions are a variety of proposals, to note a few:

- a National Memorial Day for the Victims of the Human Rights Abuses and War Crimes,
- a National Museum to preserve the memories of the victims and to educate the new generation on the history of war by reference to war manifestations and symbols,

the recommendations from the “A Call for Justice” report. The Action Plan which originally adopted by the Afghan Cabinet in December 2005 and included as a benchmark of the Afghanistan Compact in February 2006 committed the GoA to undertaking a series of measures to improve the rule of law, reform in judiciary and government institutions and provide for fact-finding and documentation and prosecution of the most serious crimes.¹¹

The Action Plan includes a range of initiatives that it envisaged to be completed within an ambitious time frame of three years. It is split into five key actions:

1. Acknowledgement of the suffering of the Afghan people
2. Ensuring credible and accountable state institutions
3. Truth-seeking and documentation
4. Promotion of reconciliation and national unity
5. Establishment of effective and reasonable accountability mechanisms

- administrative reform,
- a comprehensive strategy for the reform of the judiciary,
- fact-finding gatherings,
- finance, recruit and train the staff, expand efforts on documentations,
- launch a discourse on national reconciliation in Afghanistan, learn lessons from other countries with the aim of establishing a reconciliation committee, seeking support for the inclusion of reconciliation in the Afghanistan school curriculum.

However, in reality the document suffered from a weak political commitment that practically vanished by the time the plan was supposed to be completed. Its launch and official designation of the 10th December as Victims Day provoked strong reactions by former Mujahedin organizations that portrayed the process as a foreign conspiracy. Just months after declaration of the plan, these groups organized a large gathering of their supporters in Kabul Stadium which was followed by the adoption of the National Reconciliation and Amnesty Bill by the Parliament that granted

¹¹- Action Plan of the Government of Afghanistan, P. 7-6 June 2005

blanket amnesty for all participants of the war in the country. These were meant to counter the momentum built in support of TJ following the adoption of the Action Plan.¹²

The Law on Amnesty, National Reconciliation and Stability passed by the Afghanistan's parliament is a strong indication of a political determination to suppress demands for justice and accountability. The parliament primarily attempted to grant blanket amnesty to all political factions and hostile groups that were in conflict with one another in one way or the other through a 12 article long law on Amnesty, National Reconciliation and Stability.¹⁴

Its stated objective was to promote conciliation among different social strata, consolidate peace and stability, and herald a new political prospect for the future of contemporary Afghanistan.¹³

However, after heated debates and strong opposition by civil society organizations, human rights activists and the international community, the original 12-article reconciliation bill was re-

drafted as a 6-article bill. The original draft of this bill had several flaws. For example the bill had not considered the personal rights of an individual. In principle neither national laws nor Islamic jurisprudence allows the personal rights of an individual to be pardoned. To appease the critics, it emphasized that private rights of persons

were not subject to the amnesty and that private citizens could launch complaints through the judicial system. This was only a nominal concession and the proponents of the law did achieve their objective by depriving the Afghan state of its legal right and duty to investigate and prosecute the most serious crimes committed on its territory.¹⁴

The support for the bill was rather high within the National Assembly of Afghanistan. During an interview Mr. Qanuni, the Speaker of the Wolesi Jirga, the Lower House of the National Assembly stressed that the main goal of the law was to encourage reconciliation within all the previous warring factions in the country. He also stressed how the Afghan Parliament had successfully brought together officials of the PDPA, mujahedin organizations and some members of the Taliban.¹⁵ This move by members of the National Assembly is not surprising since the body is largely composed of the groups who were involved in the conflict and have their own strong interest in suppressing the calls for accountability and justice.¹⁶

In the face of strong opposition by Afghan civil society and the international community since it was first proposed, the GoA and the President's Office had refused to officially gazette it. The law, nicknamed as impunity bill, has been at the heart of a new controversy since it was discreetly published in the official Gazette in December 2009. It has provoked renewed criticisms by the Afghan civil society organizations and international human rights organizations who have strongly been calling for immediate sus-

The Law on Amnesty, National Reconciliation and Stability passed by the Afghanistan's parliament is a strong indication of a political determination to suppress demands for justice and accountability.

12- See Benish, Acharya and Ibrahim, Between Impunity And Accountability: A comparative overview of transitional justice processes in two post-Conflict South Asian Countries: Nepal and Afghanistan, December 2008 p. 19

13- The Law on Amnesty, National Reconciliation and Stability, First Version

14- Partaw Nadiri, " Gathering by the representatives of civil society organizations in relation to National Reconciliation Chart, www. acsf. af, 5 July 2007

15- Interview with Mohammad Younus Qanooni, Speaker, Wolesi Jirga, 2 November 2009

16- For an analysis of this see a forthcoming Afghanistan Watch paper on political groupings within the National Assembly.

pension and abrogation of the law. In January 2010, the Transitional Justice Coordination Group (TJCG), a coalition of 24 Afghan civil society organizations called upon the GoA to immediately suspend the law. The statement contended that rather than promote reconciliation and stability, by granting a blanket amnesty this law promotes impunity and prevents genuine reconciliation. Accountability, not amnesia, for past and present crimes is a prerequisite for genuine reconciliation and peace in Afghanistan.¹⁷

II: Conciliatory Initiatives in Afghanistan

After 30 years of conflict, the Afghan people have great quest for peace and security. They have experienced various trends and rounds of peace talks that have often collapsed. The post-Taliban Bonn process created high hopes that a durable peace was in horizon in the country. Nevertheless, many of those hopes still remain unfulfilled and the country is in the midst of a growing conflict and insurgency.

The history of the war in Afghanistan is also a history of several failed and unsuccessful negotiated settlements and reconciliations. In every major episode of the conflict, the ruling regimes have made efforts to negotiate and reconcile with the other sides of the war. The first such important initiative was launched under President Najibullah as he attempted to broaden the support base of

his government in the face growing conflict across the country.¹⁸ The Political Bureau of the Central Committee and Revolutionary Council of the ruling People's Democratic Party approved a 14-article resolution which substantially aimed at providing:

- security and peace for all the nationalities and tribes of Afghanistan;
- preventing conflict escalation and fraternal killings;
- foiling plots by the enemies of the their loved homeland;
- constructing a progressive and peace-loving society
- ending the bloodshed in the country.¹⁹

Based on this resolution, 295 individuals were then appointed as members of the National Reconciliation Commission and the names of each member written in the resolution text.²⁰

The national reconciliation platform was the continuation of reconciliation policy and consisted of objectives such as ending war and establishing peace through political mechanisms and conciliatory measures.²¹ A report by the Central Committee of the PDPA to the 2nd Party Congress, explained the platform of the homeland party as well as the objectives of the national reconciliation. The report had detailed that the overarching feature of the reconciliation was passage from the then critical situation to peace and the reconstruction of the country.²²

In practice, this took the form of series of

17- Phil Hazlewood, Rights groups urge action over Afghan amnesty law (AFP), Apr 10, 2010. The Accountability not Impunity: Only victims have the right to forgive, TJCG statement on Amnesty Law is available at the website of Afghanistan Watch and can be accessed at this link: <http://watchafghanistan.org/article021.php>. See also ICTJ statement on Afghanistan Amnesty Law February 17, 2010 <http://www.ictj.org/en/news/features/3456.html>, Human Rights Watch statement: Afghanistan: Repeal Amnesty Law: Measure Brought into Force by Karzai Means Atrocities Will Go Unpunished March 10, 2010 <http://www.hrw.org/en/news/2010/03/10/afghanistan-repeal-amnesty-law> And Amnesty International's Afghanistan: No impunity for war criminals 8 February 2010 <http://www.amnesty.org/en/for-media/press-releases/afghanistan-no-impunity-war-criminals> 20100208

18- Hidden Truth (Mystery of the Death of Najibullah), Razaq Mamoun, 2007

19- Haq Shenaz, and Shir Ahmad Nasry, Tahawaulat-e-Seyasi Jihad Afghanistan, Vol 1, Ed 2, P. 550

20- Ibid

21- Tadwin Seyasat Mosaleha-e-Melli: Shahkar Doctor Najibullah, www.payawatan.com

22- Faqir Mohammad Wadan, Ba pishwaz-e-dahumin salgard-e-Doctor Najibullah rayes jamhur-e-asbaq Afghanistan, Fredrich Dorf, Germany, 5 August 2006, www.payawatan.com



agreements of ceasefires and truces with hundreds of local guerrilla commanders. According to these truces, the local mujahedin commanders would commit to ending attacks on government facilities and denying other groups that were still fighting access to their territories. The government would in return provide cash and military assistance and most importantly significant autonomy to these commanders in their respective territories. This achieved remarkably important short-term successes. Just a little over a year since it was launched in 1987, it resulted into signing of protocols with commanders of 50,000 guerrilla commanders. And by 1992, three quarters of the commanders across the country had signed protocols of various kinds with the government. However, these achievements were only temporary in nature and even turned to be a key contributing factor to the eventual downfall the regime.²³

23- Martin Kipping, Two Interventions, Comparing Soviet and US-led state-building in Afghanistan, Afghanistan Analyst Network, Thematic Report, 01/2010 p. 9 and Fred Halliday and Zahir Tanin, The Communist Regime in Afghanistan 1978-1992: Institutions and Conflicts, Europe-Asia Studies, Vol. 50, No. 8 (Dec., 1998), pp. 1357-1380(1978-2001)

The Government of Najibullah eventually collapsed and the National Reconciliation Policy failed to achieve its stated objectives. In April 1992 an interim government of the Mujahedin organizations led by Sebghatullah Mojaddadi took power in Kabul. Mojaddadi declared a general amnesty for members of the PDPA and pro-Soviet government officials. However, the change of regime marked the beginning of a more bloody and devastating conflict that dominated the Kabul and much of the country until 1995.

The Program-e-Tahkim-e-Solh and the Question of Accountability and Transparency

The post-Taliban political arrangement was the most inclusive of all major political and military groups the country has seen since April 1978 coup of the pro-Soviet PDPA. Efforts were made under international auspice to ensure a broad based participation in the Interim and Transitional Adminis-

tration that were formed according to the Bonn Agreement. Though these Administrations were dominated by the anti-Taliban Alliance, it also represented Afghan political groups formed in exile in the West. Furthermore, it also included representatives of major regional and ethnic groups of the country. The only major group that was left out of the political equation was the defeated Taliban. Former members of the PDPA also took the opportunity to organize new political parties and participate in the electoral processes since then.

As the course of developments in the subsequent years showed, these high hopes were not grounded in realities of the country and chances of sustained peace and stability remained precarious. Consolidation and expansion of central authority across the country remained fresh challenges. An environment of impunity and disrespect for rule of law prevailed and key institutions of the country were dominated by groups and individuals that had their roots in the years of war and instability and used their new found positions of authority to abuse and mistreat the local communities in areas under their control. A number of reports and surveys conducted following the fall of the Taliban regime have demonstrated the increasing level of frustration and disappointment amongst the Afghan people.²⁴

An environment of lawlessness and its resultant frustration amongst the local communities provided favorable breeding grounds for a new wave of insurgency to begin first in the south and then gradually

spread in other parts of the country. The Taliban that were assumed to be a defeated force in 2002 have capitalized, amongst other things, on the inability of the Afghan State and its international allies to provide justice and break the cycles of injustices and human rights violations. The response by the GoA and the international community to counter a renewed Taliban insurgency has only achieved model short-term successes.

One such initiative is launch of the National Independent Peace and Reconciliation Commission also known as the Program Tahkim-e-Solh (PTS) or peace strengthening program. Since establishment through a presidential decree in May 2005 performance and the achievements of the PTS has been subject to controversies. Mojaddadi the speaker of Mishrano Jirga, the upper house of the Afghan National Assembly, one of the former Mujahedin leaders was tasked with heading the reconciliation program. Initially based in Kabul, it later expanded to open field offices in twelve provinces in the south, southeast and east of the country regions where the threat of the insurgency was highest. The program boasts to have reconciled 7106 militants and arranged the release of 763 prisoners from prisons and detention facilities of the GoA and the international forces in the country.²⁵ But in reality no tangible impact on the reduction of violence and insurgency has been achieved and the fate of the reconciled insurgents still remains ambiguous.

Historically, a comparison can be drawn between PTS and that of Dr. Najibullah. Both the National Reconciliation Policy and the PTS have many substantive traits in common. The fundamental objective of the National Reconciliation Policy was the

24- See, for instance, "KILLING YOU IS A VERY EASY THING FOR US": Human Rights Abuses in Southeast Afghanistan, July 2003 and All Our Hopes Are Crushed: Violence and Repression in Western Afghanistan November 2002, Human Rights Watch. These reports documents pattern of human rights abuses by local power brokers in Southeast and Western Afghanistan in the first two years following the fall of the Taliban. Take the Guns Away, a report by the Human Research and Advocacy Consortium published in September 2004 provides another interesting sample of how armed groups act with impunity to repress the Afghan civilians.

25- See the website of the PTS under Accomplishments: http://pts.af/index.php?page=en_Accomplishments

execution of the so-called reconciliation by incorporating non-communist elements into the state structure.²⁶ Therefore, attempts were made to directly or indirectly communicate through different means with academic, tribal and national figures as well as other important social and political groupings.²⁷

The PTS also executes similar programs reintegration assistance to those laying down their arms.²⁸ Both the Reconciliation Policy and the PTS faced rejection by the leaderships of the Mujahedin in the 1980s and the Taliban and other insurgent groups in this period.²⁹ As a result, the National Reconciliation program concentrating on reaching ceasefire agreements with local commanders of various Mujahedin organizations which despite modest successes failed to quell and conflict in any significant scale. Similarly, the PTS has been making efforts to reach the lower ranks of the insurgents.

Both initiatives and the bodies that were set up to lead the reconciliation agenda

26- Haq Shenaz, Shir Ahmad Nasry, *Tahawulat-e-Seyasi Jihad Afghanistan*, Vol 3, Editon 2, P. 110, Kabul, 2006

27- Haq Shenaz, Shir Ahmad Nasry, *Tahawulat-e-Seyasi Jihad Afghanistan*, Vol 3, Editon 2, P. 110, Kabul, 2006

28- Kumisyoun Tahkim-e-Solh, *The Daily Telegraph ra rad kard*, www.rahenejatdaily.com, 13 August 2008

29- Haq Shenaz, Shir Ahmad Nasry, *Tahawulat-e-Seyasi Jihad Afghanistan*, Vol 3, Editon 2, P. 110, Kabul, 2006

are state-sponsored. This while giving the government greater degree of control over the process also conditions the success of the process to the credibility of the existing governments. Similar to the Reconciliation Policy of Najibullah which tasked 295 to spread the message, the current program boasts to have involved thousands of tribal elders to communicate with insurgents in their homes areas.³⁰

The PTS faces two critical questions. Firstly, what are its scope and limits of authority? The process lacks basic publicly available strategic direction, guidelines and known procedures. As a result, the actual work is left at the discretion of individual officials and collaborators in the field. Some critics go as far as to charge the Commission is a source rather than a solution to current conflict. They point to the heavy costs of the program raise the allegations that insurgents join the process in order to get an official letter only to be able to move around freely without really giving up their causes. These accusations are further fueled by the lack of public knowledge on actual budgets and working procedures of the commission. Ramazan Bashardost, an independent candidate in the August 2009 Presidential

30- Interview with Akram, Administrative Manager of the PTS, 28 October 2009



commemoration of the Afshar Massacre, Kabul- 11 Feb 2010

Elections, questioned the claims of the Commission's officials in reconciling large numbers of insurgents. Referring to those individuals that are usually shown on the national media outlets as reconciling insurgents he said:

“Those individuals that carry white Patu (shawl) on their shoulders are paraded on the Television, is to appease Hamid Karzai and it is ridiculous”.³¹

The question that is central to achieving justice in Afghanistan, is whether those who join the reconciliation process will account for what they have done? The author despite sustained efforts to find out the position of the PTS on this point as well as other legal documents failed to do so. In an interview, the Administrative Manager of the Headquarter of the PTS in Kabul said that there is no document available other than statute of the organization.³² This potentially shows how ambiguous the policy programs and policy direction of the program is and highlights a complete lack of transparency.

An important question which remains highly ambiguous is that who and under what circumstances can be considered for reconciliation and eligible for reintegration assistance. An official of the PTS stated that those who are either in the battle field or those who were in conflict with GoA in the past fall under the reconciliation program if they pledge to join the process.³³ The fact of the matter is that groups in conflict and armed opposition to the GoA can include a myriad of active and inactive groups. This particularly applies to the regions most affected by the insurgency where weak and absent government control have given

31- Interview with Dr. Ramazan Bashardost, 17, August 2009

32- Interview with Akram, Administrative Manager of the PTS, 28 October 2009

33- PTS, Enteqad-e The Daily Telegraph, www.rahenejatdialy.com 13 August 2008

rise to different armed groups that have emerged for different political or, sometimes, criminal objectives. Thus, for the program to be effective in reducing insurgency, it requires a clearly defined policy as to whom it approaches for reconciliation.

In 2007, these reconciliation efforts were conducted at the cost of £2 million.³⁴ Concerns have been raised that the money might have spent on those who do not have an active part in the armed opposition. Some observers have suggested that the PTS have been unable to reach the main insurgents actively involved in combat. And majority of those that have allegedly reconciled have not been involved in recent conflicts. Many might have joined the process to do a favor to the PTS staff to help them expand the list and justify the financial costs to the donors and the central government.³⁵

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III: The Fragility of Peace without Justice

The transition process set in motion by the Bonn Agreement, despite its undeniably important achievements faces formidable challenges. The political process that resulted from the Agreement brought together political and military groups that had previously bitterly fought one another. A review of the recent history of TJ and reconciliation in Afghanistan reveals that it operates only within the elite levels of the political system. The post-Taliban political

34- PTS, Enteqad-e The Daily Telegraph, www.rahenejatdialy.com 13 August 2008

35- See also Michael Semple, Reconciliation in Afghanistan, United States Institute of Peace, 2009, pp.54-57

process was premised on the assumption that to put together the representatives of tribes, political and military forces that emerged as victors in the course of conflict within a political structure would help the transition from war to peace. Such an approach demonstrates that the root causes of conflict and violence were less attended to. In other words, the process was predicated on a premise that conflict might be brought to a cessation through distribution of power among the political and military elites without taking into account the backgrounds and preconditions that contributed to the emergence of these elites themselves.

At the very outset, the political architects of the Bonn Agreement believed that justice and redress to the past crimes might endanger the political process of peacemaking and stabilization. This was premised upon an understanding that forcing the perpetrators of the past crimes to account will motivate some powerful figures to attempt to disrupt the fragile process. Several years on, it is now prudent to raise those questions again: To what extent, have we contributed to peacemaking and stabilization by ignoring and delaying the execution of justice? How has tolerating and neglecting the past crimes of the current players helped? And finally, how important are the ramifications of ignoring justice in the current evolving political process?

A central point that emerges from the previous two sections is that while the quest and urgency for peace and reconciliation is quite intense in Afghanistan, the country remains undecided on how to achieve this. As the insurgency gained greater momentum and expanded to greater parts of the country during 2009, call for negotiations became more widespread. Research and

interviews for this paper during the second half of last year showed that negotiation was gaining a national prominence for nearly all political groups in the country. The candidates of 2009 presidential candidates many of whom were interviewed as part of our research presented 'peaceful settlement' as a key part of their political platforms. However, the degree of emphasis and condition for such negotiation proposed by the candidates varies to a great extent. President Karzai's present attempts for peace talks and the Peace Jirga scheduled to be held in early May 2010 in Kabul are but a continuation of this national urgency.³⁶

The methods and approaches to end the war are understandably subject to strong disagreements. Broadly speaking, two main approaches can be discerned: political reconciliation through talks and power sharing mechanisms and a thorough process of truth-seeking, accountability and reconciliation as reflected by the Action Plan. The first approach has traditionally been seen as relatively convenient and malleable by politicians in the changing contexts of war and conflict in the country. Since its first formulation by Najibullah in the 1980s, reconciliation and negotiation has often been promoted by Afghan leaders as they felt threatened by the new political and military forces. Given the complexity of the later and its long-term nature, the later is yet to achieve a high the necessary level of commitment by political elites of the country. President Karzai's weak commitment that has practically vanished in the last years is a prime example of the short-sightedness and ambiguity of the Afghan political leaders.

The official pronouncement of the Action

36- The interviews with the presidential candidates and other politicians and experts during this period can be accessed at the website of Afghanistan Watch.

Plan for TJ and the PTS and recent efforts for renewed efforts for reconciliation display the most typical examples of contradictions. Whilst the Action Plan was intended to cover the 1978 – 2001 periods, by its nature it is a forward looking process and reconciliation is one of its central objectives. Moreover, the Taliban and Hizbe-Islami and their leadership had central parts in the conflicts throughout the history of war in the country. Nonetheless, the two policies were designed in isolation from one another. As such other reconciliation initiatives could and must have been designed in line within a larger framework of the Action Plan. The PTS itself acknowledges the lack of a clear mandate and inconsistency between itself and other policies and programs of the Afghan government and the international community as one of its key political obstacles.³⁷

Despite the symbiotic relationship that exists between accountability for the past and reconciliation in the present, the debates on both processes have mostly evolved in isolation from one another. Reconciliation or negotiations with the insurgents have mostly pursued often with little transparency by the GoA and political groups and the debates related to transitional justice have similarly been mostly limited within the civil society and human rights organizations based in Kabul. The proponents of negotiated settlement with the insurgents including the GoA have, for reasons of the political expediency and convenience, have demonstrated little interest in engaging the civil society and proponents of the transitional justice. Similarly, civil society organizations also have focused less on reconciliation, viewing it as a political process that has no relevance to them.³⁸

37- See under Challenges at the official website of the PTS: http://pts.af/index.php?page=en_Challenges

38- Group Discussion with Afghan civil society on TJ and Reconcilia-

Assessing Arguments against Transitional Justice

During this research, the author encountered a number of arguments that deems accountability and justice for the past as unnecessary, an impossible task or even a politically motivated process. Five such arguments are identifiable.

1. The first argument is founded on a view of the very complex nature of war and conflict in Afghanistan. The key point is that perceptions of justice and injustice and victims and oppressor are so diverse and contradictory that can not be resolved, at least, at this stage. Thus, justice and reconciliation may mean one thing for the victims but another from the perspective of the perpetrating groups and individuals. The victims of one period of the conflict might have been perpetrators of atrocities in another period.

This line of reasoning for delay or impossible of accountability for the past emerged during interviews and meetings with a number of individuals. These individuals also asserted that the number of players involved in conflict over the last three decades is so large that it would be very difficult to identify them. Even if they are called upon for prosecution given their large quantity, they might be able to challenge the government and establish an armed opposition. Mr. Shahnawaz Tanai, a former Minister of Defense under the PDPA in the 1980s and a Presidential Candidate in the August 2009 elections contended that that redress of the past crimes against humanity was not only difficult but also impossible.³⁹ It is argued that is difficult to develop an accurate understanding of the realities of war, conflict machinations and alignment among the warring factions.⁴⁰

tion, Kabul, 25 November 2009

39- Interview with Gen. Shah Nawaz Tanai, Former Defense Minister and Presidential Candidate, 12 August 2009

40- Author's interviews with a number of politicians and commentators, Kabul, September-November 2009

2. A second position is based on suspicions and lack of clear understanding of the TJ or a deliberate attempt to discredit the process. According to this group of people the TJ is a politically motivated project employed by certain domestic and external groups to pressure other groups in the

According to some interviewees in order to survive and prevent further violence the people sought the protection of those who committed violence and the perpetrators of the violence were part of the then power machinations.

country. The argument goes asserts that this project will lead to nowhere and will destroy security and destabilize the country. This project bears no benefit to the people of Afghanistan. This view is most dominant amongst the former mujahedin organizations that believe or present the process as a conspiracy against their political influence and roles in the state structure of the country. Hafiz Mansur, a former member of Jamiat and Editor-in-Chief of the Payam-e-Mujahed Weekly in Kabul presented this view in short:

Transitional justice is a political project and a misuse of the beautiful concept of justice.⁴¹

3. Distinguishing perpetrators of violence from victims of it is complex.⁴² The intricacy of human rights abuses and the wide variety of perpetrators is one of the key factors slowing down the execution of the TJ process. Interviews were con-

ducted with individuals who believed that that wide spectrum of human rights violations was contingent upon the multiplicity of nationalities, religions and ideologies of the Afghan society.⁴³ Violence was reciprocal; therefore, the sentiments and passions of those who committed violence and those subjected to violence are interwoven. These complexities have caused the GoA to be hesitant, at times fully committing itself to the implementation of the TJ Action Plan and at other junctures it recants on the pledges it has made.

According to some interviewees in order to survive and prevent further violence the people sought the protection of those who committed violence and the perpetrators of the violence were part of the then power machinations.⁴⁴

4. One of the key complexities of the transitional justice and reconciliation in Afghanistan is the external dimension of the war and conflict in the country. The responsibility and accountability for external involvement and support from one faction or went much farther say:

“[t]he majority of the people including the foreign countries were involved in abuses... I think it is beyond capability of the people. How can one assess the past 35 years of conflict?”

These groups of people believe that any process of accountability and truth-seeking for the past that did not consider foreign involvement is incomplete and even unjust. They also acknowledge that foreign actors participating in the conflict over the last 30 years inevitably complicates matters further. Participants include Ukrainian soldiers, Russian Generals, and Panjabi, Ban-

41- Interview with Abdul Hafiz Mansour, Chief Editor, Payam-e-Mojahid Weekly as well as Periodical Chairperson of National United Council, and former member of Jamiat-e-Islami, 25 August 2009

42- Interview with Dr. Mohammad Amin Ahmadi, chairperson, Kateb Institute of Higher Education, 26 August 2009

43- Interview with Dr. Mohammad Amin Ahmadi, Chairperson, Kateb Institute of Higher Education, 28 August 2009

44- Interview with Dr. Mohammad Amin Ahmadi, chairperson, Kateb Institute of Higher Education, 26 August 2009

gladeshi and Arab militants and US other Western officials who were involved in the war in one way or another.

Overcoming the Contradictions and Charting a Common Course towards the Future

In spite of these challenges of perceptions and politically calculated opposition to the process of accountability for the past, the lack of political determination remains the most formidable challenge in the way of a genuine reconciliation and accountability. Many of these arguments are matters of perceptions rather than outright rejection of a genuine reconciliation and a process of accountability. Many of these critics would concede that the history of war has created a huge legacy that must be overcome as a prerequisite for a sustainable peace and stability. The magnitude of atrocities and suffering of the Afghan people is simply undeniable. The AIHRC 'Call for Justice' illustrated that 69% of the Afghan population has claimed that either they were directly subjected to violence and human rights abuse or a member of their family has suffered during the last three decades of conflict.

Many individuals, who opposed transitional justice process as such, did recognize the importance of overcoming the legacies of war. They acknowledged that some brave measures had to be taken in order to ensure a sustainable peace in the country. For instance, Mawlawi Arsala Rahmani a former Taliban official and a current member of the Mishrano Jirga, the Upper House of the National Assembly proposed:

...all the leaders of the factions involved in the past conflicts, the leaders of the jihadi parties, and the PDPA government should assemble in the capital Kabul, send an invi-

tation to all the people including the elders, the Ulema, the heirs of those who have lost their lives, and apologize for what they committed and call for their general pardon.⁴⁵ A series of such programs should be held in provincial capitals of other provinces. The clerics should carry the Holy Quran on their head, with few women accompanying, they should acknowledge that systematic abuses have taken place and that it is not possible to hold everybody to account for what has happened.

Ramazan Bashardost stressed the symbolic importance of public acknowledgement of the miseries inflicted on the Afghan people by the warring groups:

What is important is this that the perpetrators have to publicly acknowledge what they have done through print and visual media instruments and commit them to pay the reparations.⁴⁶

However, some see the lack of political commitment resulting from the composition and leadership of the GoA and state institutions. This was put succinctly by Sebghatullah Sanjar, the Head of Policy and Transitional Justice Focal Point of the President's Office when he pointed to the composition of the Afghan State:

The state is composed of those who were in the PDPA government previously, those youths who were in Tanzims (organizations) of the Mujahidin, and those youths that worked in the Taliban movement. These three groups are today's MPs, ministers, senators, prosecutors, judges, and police chiefs.⁴⁷

The GoA, the National Assembly and by extension the Judiciary have over the past

45- Interview with Mawlawi Arsalan Rahmani, 26 August 2009

46- Interview with Dr. Ramazan Bashardost, Ibid.

47- Interview with Sebghatullah Sanjar, Chief of Policy Unit of the President and the Transitional Justice Action Plan Coordinator 28 August 2009

years been dominated by political groups and elites that emerged during the years of war and share much of the accusation for perpetration of atrocities and suffering of the Afghan people. The short term political interests of these groups are obviously in conflict with the overall objectives of truth-seeking, accountability and societal reconciliation. President Karzai's changing position regarding the Action Plan can best be understood if the placed in the context of opposition by the former warring forces within the Afghan state including the national assembly. Although he declared the Action Plan, he changed his position to the extent that he said:

“Peace is a necessity and justice is a luxurious thing that Afghanistan may not gain now”.⁴⁸

In April 2009, responding to a question by a journalist as to who was responsible for the mass graves the President said:

“I think the Afghanistan people in general want to forget the painful past and move toward a better and a more peaceful tomorrow, a tomorrow in which the people of Afghanistan should in no way fall victim to violence, neither victim to violence by the government apparatuses nor victim to violence by parties, organizations and groups”.⁴⁹

This illustrates the most difficult challenges of transitional justice and genuine reconciliation namely the lack of or shaky commitment of Afghan political elites to that process. The Afghan elites do acknowledge the problem but remain undecided about the solutions. This is mainly because they themselves feel threatened. Crisis of confidence in the Afghan society and a growing gap between the state and society are

frequently pointed out as key issues facing the country. And a number of surveys, as pointed above, have demonstrated how domination of state institutions and abusive behavior and corruption pervasive within them are the key factors of the crisis and the growing gap.

A key objective of the transitional justice is to build confidence by healing the wounds of war and establishing the truths and holding those most responsible accountable for their atrocities. The presence of alleged perpetrators in public positions will undoubtedly hinder the potential for confidence-building between state and society. As long as confidence between state and society is not re-established, the state will never be able to gain the support of the people at the grass-root levels. Cleaning up the government from alleged perpetrators of human rights abuses and promoting good governance are some of the most important immediate aspects of transitional justice and also the most challenging of all. This is crucial as it will build up confidence in the state structures by limiting the ongoing abuses and ending an environment of impunity.

Purging the bureaucratic apparatus of the corrupt elements is central to good governance. A clean government is the core for restoring the popular confidence, which is also key to bringing justice.⁵⁰

Both the constitution and electoral law bars individuals from occupying and standing for public offices. But in practice the implementation of these provisions have met numerous challenges. And the presence of alleged perpetrators of atrocities and human rights violations and their participations in the parliamentary and presidential elections have provoked intense controversies in recent years.

48- Dr. Rahim Rasul, Three Decades of Human Rights Abuses in Afghanistan, Seminar, www.goftaman.com, Toronto, Canada

49- Ramin Anwari, BBC Dari Service, Kabul, 8 April 2009

50- Interview with Dr. Seema Samar, Chairperson of AIHRC, *Ibid*

In practice, the implementation of these constitutional and legal provisions faces two basic challenges. First and foremost is the lack of political commitment to the process. This is particularly important as institutional reform is perhaps the most political aspect of the process and requires bold political decision and leadership. Second is the lack of documentation and reliable evidence that can serve as a basis of institutional reform and removal of the suspects

from public offices. Most of the narratives of the years of war and atrocities are subject to intense controversies and consequently subject to serious disagreement and partisan perceptions and portrayals. Whilst this is not particular to Afghanistan as many countries emerging from war face such difficulties, it remains important to base the process on an impartial, inclusive and reliable data collection, truth-seeking and documentation exercise.

Conclusion

The concluding point in this paper is this that peace can only be sustained if it is based on justice and that reconciliation risk failure without a due process of accountability and if it does not transform the relationship between various strata of the Afghan society. The leaders and commanders of the last three decades of conflicts have left massive legacies for the current and future generations. Accepting these legacies as ground realities and approaching them on a proper footing, is one of the most formidable challenges in Afghanistan.

Eight years on since the Bonn Agreement, Afghanistan still faces various challenges. Afghanistan's achievements as well as that of the international community over this period are still subject to serious threats. Afghanistan is facing today a confidently rising powerful insurgency that controls parts of Afghanistan's soil and threatens the peace and stability of the capital. The proliferating corruption has ranked Afghanistan as the second most corrupt countries of the world. Persistent human rights violations and rising civilian casualties happened as much today as they did in the past.

Thirty years of conflicts have fragmented Afghanistan. The narratives of such a social history and the explanations of causes and consequences of the events may vary at length. The feeling of being victimized, suppressed and deprived has been viewed frequently in different parts of the country. Different accounts of the past might result in a different understanding of the past and the present. This fragmented past may fail to result in creating a national unified and coherent view about a common future. Afghanistan can agree on a common future only once it gains a relative consensus about its past history.

It is complex for both the opponents and the proponents of TJ to reach a relative consensus on key elements of this process. Despite that fact that there is a TJ Action Plan in place, the intellectual currents influenced by the past creates a diverse social environment. The proponents of the TJ have placed little attention on key aspects such as national reconciliation and peace-making. This has persuaded the GoA to pursue an independent national reconciliation program with the insurgents in isolation from the requirements of TJ.

The GoA has demonstrated that it lacks the political intention for pursuing TJ and has reacted ad hoc to the pressures exerted by the opponents and proponents of TJ. The proponents of the process have a strong presence in the public administration; they have successfully dissuaded the government away from the commitments it had originally made regarding TJ. Drafting and the confirmation of the National Reconciliation Chart recognized as the "amnesty law" by the civil society organizations has demonstrated how easily the GoA backs away from its commitments on human rights and the execution of justice under political pressures.

Reconciliation with the armed oppositions and the insurgents could have taken place within the framework of or in coordination with the Action Plan. The Plan enthusiastically emphasizes national reconciliation and commits the GoA to address human rights abuses and ensure peace and solidarity in post-Taliban Afghanistan. Reconciliation with insurgents on a just foundation and in line with a comprehensive truth-seeking national process would have granted greater ethical and national character to the process. In the meantime, it has now become fully evident that one of the reasons

behind the rising insurgency and popular dissatisfaction is the ever-festering culture of impunity and the declining rule of law. Administrative reform and the reestablishment of accountable state institutions within the framework of Action Plan would have improved the popular confidence and would have granted greater ethical and political leverage to the government.

The national peace program that was designed for the realization of short-term political objectives has failed so far. The officials from the Peace Commission have claimed that they have succeeded in driving away 7, 000 insurgents from conflict, however, this success story had no effect on calming the virulent insurgency. What has stood out the most in the activities of the Commission is the absence of transparency and lack of accountability in its routine operations. Transparency and accountability are the defining elements of any peace and reconciliation processes.

Finally, the role of Afghan and international civil society organizations is the key to success in truth seeking, accountability, and national reconciliation processes. Experiences have shown that in the absence of an active, dynamic and forward-looking civil society, achieving such objectives is difficult if not impossible. The civil society organizations also should adopt an inclusive approach to TJ and play significant role in driving forward discussions related to national reconciliation. Overlooking the program called “National Reconciliation” is detrimental both to the civil society as well as the future of the country.

In short a sustainable peace and justice will materialize only when there is the political will combined with an understanding from within the social and political machinations of such a process. This will only be possible when the civil society organizations play their due role as a unified lobbying and informing force.

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Annex2:

ABOUT AFGHANISTAN WATCH

The Afghanistan Watch is an independent, non-governmental and non-political organization registered with the Ministry of National Economy of the Islamic Republic of Afghanistan. It envisions a democratic, peaceful, tolerant and just society in which all citizens have equal opportunities to realize their human potentials.

Its mission is to undertake activities that will promote peace, justice, and a culture of mutual tolerance and respect for human rights in Afghanistan. As its core values the organization is strongly committed to democracy, justice, human rights, sustainable and balanced social and economic development of the country and impartiality, independence and professionalism as guiding principles of its activities.

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