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# Transitional Justice in Post-war Afghanistan

by Ossai Miazad\*

The September 11th attacks on the United States (U.S.) and the ensuing war against terrorism have galvanized world attention onto the political situation in Afghanistan. This attention is likely to lead Afghanistan into a phase of reconstruction after two decades of war and conflict. The country's political leaders face many challenges as they seek to rebuild the nation and restore the rule of law. Similar to the experience of other transitional governments, Afghanistan's newly established leaders will be required to address the severe and systematic violations of humanitarian and human rights law perpetrated by the previous regimes and the country's warring factions. During the last decade of conflict in Afghanistan in particular, these violations have taken on the added dimensions of ethnic- and gender-based persecution. If Afghanistan is to move toward a durable peace, it must break the cycle of impunity by instituting a legal approach to account for past abuses of humanitarian and human rights law.

On December 5, 2001, the United Nations (UN) brokered talks in Bonn, Germany, culminating in an agreement for Afghanistan's future political framework. This remarkable achievement marked a new beginning for the war-torn nation. By establishing a six-month interim administration, the agreement signaled the first step toward the country's reconstruction. After six months, power will shift to a two-year transitional administration; at the end of this term, power will be transferred to a government established through national elections. The agreement addresses important human rights concerns, particularly with regard to the representation of women and ethnic minorities in the new administration. Although earlier drafts of the agreement prohibited an interim authority from granting amnesty to those suspected of crimes against humanity, the provision was later deleted from the final agreement at the insistence of members of the United Front delegation. The final agreement remains silent on the transitional authorities' obligation and commitment to bringing war criminals to justice.

The formidable task of rebuilding Afghanistan and reintegrating it into the international community will require measures to ensure accountability for past war crimes. Afghanistan is obligated by the UN Conventions to which it is a party, and by international customary law, to hold accountable perpetrators of humanitarian and human rights law violations. Further, by establishing a well-crafted and effective legal response to such violations, a new Afghan government can meet the goals of serving justice, building confidence in the new administration, and prohibiting war criminals from entering future governments.

## Background

The Soviet Union invaded Afghanistan on December 24, 1979, motivated both by political expansionist goals and the fear that instability within its small Central Asian neighbor might spill into its own borders. Its immediate task was to crush the uprisings stirred by the policies and repressive tactics of the *Khalq* faction of the People's Democratic Party of Afghanistan, an Afghan communist party that had seized control of the country through a coup d'état on April 27, 1978.

An estimated 1.24 million Afghans died during the decade-long Soviet occupation, and the flow of refugees, primarily

to bordering Pakistan and Iran, reached five million. Armed groups at the center of the resistance against the Soviet occupation collectively became known as the *mujahiddin*. Although engaged in a common resistance movement, the *mujahiddin* were composed of ethnic, tribal, and political factions as diverse as the population of Afghanistan.

Afghanistan became a Cold War battleground. The United States and Saudi Arabia provided most of the massive support for the resistance, nearly all of which was funneled through Pakistan. The policy implemented on the ground was to provide the greatest support to the most radical *mujahiddin* groups. Thousands of fighters from the Middle East and North Africa joined the resistance forces. Among them was Osama bin Laden, who came to Pakistan in the early 1980s and built training facilities for these foreign recruits inside Afghanistan.

The final withdrawal of Soviet troops from Afghanistan in February of 1989 did not lead to an end to armed conflict in the country. Despite the troop withdrawals, a Soviet-supported government remained in control. By 1992 the *mujahiddin* had toppled the Soviet-backed government in Afghanistan. In the aftermath of the Soviet withdrawal, the U.S. and its western allies abandoned war-torn Afghanistan. The United Nations' efforts toward brokering a settlement for a transitional government suffered from a lack of commitment by Afghanistan's neighbors and the international community. No longer engaged against a common enemy, a power struggle among the various *mujahiddin* factions soon erupted. It was within this political vacuum that armed factions, many led by former *mujahiddin* commanders, established themselves as the local authority.

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The framework for an interim government forged by Pakistani-based *mujahiddin* in the Peshawar Agreement of April 24, 1992, crumbled only months after its implementation. The failed power sharing agreement of the Afghan Interim Government (AIG) left Burhanuddin Rabbani, leader of the *mujahiddin* faction of *Jamiat-e Islami* (Society of Islam), and his defense minister Ahmad Shah Massoud, seated in the capital city of Kabul, although their control over the capital was by no means complete. Gulbuddin Hekmatyar, leader of *Hezbe Islami* (Islamic Party), a rival *mujahiddin* faction and prime minister of the AIG, continued to bombard Kabul, and by 1994 a full-scale civil war had erupted among the various rival factions. The Rabbani government remained in Kabul until September 1996 when its members were forced to retreat north by the Taliban, an armed militia comprised mainly of non-Afghan combatants and Afghan refugees, who had studied in religious schools in Pakistan.

With extensive foreign support, particularly from Pakistan, the Taliban declared itself the government of Afghanistan in 1996. Initial signs from Washington indicated a tacit approval of the Taliban takeover. The regime's refusal to extradite Osama bin Laden and its violations of basic human rights principles, particularly regarding women's rights, led to its isolation by the international community. Only Saudi Arabia, the United Arab Emirates, and Pakistan granted the Taliban official recognition. The rise of the Taliban spurred the formation of the anti-Taliban coalition known as the United Front (including parties that formerly made up the Northern Alliance), whose main foreign supporters included India, Iran, and Russia. The United Front, which controlled pockets of territory in northern and central Afghanistan, supported the government headed by Rabbani. Because the Taliban had not consolidated control over the entire country, military offensives and fighting between the Taliban and United Front continued throughout the Taliban's reign in Kabul.

### Violations of Humanitarian and Human Rights Law

Severe violations of international humanitarian and human rights law have occurred throughout the conflicts in Afghanistan. The violations of humanitarian law have included direct attacks on civilian populations, indiscriminate aerial bombardment, summary executions, and rape. No single faction holds a monopoly on committing these violations; rather, a cycle of impunity has instigated reprisal killings and the repetition of atrocities. In many cases, support from neighboring countries has fueled the violence by pitting one warring faction against the other. Additionally, each faction is responsible for violations of human rights law, including arbitrary detention, forced labor, forced deportations, and ethnic based violence. Moreover, women and girls living under the Taliban regime have perhaps faced some of the most severe and systematic human rights violations.

### Humanitarian Law

The principles set out by the 1949 Geneva Conventions (Conventions) guide international humanitarian law. As a signatory to the Conventions, Afghanistan is a High Contracting Party and is bound by Common Article 3. Aimed at ensuring the humane treatment of anyone not participating in hostilities, Common Article 3 applies as soon as a situation of internal armed conflict exists within the territory of a party to the Conventions. The legal obligations imposed on each party to the conflict, with respect to the treatment of persons taking no active part in hostilities, prohibit the following acts: (1) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (2) taking of hostages; (3) outrages upon personal dignity, in particular humiliating and degrading treatment; and (4) passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court that affords the judicial guarantees recognized as indispensable by civilized peoples. Further, the customary law of armed conflict recognizes the principle of civilian immunity and the obligation of warring parties to distinguish between combatants and civilians. UN General Assembly Resolution 2444, Respect for Human Rights in Armed Conflicts, adopted on December 19, 1968, prohibits attacks on civilian populations, and notes that a distinction must be made at all times between persons taking part in hostilities and members of the civilian population in order to ensure that the latter be spared as much as possible.



Official signing of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions.

### Indiscriminate Bombings

The civilian population in Afghanistan has suffered repeated violations of humanitarian law through indiscriminate bombings and targeted persecution based on ethnicity or political affiliation. For example, during the Soviet-backed Afghan government's military operations, Scud missiles and other methods of warfare that lack sufficient accuracy and targeting capability were employed. Weapons that cannot be directed at a specific military objective violate the laws of war, because their use leaves the civilian population vulnerable.

An estimated 25,000 people were killed in Kabul in 1994 alone when Gulbuddin Hekmatyar and General Abdul Rashid Dostum, founder and principle leader of the *Junbish-i Milli-yi Islami-yi Afghanistan* (National Islamic Movement of Afghanistan) (*Junbish*) launched a full-scale civil war in an effort to oust the government of Burhanuddin Rabbani. Civilians comprised most of the casualties resulting from rocket and artillery attacks. A 1999 UN report noted that in recent years the Taliban has intensified aerial bombardment, causing considerable civilian casualties, damage to property, and displacement of the population.

### Forced Displacement and Summary Execution

Political affiliation or perceived loyalties have rendered individuals and entire communities victims of acts of violence and terror. Human Rights Watch has documented the

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targeting of ethnic Pashtuns and others suspected of supporting the Taliban in areas controlled by the United Front. Such targeting, which took place as recently as 2000, included summary executions, burning of houses, and looting. In May 1997, *Junbish* forces, as members of the United Front under the command of General Abdul Malik Pahlawan, summarily executed an estimated 3,000 Taliban prisoners of war in Mazar-i Sharif. Accounts of the brutal killings indicate that some of the prisoners of war were taken to the desert and shot while others were thrown down wells and blown up with grenades. A report prepared by Kamal Hossain, UN Special Rapporteur of the Commission on Human Rights, describes reported summary executions of suspected supporters of the United Front by Taliban forces entering into villages in Bamyan, a region located in central Afghanistan. The same report highlights the forced displacement of 65,000 to 150,000 civilians during a Taliban offensive in the Shamali Plains, an area north of Kabul controlled by opposition forces. The Special Rapporteur's report cites first-hand accounts of house and crop burnings, forced deportations, family separations, the separation and deportation of women, and arbitrary killing in southern Shamali.



Women and children having tea in an Afghan refugee camp. The photo was taken as part of a project organized by a University of Michigan student that encourages refugees to document their lives.

Credit: Nooria

#### Ethnic-based Massacres

Human rights organizations and the UN have documented several Taliban-led massacres of the Hazara ethnic minority. Two of the most recent massacres occurred in May 2000 and January 2001. The latest reported massacre occurred at Yakaolang in the central highlands of Afghanistan. One UN investigator described the sight of bodies in a mass grave, hands tied behind their backs: "[i]n no way was Yakaolang an isolated, or locally organized event," but rather "a centrally organized operation." UN investigators estimate there have been fifteen separate massacres of civilians over the last four years, and explain that each massacre has been highly systematic and can be traced to the Taliban's Ministry of Defense or to Mullah Omar, the Taliban self-proclaimed *Amir al-Momeneen* (Ruler of the Faithful). The UN report also notes the participation of non-Afghan combatants, including Pakistanis and members of Osama bin Laden's *al-Qaeda* organization.

#### The Intersection of Gender and Ethnicity: Rape as a Weapon of War

Women have been targeted on the basis of both gender and ethnicity, and have faced sexual assault, abduction, and forced marriage throughout the armed conflict. A 2001 Human Rights Watch report named opposition commanders with records of serious violations of humanitarian law.

The report documented the February 1993 killing, rape, and disappearances of ethnic Hazaras in West Kabul perpetrated by Abdul Rasul Sayyaf's *Ittihad-i Islami* (Islamic Union). Further, the 1995 U.S. State Department report on human rights practices noted that after capturing Kabul's predominantly ethnic-Hazara neighborhood of Karte Seh, Northern Alliance troops systematically looted whole streets and raped the women residents.

#### Human Rights Law

Similar to the humanitarian law violations, there have been widespread abuses of human rights law. Throughout the conflict, women have suffered some of the most egregious human rights violations. The most systematic and horrific violations of women's rights have occurred under the Taliban regime.

Afghanistan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights in 1983, and the Covenant on the Rights of the Child in 1994. In 1980, Afghanistan signed, but has yet to ratify, the Convention on the Elimination of All Forms of Discrimination Against Women. The principles set forth in the treaties, as well as in the UN Declaration of Human Rights, grant women and girls the fundamental rights to education, work, health care, freedom of

movement, and equality under the law. The ICCPR specifically protects women from gender-based violence, and torture or cruel, inhumane, or degrading treatment or punishment.

Through official edicts, the Taliban prohibited girls from going to school, refused women the right to work outside the home, with the exception of some health care workers, and severely restricted women's and girls' access to adequate health care. In addition to denying these basic human rights, the Taliban severely restricted women's freedom of movement. By official decree women were prohibited from leaving their homes unless they wore a *burqa* (a head-to-toe garment with a small mesh opening at the eyes) and were accompanied by a close male relative. Before the Taliban assumed control, seventy percent of all teachers, fifty percent of civil servants, and forty percent of medical doctors in the country were women. The policies of the Taliban have taken a heavy toll on the people of Afghanistan, particularly women and girls.

According to a 1999 report issued by Radhika Coomaraswamy, UN Special Rapporteur on Violence Against Women, the Taliban enforced their discriminatory edicts by punishment without any due process rights. Punishment for

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transgressions against the Taliban's regulations included public flogging, stoning, and public execution. Murder, working with the opposition, sodomy, and adultery were considered crimes that carried the death penalty. Amnesty International reported that during 2000 at least fifteen people faced public executions, including the stoning to death of a woman. The Taliban's policy toward women and girls has had a life-threatening effect on an already suffering population. Each day an estimated forty-five Afghan women die from pregnancy-related causes, and the rate of illiteracy among girls has reached ninety percent. In 1998, Physicians for Human Rights reported that ninety-four percent of the Afghan women interviewed suffered from severe depression. Women and girls will likely continue to feel the impact of the discriminatory policies long after the Taliban's departure.

### International Obligations and Mechanisms for Accountability

The kind of violence and persecution that occurred in Afghanistan makes granting blanket immunity to perpetrators of abuses inconsistent with international law standards. A new government in Afghanistan will have the obligation to at least punish the most egregious human rights violations. This obligation is most explicitly set forth by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These conventions require states not only to protect the rights prescribed, but also to prosecute acts of genocide and torture perpetrated in their territories.

Afghanistan ratified the Genocide Convention in 1956 and the CAT in 1987. Article 5 of the Genocide Convention requires contracting parties "to provide effective penalties for persons guilty of genocide." Further, Article 6 requires that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." Similarly, the CAT requires states either to investigate and prosecute those who commit acts of torture, or to extradite suspects to other jurisdictions. Customary law imposes a similar obligation: "[a] state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide."

A variety of mechanisms for accountability have been implemented in countries emerging from conflict. Approaches include domestic prosecution by establishing a special prosecutors office and using the local courts; non-criminal sanctioning to offset the challenges related to criminally prosecuting large numbers of individuals involved in violations; and truth and reconciliation commissions to collect testimony and document the history of the abuses.

#### Domestic Prosecution

Major challenges to a new government in Afghanistan will include establishing legitimacy and credibility as well as the rule of law. The commitment to hold parties accountable for human rights violations could represent an important step in that direction. Although the legal system in Afghanistan

requires rebuilding, a domestic response to past war crimes will likely demonstrate the greatest legitimacy and garner support among the Afghan people. There is a commonly held perception among Afghans that they have been the victims of foreign meddling. Many of the war criminals that should be brought to justice have received support from neighboring countries. A domestic tribunal can thus help to establish the sentiment that the country is reclaiming control rather than perpetuating a sense of helplessness.

Several challenges exist to the domestic prosecution of war criminals in Afghanistan. Factional rifts and suspicion have intensified as a result of the war. Consequently, maintaining a sense of order and fairness may be difficult. These issues have been mitigated in other countries facing similar situations by ensuring transparency throughout the prosecution process as well as the diversity of investigators, prosecutors, and judges. The prosecution process must be committed to investigating and prosecuting war crimes committed by individuals on all sides.

The violations that have occurred in Afghanistan have been so extensive and widespread that prosecution of every perpetrator may be impossible and destabilizing. International practice suggests that in such a situation, representative prosecution of those most culpable may satisfy international obligations. For example, the tribunals established in Rwanda delineated four levels of culpability: (1) the planners and leaders of the genocide, those in positions of authority who fostered these crimes, and particularly notorious killers and sexual torturers; (2) others who killed; (3) those who committed crimes other than rape or murder against persons; and (4) those who committed offenses against property. All suspects who fell into the first category should find themselves subject to full prosecution and punishment. If those in the second and third categories, who are likely to make up the vast majority, fully confess to their crimes and provide information on accomplices or co-conspirators, they will in turn receive an expedited process and reduced penalty. Finally, fourth category suspects will not face criminal prosecution.

#### Non-criminal Sanctions

Non-criminal sanctions can also serve an important and necessary function. Such sanctions may prevent guilty parties from assuming public office. It is difficult to imagine how a new Afghan government can win the confidence of the millions of refugees and internally displaced people who will return to Afghanistan to find the individuals responsible for the atrocities committed against them in renewed positions of authority. An example of the use of non-criminal sanctions can be found in the Dayton Peace Accords, which brought an end to the fighting in Bosnia by requiring "the prosecution, dismissal or transfer, as appropriate, of persons in military, paramilitary, and police forces and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."

#### Truth Commissions

Truth commissions, often mandated to create an official history of past human rights abuses, can also be charged with proposing specific steps to deal with past abuses and to prevent their repetition. Truth commissions are often based

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**The kind of violence and persecution that occurred in Afghanistan makes granting blanket immunity to perpetrators of abuses inconsistent with international law standards.**

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## Conclusion

Despite numerous setbacks and uneven results in the attempts of African nations to establish human rights institutions, there have been some positive developments, particularly within the last decade. Clearly, the increasing international commitment to the establishment of national human rights bodies has raised the profile of human rights issues within Africa, and has tied international legitimacy to the continent's efforts to improve human rights protection.

On the other hand, the international community's involvement in the establishment of these commissions has not always been an effective way of promoting or protecting human rights. The advice and funding given is often generic and not tailored to a country's particular needs. Further, there tends to be little coordination between the various funding sources. As in Sierra Leone, this lack of coordination often results in development and support for only one successful project at a time, but no effective overall strategy.

The international community's indiscriminate support for all human rights commissions, regardless of their effective-

ness, might suggest support for commissions that blatantly fail to expose or protect against human rights abuses. As Afronet Online, an African NGO based in Zambia, remarked, "... [i]t would seem that pronouncements made loudly at appropriate fora, coupled with structures put in place by African governments, are part of the grand deception of their people (and the international community) to give an impression of the improving human rights record in their respective countries." Clearly, the international community does not want to be seen as supporting attempts to overlook or conceal human rights abuses.

International donors and institutions must consider what is needed to help countries develop institutions for the promotion and protection of human rights. There is a need for greater analysis of how international funding is being distributed, as well as the need for a more result-oriented process for supporting effective national human rights bodies. 🌐

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on mandates to study the broader context in which the abuses occur and the structural elements of the government, security forces, and society that make patterns of violations possible. Analysis and reporting that could guide government policy would be particularly relevant regarding the violations against women's rights.

A truth and reconciliation commission can serve an important and necessary function in the nation building process, particularly when there has been a stream of human rights violations inflicted upon the population, as in Afghanistan. This function is not a substitute for criminal prosecution. In fact, a commission of inquiry into human rights has worked well when implemented in tandem with criminal proceedings by collecting testimony and documenting abuses later used in criminal prosecution cases.

## Jirga

The traditional process by which Afghans have solved issues ranging from local disputes to those of national importance has been through the *Jirga* (Assembly). Representatives of tribes and communities gather to decide questions that affect their families, villages, tribes, region, and nation. Groundwork for a *Jirga* to address war crimes can be modeled after the arrangement made by the Bonn Agreement for the convening of a *Loya Jirga* (Grand Assembly). An independent commission of twenty-one constitutional and customary law experts has been charged with convening an assembly for the purpose of selecting a transitional government. Similarly, a commission of international and customary law experts can be established to lay the framework for accountability. Because representatives to the *Jirga* have traditionally been male tribal elders, special attention will have to be paid to the representation of women. One option would be to establish a sub-commission to address the violence and abuses faced by women and girls.

Many advantages will result from domestic prosecution of war crimes in an indigenous Afghan mechanism familiar to the population. There will also be great need, however, for

outside support to ensure compliance with international law standards. Because Afghanistan's infrastructure has been destroyed and its human and material resources depleted, serious challenges exist for an exclusively domestic response. Significantly, Annex II, point 6 of the Bonn Agreement retains the right of the UN to investigate human rights violations and recommend corrective measures. The international community, particularly those non-governmental organizations that have been monitoring and documenting the situation in Afghanistan, can play an essential role as advisors, experts, and investigators.

## Conclusion

It is indisputable that Afghanistan must address severe violations of humanitarian and human rights law. Such a course of action must be taken immediately, as the threat of war criminals entering the transitional government and potentially destabilizing Afghanistan once again looms.

Each of the mechanisms discussed has an important role to play in the effort to hold violators of humanitarian and human rights law accountable while rebuilding Afghanistan. Shared domestic and international cooperation is necessary to criminally prosecute those responsible for the most egregious violations, such as massacres. Non-criminal sanctions can be employed to ensure that those culpable—even if not prosecuted criminally—do not assume positions of authority. A truth commission has the advantage of beginning promptly and moving the country toward reconciliation, as well as compiling a historical record to prevent the past from repeating itself. Ethnic minorities and women must receive adequate representation and attention in these proceedings, as they have faced some of the most systematic and widespread violence. Although challenges exist to attaining accountability, Afghanistan's compliance with international and customary law standards and its realization of sustainable peace and reconstruction requires the new government to meet the challenge.

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