



Armanshahr/OPEN ASIA

How and why truth and justice have been kept off the agenda

A review on transitional justice in Afghanistan

Prepared by: David Knaute

**“However tall a mountain, there is a route to its peak”
Afghan proverb**

November 2015

**How and why truth and justice have been kept off the agenda
A literature review on transitional justice in Afghanistan**

Prepared by: David Knaute

Cover design & layout: Rooholamin Amini

Publisher: Armanshahr

First edition: 2016

Print-run: 1,000 copies

All rights reserved for the publisher.

This publication was made possible by the generous support of the American people through the United States Agency for International Development (USAID) under the terms of its Associate Cooperative Agreement Number 306-A-14-00001 (Afghan Civic Engagement Program) implemented by Counterpart International and its partners. The contents and opinions expressed herein are not the responsibility of Counterpart International and do not necessarily reflect the views of USAID.





Contents

EXECUTIVE SUMMARY.....	5
INTRODUCTION	8
Background	8
What is transitional justice?	8
A brief history of transitional justice	8
Approach to transitional justice	9
Transitional justice in conflict settings.....	11
THE CONTEXT OF TRANSITIONAL JUSTICE IN AFGHANISTAN	13
The Afghan conflict.....	13
The Afghan society	16
Challenges to transitional justice.....	17
ACHIEVEMENTS AND OPPORTUNITIES.....	22
The pillars of transitional justice	22
The recognition of victims’ suffering	22
Ending impunity	28
Institutional reform	38
Thematic issues	44
The role of civil society	44
Women and children	47
Social and economic rights.....	52
CONCLUSION	54
BIBLIOGRAPHY.....	56



EXECUTIVE SUMMARY

The 2014 election of Ashraf Ghani – who succeeded Hamid Karzai as president of Afghanistan – followed by the withdrawal of international troops in December 2014, marked a turning point in the Afghan conflict. Close to one year later, what was predicted is happening: the Taliban are gaining more ground and it has become apparent that Afghan security forces do not have the capacity to stop them. It also confirms that the period from 2001 (or the fall of the Taliban) to 2014 did not represent a pause in the conflict, but rather a specific phase of it. In the midst of war, however, many observers believed in peace. New institutions were in place, women recovered their rights, refugees came back home, Afghanistan was on the path to development. There were even talks of national reconciliation. But at the same time, armed violence prevailed, civilians were killed, criminality and corruption were rampant. What was the missing link?

This report argues that keeping transitional justice off the agenda has been a serious mistake in post-2001 Afghanistan. While restoring victims' dignity, ending impunity and reforming institutions - the three pillars of transitional justice - are challenging objectives in a conflict or post-conflict environment, in the case of Afghanistan some opportunities have been missed. The situation in 2002 was certainly not as bad as what it became later. There was some political good will and though a bit late, an *Action Plan for Peace, Reconciliation and Justice in Afghanistan*, proposed by the Afghanistan Independent Human Rights Commission (AIHRC), set an excellent roadmap in 2005. But soon after, there was some turn-over that culminated in 2007 with the adoption of a bill that is widely considered as an amnesty law, precisely at a time when the option of bringing to justice the perpetrators of past crimes was gaining ground into media and public opinion. In the aftermath, and as the Afghan government became uneasy about the resurgence of Taliban insurgency, the meaning of the word reconciliation changed from one that refers to dealing with past crimes, to one that refers to a dubious attempt to settle on-going unrest. The AIHRC was progressively marginalized and its Action Plan abandoned in 2009, when it had not even started being

implemented. Besides, national and international stakeholders didn't understand the complementary goal of transitional justice, which is to provide guarantees of non-recurrence and restore trust. Without these elements, it has been – and will remain - impossible to break the cycle of violence in Afghanistan. If one may wonder, in a situation of continuing conflict, whether transitional justice impedes a peace process and what determines whether a nation is ready to confront its violent past, the argument that accountability may undermine stability is often exaggerated to suit political ends. This has so far been the case in Afghanistan. Indeed, political reconciliation without truth-seeking and justice only rehabilitates those responsible for grave human rights violations; it doesn't lead to peace. This is worth saying that transitional justice is not a soft form of justice but a comprehensive approach to justice, which maintains criminal prosecution at its core. However, there has been no progress in this field in Afghanistan. In such a context, some argue that the assertion of the International Criminal Court's jurisdiction over the most serious crimes committed since 1 May 2003 may be both timely and useful, and would contribute to deterring any further crime from being perpetrated and going unpunished in Afghanistan. But there are several reasons why Afghan civil society should not be over-enthusiastic about what to expect from this, in particular in the absence of an international enforcement capacity to make arrests. Another challenge, which this report highlights, is the level of impunity that persists in Afghanistan. This involves threats, attacks and other harmful actions against those who appear too vocal on transitional justice matters.

Fortunately, it is never too late to implement measures of transitional justice, and never a bad timing as various strategies suit different contexts. As a matter of fact, there are real possibilities, even in the Afghanistan of today. To begin with, stakeholders must build on the fragmented but numerous initiatives undertaken so far. There has in particular been much though incomplete documentation, mass graves (key in the context of Afghanistan) were located, list of victims of enforced disappearance were established, memorials were built, groups of victims and victims' families meet, vetting processes failed but only after having proved popular, security forces have been reformed, the media has partially played its role, civil society organizations have been very active though sporadically. The revival of the Afghan Transitional Justice Coordination Group, created in 2009, is one of the opportunities not to be missed. Secondly, stakeholders must make use of the new political environment, which may be more conducive than the previous one. The Karzai government had become obsessed with political reconciliation with the Taliban and could only see one facet of peace-making in Afghanistan. This may be different with the government now in place. At an international level, the international community's failed engagement in the Afghan conflict is at this point widely acknowledged. So many donors and partners may be ready to reconsider their approach to transitional justice, at least if they are convinced that it can contribute to protecting public institutions and prevent the Taliban from coming back to power. There is also growing international evidence about the benefits of

measures of transitional justice, as manifested by the recent establishment of a mandate of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence by the United Nations. One should not forget that transitional justice as we know it today only emerged in the early 1990s, meaning that there are now many more successfully tested strategies and existing jurisprudence, which the proponents of transitional justice may use, than back in 2001. Plans for transitional justice in Afghanistan should have a strong gender bias, as women have uninterruptedly been disproportionately affected throughout the different phases of conflict. Transitional justice can contribute to empowering women and reducing their vulnerability to future or ongoing violence, but also to preventing the reproduction of unequal gender relations, which result from the complex web of conflict, religion, custom and poverty prevailing in Afghanistan. Afghan children should also not be kept on the margins of existing processes, especially that they are among the most affected by ongoing violence. Education is the best channel to avoid that Afghan parents continue to pass on their own histories and hatreds as a poisoned gift to their children. Finally, social and economic rights should be considered given the obvious connections between the lack of development and conflict dynamics in Afghanistan.

The report concludes that continued failure to address issues of impunity and implement a comprehensive process of transitional justice has actually shaped how Afghanistan looks today. Although the way is still long to fulfill the great promises of transitional justice – i.e. restoring peace but also a sense of truth, justice and dignity for the victims – all remain a constant demand of the Afghan people, as memories of past crimes and abuses remain raw in their hearts. The Ghani government should therefore propose and implement a solid framework for the establishment of transitional justice mechanisms, in collaboration with the AIHRC, Afghan civil society, human rights organisations and groups of victims. This should be complemented by a strong support from the international community, which should place transitional justice at the core of its interventions in Afghanistan.

INTRODUCTION

Background

1. 28 September 2015. The symbolic seizure of Kunduz by the Taliban in Northern Afghanistan surprised many observers; after weeks of fighting and the tragic loss of civilian lives, the Taliban withdrew. For sure, these events were a strong reminder that the Afghan conflict has not ended with the fall of the Taliban regime in 2001, far from it. A situation that explains to a great extent why the Afghan people are now extenuated and yearn for security and peace. But what is needed for this to happen? Proponents of transitional justice – or justice in countries in transition to “peace” or “democracy” – argue that there can be no peace without justice. The problem is that transitional justice is off the agenda in Afghanistan. This report, which includes some theory and a comprehensive literature review on transitional justice in Afghanistan, aims to present an overview of challenges and opportunities, which Afghan people and the international may take into account or make use of, in order to restore the great promises of transitional justice, i.e. peace but also a sense of truth, justice and dignity for the victims.

What is transitional justice?

A brief history of transitional justice

2. Most measures associated with transitional justice are nothing new but where to start a history of this field is no easy question. One thinks of the Allies’ precedent-setting trials of Nazi war criminals at Nuremberg, the post-junta human rights policies in Argentina in 1983, or truth and reconciliation efforts in South Africa from 1994. The term actually began to emerge from the late-1980s to the mid-1990s as a device to signal a new sort of human rights activity and a response to concrete political dilemmas human rights activists faced in what they understood to be “transitional” contexts; the ending of repressive regimes in Latin America forcing a shift in strategy and thinking. The transmission and acceptance of the phrase was most

significantly aided in the mid-1990s by the publication of a four-volume compendium entitled *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* in 1995. Importantly, the structure of the volumes suggests that transitional justice was a fully formed and rather well-understood set of practices by 1994 - so much so, that one could compile a "neat list of transitional justice measures that might arise in undertaking them, including commissions of inquiry, prosecutions, lustration or purges, and restitution or reparations programs".¹

3. The United Nations historical document *The Agenda for Peace* set the foundation for comprehensive peace building processes that move beyond managing conflicts with peace keeping. Beginning with resolution 1040 (1996), in respect of the situation in Burundi, and in numerous resolutions since then concerning countries undergoing transitional processes, the Security Council has called for the restoration and maintenance of the rule of law and established peacekeeping mandates with rule of law components that include the implementation of transitional justice measures. The 1997 publication of a UN-commissioned report on combating impunity known as the "Joinet Principles",² which advocated for the rights to know, to justice, and to reparations, was also a signal event in this regard.

4. In the meantime, the field of transitional justice has evolved and been adapted to various contexts. Initially applied to situations of transition from authoritarian rule to democracy in Latin America, Eastern Europe, and South Africa, it has been progressively applied in contexts where the transition was of a different nature, mainly post-conflict situations (such as in Sierra Leone, Timor Leste, Liberia, or Nepal) and, more recently, in ongoing conflicts (such as in Colombia, Afghanistan, and the DRC). There have been approximately 40 truth commissions to date. Their common objectives include accountability, official acknowledgement for crimes of the past and for victims' experiences of these crimes, establishing an inclusive history and citizenship, identifying victims for reparations, making a moral/symbolic break with the past, contributing to the development of a culture of respect for the rule of law and human rights, making recommendations for institutional reforms, and serving as a platform for nation-building and reconciliation.³

Approach to transitional justice

5. Transitional justice has been the focus of growing attention in recent years, including through the work of international and hybrid criminal jurisdictions, truth commissions, national courts and local reconciliation efforts, which all enabled individuals, communities and nations to respond to the atrocities and abuse arising from war. Nevertheless, there is no single theory of transitional justice, nor does the term have a fixed meaning.

1. Doc 7

2 See : http://www.dealingwiththepast.ch/fileadmin/user_upload/2013_Course/Readings_2013/1_Joinet-Question_of_the_impunity_of_perpetrators_of_HR_Violations.pdf

3. Doc 1

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, whose mandate was established in 2011 by the United Nations to cover the field of transitional justice, defines it as a “set of processes with four inter-linked aims: recognizing the suffering of victims through documentation, truth-seeking and symbolic measures; holding perpetrators accountable and ending impunity through retributive and restorative justice methods (these can include prosecutions and reparations); laying the ground for institutional reform through disarmament, security sector reform and vetting; and reconciling through all the above and additional measures”.¹ In a 2004 report by the UN Secretary General, transitional justice is defined as comprising the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.² Other definitions add more elements – such as the contribution of transitional justice to social reconstruction - but eventually cut across the above ones. Comprehensive national consultations, particularly with those affected by human rights violations, have been recognized as a critical element of transitional justice, while commissions of inquiry are seen as possible important precursors to transitional justice mechanisms.

6. The term ‘transitional justice’ does not refer to a special kind of justice, and even less a form of soft justice, but to a strategy for the achievement of a “legally grounded understanding of justice”,³ that is the realization of the rights to justice, truth, reparations and guarantees of non-recurrence in the aftermath of gross violations of human rights and serious violations of international humanitarian law. These measures work best when designed and implemented in relation to one another. It is also usually a matter not of choosing between measures but of appropriate sequencing. Besides, transitional processes are dynamic, meaning that besides allowing for suitability to context, the design of the policies to implement transitional justice elements should take into account fittingness to a certain stage in a process. Thus, what is necessary and feasible for prevention, changes over time, not only as institutional characteristics change, but also as the horizon of possibilities shifts.⁴

7. Transitional justice measures, for example truth-seeking initiatives, can be used preventively to identify and respond to risk factors for violence and human rights violations; and they can also contribute to restoring trust. Trust, which is often lacking in post-authoritarian and/or post-conflict settings, is the foundation for the development of a rule of law culture, an environment that fosters reconciliation and a necessary precondition for effective communication between the victims and the authorities, as well as within society. Finally, transitional justice measures contribute to the

1. Doc 3

2. S/2004/616, para. 8.

3. Doc 12

4. Ibid.

promotion of a transformative form of justice, by seeking to address not just the consequences of violations committed during conflict but the social relationships that enabled these violations in the first place. In other words, transitional justice has moved the purpose of justice from being *principle- or duty-based* to being *results-based*.¹

Transitional justice in conflict settings

8. The key argument of those who do not support transitional justice in general, is that it cannot be implemented in contexts where peace has not been fully restored. From this viewpoint, in order to move forward with transitional justice, violence has to end and the causes of instability and insecurity be addressed as a priority. While there is no firm evidence about this, it is true that transitional justice initiatives have not taken into account or much analyzed the significant differences between the post-authoritarian contexts, where the model of transitional justice originally took shape and the situations of post-conflict and fragility in which it is now predominantly implemented. Empirical evidence from numerous post-conflict transitions also provides no clear answers about the relationship between truth-telling, accountability and reconciliation and a nation's prospects for avoiding renewed conflict, and there are few examples of instances in which victims got justice when the guilty were still in power, and that impunity was as firmly entrenched as ever.

9. The transition paradigm has also regularly been perceived as too tainted by a specific political project (democratization), implying that the term "transitional justice" should be abandoned, and replaced with something along the lines of "mass atrocity" justice.² The attempt to shift meaning in this way could make sense given the immense expansion of international principles and law on these issues since the late 1980s, and the emergence of an "anti-impunity" movement, which, though related to transitional justice, has a different history and conceptual background. Some also argue that transitional justice has become one among many interchangeable policy tools used to manage conflict, alongside negotiations, economic sanctions, and military force. If justice cannot bring peace and reduce violence as effectively as these other instruments, then logically it follows that it should be replaced by these other tools. According to the same sceptics, the assumption that justice can be pursued neutrally during conflict is inconsistent with the claim that justice can independently affect the prospects for peace by marginalizing some actors and empowering others. They add that the potential of a backlash against international justice may be great if evidence emerges that it undermines humanitarian efforts, inhibit peace talks, and impede successful implementation of peace accords.³

10. On the other side of the spectrum, proponents of transitional justice

1. Doc 9

2. Doc 7

3. Doc 9

ask a legitimate question: what actually determines whether a nation is ready to confront its violent past and, in a situation of continuing conflict, whether transitional justice impedes a peace process? If the argument that accountability may undermine stability is common in post-conflict situations, the risks of pursuing accountability are often exaggerated to suit political ends; experience in post-conflict countries has actually proven that (political) reconciliation without truth-seeking and justice only rehabilitate those responsible for grave human rights violations. In other words, violence would have to be confronted and addressed in order to break the cycle of conflict. Given that political will and leadership are scarce in peace-building contexts, it is then certainly more of a challenge to support justice initiatives than security and development initiatives, but new models in the implementation of transitional justice at the time of war are needed.

THE CONTEXT OF TRANSITIONAL JUSTICE IN AFGHANISTAN

The Afghan conflict

11. The Afghan people have experienced several decades of war, which have been marked by successive but uninterrupted phases of conflict since 1978. This constitutes the frame and scope of transitional justice in Afghanistan. This is reinforced by the fact that more than 70% of the Afghan population was actually born after 1978, meaning that they have only known a war-torn country. One has to bear in mind, though, that Afghanistan was by 1978 already shaped by a long history of conflict. Besides, many of the patterns of human rights violations established in different phases of the war keep occurring. An illustration is that many Afghans continue to use the acronym for the National Directorate of Security's predecessor, the KHAD, to refer to the new intelligence agency, which speaks volumes about perceptions that it is no break with the past.¹ Most importantly, the scale of violations has been and remains massive. Back in October 2002, then Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Asma Jahangir, who carried out a mission to Afghanistan, already called for a commission of inquiry 'to undertake an initial mapping-out and stocktaking of grave human rights violations of the past, which could well constitute a catalogue of crimes against humanity'.²

12. All parties through the various phases of the war have committed war crimes and egregious human rights violations. However, the first phase from the coup of April 1978 to December 1979 is the most poorly documented. In his 1986 report, UN Special Rapporteur Felix Ermacora detailed the information he had received on disappearances. In the view of the witness, well over 27,000 persons would have been registered missing if the registration procedure had not been stopped when it was discovered that the number of missing persons was much higher than foreseen.³ During

1. Doc 3

2. Ibid.

3. Ibid.

the Soviet invasion of Afghanistan from 1979 to 1988, Soviet officials and the Soviet-backed Afghan government routinely imprisoned people for political reasons, while enforced disappearance, torture, and summary executions were systematic practices. Afghanistan's intelligentsia and professional class were destroyed through imprisonment, execution or exile. Women were targeted for abduction, rape and other sexual violations, either randomly or during torture; they were often attacked and killed with their children because the men in many communities had to abandon their homes either to fight or avoid capture and execution. Villages and roads, once razed, were scattered with mines. Between one to two million Afghans died and another five to six million were displaced.¹

13. Among the most serious violations of international humanitarian law in the entire war, one may list the following: the bombardment of Kabul during the factional conflict from 1992 to 1996, during which at least 50,000 people are believed to have died as a result of rocketing and shelling while mass rape emerged as a tactic used by some factions;² the massacre of Mazar-e Sharif in August 1998, in which over 2,000 civilians, most of them Hazara, were summarily executed by the Taliban; at one site, known as the 'nine wells' site, at least several hundred prisoners had been forced down the wells, where they died from suffocation or as a result of wounds suffered when grenades were thrown into the wells; abuses against civilians and other non-combatants by the Northern Alliance factions, when they reasserted control over parts of northern Afghanistan in the last months of 2001 and first months of 2002: for instance, violent attacks were carried out against Pashtun villagers, where Jombesh, Jamiat-e Islami and Hezb-e Wahdat engaged in beatings, rape and other assaults.³ In some cases, they summarily executed villagers. The death in custody of 2,000 or more Taliban prisoners constitutes one of the most serious war crimes of this phase of the war.

14. The overthrow of the Taliban regime did not end violence; on the contrary, it was the start of a new war with continued patterns of abuse. Actually, how the Taliban regime fell was crucial for setting the stage for the post-2001 order. Indeed, the way the Northern Alliance reassumed power distinguished the 2001 transition from what many have come to expect in a transitional justice process, namely a popularly-backed resistance force bringing down an unpopular regime and then holding it to account for its past crimes.⁴ While its commanders had little power left among them before the Taliban fell, they then became one of the central causes of insecurity in the country by acting with impunity in pursuing their own factional, ethnic and economic interests. The 2002 Emergency Loya Jirga by then US Special Representative Zalmay Khalilzad who sought to 'integrate all the faction leaders into the new political set-up so that they would not disturb it from

1. Doc 29

2. Doc 3

3. Ibid.

4. Ibid.

outside', didn't solve the problem.

15. Continuing attacks by those not party to the transitional agreement - namely the Taliban - has represented the most dangerous threat to the sustainability of the post-2001 peace process. The very measures taken by transitional authorities and their international partners to prevent or quash armed resistance to the new order also became a source of instability. To add to the already tense situation on the ground, US forces, which formed the bulk of the large international presence in Afghanistan, have systemically been accused of various systemic human rights violations. In particular, they have allegedly committed human rights violations, such as arbitrary detentions, torture and humiliation, to fight the insurgency. Militias and some units of the new US-backed Afghan Local Police have also committed serious human rights abuses, including killings, rape, arbitrary detention, abductions, forcible land grabs and illegal raids.¹ In most cases, no action has been taken against those responsible, often because the militia commanders are connected to powerful strongmen or local officials.

16. As a consequence, the combined efforts by national and international actors have had little impact in the transformation of the conflict with support for the Taliban increasingly visible at the local level, even more since 2015 following the withdrawal of the great majority of international troops. Meanwhile, progress in economic development and social welfare in the country has remained meager and has not met the high expectations raised by the injection of billions of US dollars into the Afghan economy since 2001 by the international community. Major challenges have remained inadequately addressed, especially in building democracy and the rule of law. The civilian population of Afghanistan has generally remained dissatisfied with the Karzai government. Many have expressed their frustration by providing voluntary support to insurgents as a way to demonstrate their opposition. Furthermore, economic deprivation, lack of employment opportunities as well as harsh living conditions particularly in rural areas have led many youths to join various insurgent groups. Millions have lived part of their lives as refugees in Pakistan and Iran, and hundreds of thousands are still internally displaced. Many remain in exile as a result of the uncertainties that persist in Afghanistan, and the most recent years, thousands of young Afghans have chosen to migrate abroad because of the prevailing insecurity and the absence of livelihood.² In brief, the Afghan conflict continues and the near future remains grim, in spite of the hopes raised by the election of a new president in the person of Ashraf Ghani in October 2014. The failure to change conflict dynamics is rather significantly illustrated by President Barrack Obama's u-turn decision in October 2015 not to withdraw the 10,000 remaining US troops in Afghanistan throughout most of 2016.

1. Ibid.

2. Doc 27

The Afghan society

17. Afghanistan, especially outside its main urban centers, is an intensely patriarchal society with complex tribal codes and customs circumscribing social interaction, and deeply marking the relationship between women and men. Some argue that these are precisely existing social structures and kinship systems that have made Afghan society highly resilient after decades of war and the absence of a functioning state. Regardless of one's moral attitude in this regard, these are strong forces that are embedded in the Afghan social fabric and not easily severed. While they may have stood in the way of building transparent, accountable institutions, they have served an important function in society.¹

18. Historically, there have been several attempts to modernize Afghan society. The earliest came in the early 20th century during the reign of King Amanullah, who, after Afghanistan's independence in 1919, sought sweeping reforms in constitutional law, trade and education. His equally ambitious efforts to restructure Afghanistan's social relations through legal reform — and more controversially, banning public veiling — were received much less enthusiastically. After Amanullah abdicated in 1929, most of his reforms were abandoned. Several decades later in the 1970s, communist governments put forward similar sweeping reforms, particularly in the area of education, in order to uproot what they considered to be backward traditional and religious norms and practices within Afghan society. The 1978 coup by the People's Democratic Party of Afghanistan (PDPA) carved deep rifts in both rural and urban society. The earliest years of the war decimated the traditional leadership, tribal and religious, and replaced it with the political-military leadership of the *mujahidin*, who initially fought against Soviet and Afghan troops then each other, and militia factions.²

19. The salience of ethnicity or tribal bonds rather than a national identity among warlords is therefore a gradual consequence of wars and external interventions, which politicized identities along ethnic and tribal lines. Typically, groups see their leaders as victors, saviors, martyrs or as those addressing their security and other needs. At the very least, they see them as necessary evils to defend the community against rival warlords.³ Today, Afghanistan's ethnic dimension remains problematic, which seems unacknowledged by international stakeholders. Those grievances and rivalries prevailing during the pre-2001 civil war could easily re-emerge should the reconciliation process be perceived as unfair by one group or another. Less comfortable for observers to acknowledge, perhaps, is that the Taliban's vision for social order is not entirely alien to large segments of Afghan society. Under their rule, many laws, particularly with respect to women, were just an extension of the complex tribal codes and social customs already in effect in the Pashtun south.⁴

1. Doc 8

2. Doc 18

3. Ibid.

4. Doc 29

20. This section's purpose was not to present the Afghan society as a whole, but only one segment of it, i.e. its traditional structures. The reason is that these have historically played an active role in conflict dynamics in Afghanistan. The rapid and more positive social transformations, which have occurred concurrently with the country's opening to a set of economic, technological and cultural changes since 2001, are not depicted here, but under paragraphs 107 and 108.

Challenges to transitional justice

21. In 2001, the Bonn Agreement that put an end to the Taliban regime was not a peace agreement among the parties to the conflict. Its signatories did not include the Taliban and none of its principal signatories, most of whom had committed crimes, had any interest in pressing for justice. The only openings for transitional justice were that the Bonn Agreement avoided an amnesty provision and created a national human rights body, the Afghanistan Independent Human Rights Commission (AIHRC). It also bound the country to international legal obligations on human rights. As early as 2001, the task of transitional justice was led by the President's office working in close cooperation with the AIHRC, the United Nations Assistance Mission in Afghanistan (UNAMA) and the Office of the High Commissioner for Human Rights. The AIHRC was given the mandate of a governmental monitoring body with the role to consult and evaluate the views of the Afghan people on transitional justice. Despite driving its mandate from the Afghan constitution, the AIHRC quickly faced many challenges in receiving government funding relying entirely on international donors.

22. In 2002, the AIHRC began a three-year, countrywide survey of Afghan views on creating truth and accountability for past war crimes. It managed to collect and analyze 4,151 testimonies from 32 Afghan provinces covering the 1978–2001 conflict periods. In addition to individual testimonies from across the country, it also conducted focus groups with over 2,000 participants.¹ The collection of testimonies as a bottom-up approach was remarkable in the light of ongoing violence and security challenges. In its final report *A Call for Justice*, published in 2005, the AIHRC acknowledged the gratitude among ordinary Afghans for being consulted in such a project. The number of people participating in the fact-finding phase actually demonstrated the need among Afghan people to document their narratives and uncover the truth. In the aftermath of the parliamentary elections in 2005, and based on some recommendations from its report, the AIHRC, UNAMA's Human Rights Office, and international donors promoted an *Action Plan for Peace, Reconciliation and Justice in Afghanistan* (the Action Plan) that outlined sequential steps aimed at achieving a measure of accountability through memorialization, appointments vetting, and documentation. Endorsed in December 2006, the Action Plan forced transitional justice onto the political landscape and was included as one of the benchmarks for both the 2006 Afghanistan Compact

1. Doc 25

and the 2008 Afghanistan National Development Strategy.¹ It included five measures in graduated sequence to be completed over three years: (1) according dignity to victims, including through commemoration and building memorials; (2) vetting human rights abusers from positions of power and encouraging institutional reform; (3) truth seeking through documentation and other mechanisms; (4) reconciliation; and (5) establishing a task force to make recommendations for an accountability mechanism. Two features sparked more controversy than the others: the reference in the preamble that under international law, no amnesty could be given for war crimes and action point five that provided for the establishment of a mechanism for criminal accountability. As a result, action point five was watered down and only called for the establishment of a commission that would make recommendations to the president about how to promote accountability.²

23. The Action Plan set an ambitious timeline to achieve the activities outlined, which expired in March 2009. President Karzai subsequently refused a request from the AIHRC and civil society for its extension.³ Most of the recommendations of the Action Plan were therefore never implemented. Another similar discussion flared up during the summer 2012 around the debates about the release of AIHRC's Conflict Mapping Report, which has mapped human rights violations in Afghanistan from 1978-2001, in each province. AIHRC chairperson, Sima Samar, herself consistently argued that the only reason for not releasing the report was the lack of support by President Karzai.⁴ One of the objectives of the Conflict Mapping Report was to create a shared narrative of the war and to make Afghans aware of the commonalities of the war experience they all lived through, on the assumption that meaningful reconciliation could not take place without it. The number of testimonies was a significant achievement, yet there were certain challenges due to the nature of the atrocities committed. First, the AIHRC's decision to set the conflict timeframe as beginning in 1978 and ending in 2001 was (and still is) somewhat controversial as it was not based on national consensus. Second, it led to relativism in the rule of law by providing instant immunity for the US forces in presence since 2001.

24. Although the documentation had lasted for almost four years and in almost all provinces, information from the Conflict Mapping Report was impressively never leaked. Only in July 2012 did a controversial article in *New York Times* explained that the report "details the locations and details of 180 mass graves of civilians or prisoners, many of the sites secret and none of them yet excavated properly. It compiles testimony from survivors and witnesses to the mass interments, and details other war crimes as well", the report was also described as "tallying ... more than a million people killed in the conflict, 1.3 million disabled, although not all of those are

1. Doc 14

2. Doc 3

3. Doc 2

4. Doc 3

necessarily victims of war crimes'.¹ The English version was scheduled for completion in mid-2012 and both the Dari and the Pashto versions for late 2012. In December 2011, however, President Karzai took action against the commissioner overseeing the report, Nader Nadery, who had also been an outspoken critic of electoral fraud in Karzai's bid for reelection in 2009. Karzai did not renew Nadery's term at the AIHRC, leaving the fate of the report unclear.

25. In the early stages of the post-2001 transition, two significant opportunities that may have triggered transitional justice processes - the presidential elections in 2004 and parliamentary elections in 2005 - were lost as meaningful vetting was not carried out. In 2007, as the radical option of bringing to justice the perpetrators of past crime was gaining ground into media and public opinion,² the Parliament passed a bill that is widely considered as an amnesty law offering systematic impunity and putting an end to transitional justice. The 2007 Amnesty Law, which took legal effect when published in Afghanistan's Official Gazette in December 2008, granted "general amnesty" to "all political factions and hostile parties who were involved in one way or another in hostilities before the establishment of the Interim Administration"³ before 2001. This law also extended to those groups who were then fighting with the government, such as the Taliban. General amnesty was granted only once parties adhere to "the Constitution and other enforced laws".⁴ However, the only provision of the bill that makes reference to judicial prosecution of war crimes is the provision that recognizes the individual rights of war victims to seek justice and issue formal complaints against those alleged to have committed war crimes. The scope of the adopted law is vast. Its stated aim is to strengthen 'reconciliation and national stability, ensuring the supreme interests of the country, ending rivalries and building confidence among the belligerent parties'.⁵ However, the method is to provide blanket amnesty for those involved in past and present conflicts in Afghanistan. The law has been further interpreted as not only providing amnesty for crimes that have been committed, but potentially for future crimes.⁶

26. In January 2010, President Karzai unveiled a new "effective, inclusive, transparent and sustainable national Peace and Reintegration Program" at the London Conference.⁷ This program could allow Taliban perpetrators of war crimes back into communities with no attempt to hold them to account and little concern for its impact on respect for the rule of law. President Karzai also appeared increasingly reluctant to address the past, which eventually had him refer to the criticisms about the presence of war criminals in his

1. Ibid.

2. Doc 10

3. Doc 31

4. Ibid.

5. Ibid.

6. Doc 3

7. Doc 2

government as an “outdated issue”.¹ Finally, many other side-factors have undermined developments in the field of transitional justice:

a) Transitional justice has not been properly explained, or understood by key stakeholders, including Parliament. Slightly more than a dozen of Parliamentarians and Senators have voiced concerns over recent developments and taken official stand in favour of a transitional justice agenda. Many Afghans have also remained unaware of the extent of the devastation beyond their own community’s losses; this absence of officially sanctioned truth-seeking, information about war crimes and human rights violations circulates in a twilight zone where everyone thinks they know but no one dares speak about it.² More specifically, many in Afghanistan equate transitional justice only with formal legal accountability i.e. judicial sentencing and prosecution, relegating the element of truth seeking. Transitional justice has also not been articulated as a social and legal process, one which key stakeholders must go through together.

b) Key members of the international community have been silently watching unfolding developments, and remained neutral on issues of accountability and war crimes. A focus on disarmament, electoral vetting and political reconciliation, as well as more broad-based discussions about how to bring peace to Afghanistan, has further undermined progress in the field of transitional justice. Instead of supporting political reconciliation between different factions in order to mitigate conflicts, the transitional Afghan government was led and supported by the international community in strengthening a central government and extending its authority throughout the country. This didn’t help legitimacy and consequently had perverse effects in that this ultimately led to a reduction in state capacity – the opposite of what was supposed to be achieved.³

c) No opportunity has arisen for Afghans to discuss the war in a way not tinged with fear that such discussions would be seen as a challenge to the authority of the warlords.⁴ There has been an active resistance to change by power holders based on their self-interest and also a strong sense of blame and responsibility toward external powers, such as Pakistan, The Soviet Union, USA and Iran. It is likely that the people of Afghanistan consider external military interventions rather than internal groups as accountable for past atrocities which complicates the pursuance of justice.

d) Present and recent past violence and gross human rights violations either by Afghan and international forces or their armed opponents have hampered the emergence of a meaningful and credible transitional justice process that is supported by public trust. The people of Afghanistan cannot be forced to consider atrocities as the past when they continue to live with violence, fear and insecurity. Besides, establishing an inclusive account of the past with the Taliban as the main perpetrator of crimes would also have

1. Ibid.

2. Doc 3

3. Doc 8

4. Doc 18

been viewed as a biased tool of the international community.

27. Reconciliation is often recognized as the “transforming of the behavior and attitudes of former enemies in order to create new relationships based on mutual trust”.¹ This concept is not necessarily a new idea in Afghanistan, where reconciliation has a significant cultural value. But there are two distinct and competing perceptions of national reconciliation in Afghanistan. One is the question of local perceptions of the continuation of atrocities in the light of the ongoing conflict, violence, external military intervention and its impact on civilians. The other is international pressure to promote reconciliation as a component of nation building, which considers the cause of conflicts in the past as internal rather than external interventions. With the spotlight on political reconciliation, less attention has been given to ongoing efforts in dealing with crimes committed throughout the various conflicts in Afghanistan.

28. In sum, a ‘putting peace before justice’ argument has so far prevailed in Afghanistan. It constitutes a gross miscalculation in rendering Afghan society awash in a culture of impunity, which increased the fragility of the legitimacy and credibility of the newly established regime. In this context, it is even not uncommon to hear Afghans today wax nostalgic about Soviet-era reforms, the relative peace under Najibullah or the ‘tough justice’ of the Taliban years.² A hasty reconciliation with the Taliban without due regard to human rights, will be unsustainable and ultimately self-defeating. Such an approach will obliterate truth-seeking efforts and obviate justice, promote continued impunity and lead to further human rights violations. As such, it *cannot* lay the foundations for sustained peace. Finally, such an agenda fails to take into account the cost for the forward-looking populations of Afghanistan, who have repeatedly expressed their support for democratic institutional changes.³

1. Doc 2

2. Doc 3

3. Doc 27

ACHIEVEMENTS AND OPPORTUNITIES

The pillars of transitional justice

The recognition of victims' suffering

Documentation

29. The method to address past wrongs by conducting nationwide consultations to gather testimonies, which was adopted in Afghanistan (see paragraph 22 on AIHRC's report *A Call for Justice*), is somewhat similar to what was undertaken in South Africa. Such a method, which focuses on victims rather than trials and assigning blame, was opportune as it supported a gradual process of documenting the scale of abuses that could have eventually led to a national debate on reconciliation.¹ Afghanistan is still far from bringing alleged perpetrators to trial, but by ensuring that all known relevant information is collected, the evidence would be available for criminal proceedings when the opportunity arises.

30. Proper documentation efforts seemingly only began after the mid-1980s. But many challenges then erupted, which explains that documentation remains thin:

a) Soviet officials may have taken documents with them when all Soviet forces withdrew following the Geneva Accord of 1988. If war had ended with the Soviet withdrawal, it might have been possible in the immediate aftermath to investigate and document the atrocities that took place. But a new phase of conflict immediately began, redefining the battle lines and adding new layers to the catalogue of war crimes, and the possibility of investigating violations during the Soviet and pre-Soviet era receded.

b) Later transitions - such as the collapse of the Najibullah government in 1992 - also failed to provide an opportunity for investigations into past human rights abuses because the conflict was still ongoing. Whatever documents that survived the fighting of this period may have been destroyed,

1. Doc 25

removed or lost when the Taliban came to power.¹

31. Much of existing research focuses on the conflict from 1978 to 2001; less has been done on the post-2001 phase of the conflict. In addition, little effort has been made to link documentation of pre-2001 abuses with post-2001 abuses or to identify patterns of abuse that have continued. Despite greater acceptance of a common version of part of the history of the war - the events between 1978 and 1989 - Afghanistan's various communities and political factions also dispute even portions of that period as they reconstruct events through the lens of their own experience. Only one historical book (*Afghanestan dar masir-i tarikh*) by an Afghan author Ghoobar published in the 1970s is commonly referenced.² As a result, a collective memory is missing and one may wonder whether the Afghan society is ready to revisit its own history before turning to the future. In the absence of a coherent narrative of what happened during the conflict, the past remains a source of hatred and recrimination.

32. Virtually every transitional justice mechanism does rest on a foundation of methodologically sound documentation. In Afghanistan, however, the various methodologies that exist are not uniform. There is also nowhere to keep existing documents and evidence safe. Even more daunting is the absence of the conditions, which are required to report truthfully about crimes committed by people who remain in power and are likely to use that power to prevent such documentation or stop it from seeing the light of day. Afghans who seek to document past crimes face significant risks, including death, serious abuse or torture, kidnapping, and other threats. Few other subjects in Afghanistan are as potentially dangerous.³

33. Apart from AIHRC reports, *Casting Shadows*⁴, a report published in 2005 by the Afghanistan Justice Project - an independent research and advocacy organization established in late 2001, is still the most comprehensive published report of the war crimes of 1978–2002 to date. Other examples of documentation-type activities by Afghan and international civil society organisations include:⁵

a) In 2002, a mapping report of the Office of the High Commissioner for Human Rights, using only previously published reports to catalogue the major patterns of violation during the war, which was eventually not published but did, most likely by accident, find its way onto the UNAMA website from where it was picked up by various human rights organisations. While the report was quickly taken off the UNAMA website, it was be disseminated by others.

b) A series of documentaries about conflict and war crimes by the Institute for War and Peace Reporting including “The Forgotten Victims”, a documentary produced in 2012 and covering the period from just before

1. Doc 3

2. Doc 10

3. Doc 18

4. <http://www.refworld.org/pdfid/46725c962.pdf>

the 1979 Soviet invasion to the Taliban's rule from 1996 to 2001. Because of this wide historical sweep, the film focuses on selected incidents, such as a massacre of civilians in Yakawlang, central Afghanistan, committed by Taliban forces at the beginning of 2001.

c) In 2012, creation of the Afghanistan Forensic Science Organization (AFSO) with the backing of Physicians for Human Rights (PHR). The AFSO is the first non-governmental forensic science organization in Afghanistan, with the mission to document and protect the integrity of six existing mass graves in three ethnically diverse provinces in Afghanistan, as well as to raise awareness about the importance of documenting mass graves in the country at large.

d) In 2013, the release by the Dutch prosecutor's office of a list containing 5,000 names of those killed during the communist regime in Afghanistan, sparked two days of mourning throughout the nation. During the course of a War Crimes investigation concerning Torture and Killings, the International Crimes Unit of the Netherlands National Police obtained Death Lists from Afghanistan, dating from the 1970s. Almost 5000 names are listed in these documents, in which the authorities meticulously recorded the regime's killings. The list, is amongst the many pieces of evidence illustrating the extent of war crimes that have taken place throughout Afghanistan's three decades of conflict.

Several other organisations also work to preserve evidence and record memories about the conflict in innovative ways. The Foundation for Solidarity for Justice/ Feminine Solidarity for Justice Organisation (FSFJ) has documented some victim's stories and UNIFEM has collected women's oral testimonies of war from throughout Afghanistan. Killid produced a book, funded by OSI, called "Crimes of War," which consisted of 25 reports on crimes of war committed by commanders, warlords and foreign troops, Armanshahr Foundation/OPEN ASIA produced a short documentary "Eye (I) Witness" and published several collections of life stories under the series "Let's break the silence" including ["The Past enlightens the Future"](#), ["An account of War Ruins"](#), ["For the record in History: stories of victims of one decade of war"](#) of both victims and expert testimonies of their experience of war¹

34. To raise the standard of information available for transitional justice initiatives and provide greater access to such information, in 2008, the War Crimes Research Office and the Pence Law Library of the American University Washington College of Law together with the United States Institute of Peace (USIP), launched the Afghanistan Documentation Project, a project to build a fully searchable and publicly accessible database of documents regarding the atrocities perpetrated in Afghanistan since the war began in 1978. The archive's holdings include many of the reports by established international human rights organizations, UN human rights reports, and reports by Afghan organizations. The archive also includes

1. Doc 2 and Armanshahr Publications "Let's break the silence": <http://openasia.org/item/category/issues/transitional-justice/victims-narratives/page/3> and the short documentary: "EYE (I) Witness" produced by Armanshahr: https://www.youtube.com/watch?v=CYC9t-E2M7w&list=PL-rkil_vbRLmvxu12KwN8rnM4zdbS7c06

some unpublished testimonies, including those of the Afghanistan Justice Project, which are encrypted and secured but not yet accessible to the public. Through these encrypted testimonies, the database also functions as a secure repository outside Afghanistan for data that may be too sensitive to publish—either in Afghanistan or elsewhere—at present.¹ The Web-based interface means that this information is available for the first time to the Afghan public, which has had little opportunity until now to read about or share its history.²

35. A specific matter is the exhumation of mass graves. This is a capital aspect of documentation as when a mass grave is exhumed, it becomes harder for a government or anyone else to deny or ignore the crimes that have been committed. In Afghanistan, where over 100 mass grave sites allegedly contain many of Afghanistan's estimated 1.5 million dead, the stakes are enormous. But major obstacles need to be overcome before mass graves can even hope to contribute to processes of confronting the past. To begin with, there is neither a formal government policy on mass graves nor government legislation protecting grave sites. On a practical level, there is currently no local capacity to conduct forensic investigations according to accepted international standards. A major challenge in investigating mass graves is once again an environment in which many of those suspected of war crimes continue to dominate government structures.

36. A mass grave at Dasht-i-Leili apparently contains the remains of as many as 2,000 Taliban (Afghan and Pakistani) prisoners, as well as perhaps some al-Qaeda militants, who surrendered to the Northern Alliance and US Special Forces in November 2001 after the fall of Kunduz. Physicians for Human Rights researchers discovered the mass grave in January 2002 and examined the site in May 2002. Subsequently, experts exhumed the remains of fifteen individuals, and conducted autopsies on three of these, determining that the deaths were homicides. A full exhumation was, however, never conducted. In 2008, Physicians for Human Rights discovered excavations that suggested that the grave at Dasht-i-Leili had been tampered with; prompting concerns that evidence had been destroyed.³ After the gravesite was discovered and reports of the killings surfaced in the media, the Bush administration categorically refused to initiate any investigations into what actually happened on the road between Kunduz and Sheberghan and in the Sheberghan desert. In 2009, the Obama administration issued a statement saying that it would order an investigation into the incident. No details of any official investigation have been made public.⁴

1. Doc 18

2. Doc 21

3. Doc 2

4. Doc 3 also see A [2002 documentary](#) named [Afghan Massacre: The Convoy of Death](#) by [Jamie Doran](#), produced testimony from eyewitnesses alleging hundreds or even thousands of prisoners had died, either during transport in containers or being shot and dumped in the Dasht-i-Leili desert after arriving at hopelessly overcrowded Sheberghan prison. https://en.wikipedia.org/wiki/Afghan_Massacre:_The_Convoy_of_Death

The voice of victims

37. All transitional justice measures are designed to provide recognition to victims, not only of their stories and the suffering that they have endured, but also, and crucially, of their status as bearers of rights. They can also be seen as means of promoting trust, both horizontally, between victims and others, and, importantly, vertically, between victims and State institutions.¹ Committing to a rights-based approach to victims is key to restoring the dignity they deserve. Such a commitment requires consulting with victims and providing adequate information to allow them to make informed decisions. This also means including victims and particularly women victims, in discussions and decisions on transitional justice at the local, national, regional and international levels. In Afghanistan, however, the needs of victims have largely been ignored. Worse, in the process of demanding their rights, they have often placed themselves at risk and the weight of ensuring the implementation of justice measures, particularly reparations, has often primarily been on them.

38. The appointment in 2007 of 10 December as a day for commemorating victims of war crimes (coinciding with international Human Rights Day) and, in 2012, 8 September as National Martyrdom Day (coinciding with the day of the death of Ahmad Shah Massoud on 8 September 2001) are the only national level victim-oriented initiatives so far.² However, special initiatives have been undertaken. In 2007, USIP has produced and dubbed into Dari a film on “Confronting the Truth”, which deals with the role of truth commissions. To commemorate 2008 Victim’s Day, UNAMA released a video (“Healing Tears”) that was broadcast by national networks all over the country. The video was geared to helping Afghan people discuss ways of addressing the past. The impact of these efforts is hard to assess. According to a UNAMA human rights officer, some MPs said that their video was able to reopen the debate on the need to address the past. Afghan NGOs also apparently expressed appreciation for the initiative.³ Also on 2008 Victim’s Day, a monument was erected in Dasht-e Shohada just outside Fayzabad city centre in Badakhshan to mark a communist mass grave there. The following year, the AIHRC inaugurated the country’s first war museum in Badakhshan. The museum commemorates the deaths of tens of thousands of people and includes displays of remnants from war-torn pieces of cloth, mangled shoes, handcuffs, prayer beads - and hundreds of photos and names of victims. The land for the museum was donated by the community and victims were involved in the process. Because of threats, the AIHRC was forced to change the name of the museum so that it only refers to the Soviet occupation, the first period of the conflict. The other memorial museum, ‘A Way from Darkness’ (*Rah-i az meyan tariky*), inaugurated in 2010, is located on AIHRC’s premises in Herat and commemorates the victims of the wars. This memorial museum covers the three phases of the

1. Doc 16

2. Doc 3

3. Doc 2

conflict, but with less focus on the *mujahidin* years as Herat was relatively calm. Nevertheless, a Jihad Museum was set up under the auspices of then Governor of Herat Ismail Khan in 2010. An AIHRC Commissioner has been quoted saying there are further plans for memorials in Herat and Kunar.¹

39. Victims' organisations have only emerged over the past few years and remain a weak force. Among other challenges, they lack vocal spokespersons or spontaneously shaped groups of victims, to exercise pressure. Better coordination and collaboration among victims' organisations and victims from across Afghanistan at the national level is also needed. Still, some structures exist. FSFJ is Afghanistan's first victims' network launched in 2006. Currently, it operates only in Kabul, but it aims to take the *shuras* to other provinces and is establishing an office in Herat; an office in Mazar is also planned. The AIHRC (together with UNAMA) has encouraged victims' networks across Afghanistan and has recently supported the creation of victims' groups in Kabul, Bamiyan and Jalalabad, taking the total number to six. The growing membership of the Afghan Victims' Social Association in Yakowlang District, Bamiyan Province, which now numbers close to 100, and the high attendance of workshops organized by the organization, may reflect the popularity of these associations. The Afghanistan Human Rights and Democracy Organisation (AHRDO), established in 2009, works with victims in Kabul, employing arts and culture-based methodologies to deal with the past and explore issues of human rights and transitional justice. AHRDO hopes to strengthen the link between theatre and transitional justice, while simultaneously giving voice to the victims of Afghanistan and exploring grassroots solutions for dealing with Afghanistan's painful present and past. One example of their work was reviving the play *AH-7808* – an Irish theatre play on the legacy of impunity adapted to the Afghan context, with the support of the International Center for Transitional Justice. The play, which first toured the country in 2008, attracted international media attention.²

40. The establishment of a national victims' network culminated with the organization of a Victims' Jirga in May 2010. This unprecedented gathering of over 100 victims from all periods of the conflict and from all regions of Afghanistan took place in May 2010, one month before the Peace Jirga. This was the first time individuals who identified themselves as victims of war crimes came together nationally. It was also the first time victims articulated a common position expressed in a final statement and to the media.³ Other gatherings of victims such as those of the Afshar battle are largely privatized and remain limited to the circle of relatives and those who share a hometown.⁴ Some NGOs and umbrella platforms such as the Transitional Justice Coordination Group, Armanshahr, Afghanistan Human Rights and Democracy Organization, PHR, FSFJ, ACSF, CSHRN, Afghanistan NGOs

1. Ibid.

2. Ibid.

3. Doc 3

4. Doc 11

Coordination Bureau, FCSF, CSDC, CCA, AWN, HRF have organized press conferences on victims' rights and victims' weeks throughout the country, with an unexpected media coverage and participation from parliamentarians and other relevant stakeholders.¹

41. Afghan media has been largely quiet on issues of transitional justice, and its capacity to research, understand and inform the public about the nation's experiences during wartime remains limited. However, victims have found channels for their suffering in some media. FSFJ has produced a series of stories of the victims of conflict in an Afghan newspaper. These stories were also broadcast by a radio station in Kunduz and Takhar during 2007-2008. The Afghanistan National Participation Association, with AIHRC assistance, produces three radio packages per week exploring victims' stories and the meaning and experience of transitional justice in other countries. These are then disseminated to over 40 local FM radio stations. The Killid Group regularly covered human rights violations and war crimes in its magazine. In early 2009, Killid Radio held roundtable discussions addressing the crimes of war and transitional justice.² Personal accounts of the war have been aired by Ariana Television on program called 'Qessa-ha-e Jand' ('War Stories') featuring personal accounts of the war and by *Hasht-e Sobh*, an Afghan daily, that has published victims' stories on a daily basis. Shamshad Television aired a program originally called 'Gran tsook Dey' (Who Is Responsible?) and that featured stories of women as victims and survivors of the war. Other media outlets, including Killid Media Group and Saba Television have also produced programs with a focus on transitional justice issues. Most of these programs have nevertheless ended due to funding constraints.³

42. The following points also need to be taken into account when it comes to recognizing victims in the context of Afghanistan:

a) If memorialization is not treated with great care, it can increase resentment over the disproportionate representation of one group over others and can be used as a divisive political tool. For instance: if a monument highlights communist-era atrocities, Taliban victims may take offence; if it hails the *mujahidin*, victimized ethnic minorities may protest.

b) More attention should be given to historical views within Islam of victim recognition and accountability and reparation towards victims by inviting into the debate moderate and liberal clergy.

43. In sum, it clearly appears that much is yet to be done to respond to Afghan victims' constant demand for truth and recognition, as memories of past crimes and abuses remain raw in their hearts.

Ending impunity

Prosecution and reparations

44. No one, regardless of rank or status, is above the law. Based on

1. Doc 34

2. Doc 2

3. Doc 3

this essential judgment, criminal prosecutions, in many ways, are the most developed element of the field of transitional justice; their absence from a transitional justice framework can cause much damage. This is true even of the well-known South African experience, where the absence of prosecutions cast a shadow over the entire transitional justice framework.¹ However, in Afghanistan no step has been taken in this regard, especially that in the absence of complaint by a victim, Afghan authorities are prohibited from prosecuting accused war criminals on their own. So far, in a step taken completely outside the discussions of transitional justice, the Afghan government only initiated proceedings against one senior government official, Assadullah Sarwary, in late 2005. Sarwary - former director of the intelligence agency, AGSA or the Department for Safeguarding the Interests of Afghanistan, which operated under President Taraki from 1978 to 1979 – remains in prison.²

45. Paragraphs 46 to 51 provide some essential theory³ on the issue of prosecution, in order to help the Afghan civil society and government take informed decisions on this matter:

46. Despite national and international obligations, countries in transition have been shown to be greatly tempted by amnesties, including blanket amnesties that shield perpetrators of even the worst violations from their legal responsibility. Reasons for the tendency to opt against accountability are complex and manifold: one of them is the perception that prosecutions may threaten incipient, transitional institutions and that, in any case, results are too difficult to attain. Adopting a prosecutorial strategy is required to make progress. A prosecutorial strategy is part of a system of laws, political measures and funding priorities, involving the adoption of concrete courses of action. At the broadest general level, it consists of a framework for giving direction to investigations, concentrating prosecutorial efforts and guiding the deployment of necessary resources. It is a “focalizing” tool. The articulation and adoption of a strategy must not constitute a straightjacket. No strategic plan can eliminate all contingencies. Judicial processes are dynamic and the horizon of prosecutorial possibilities shifts at different stages of a transitional process, and thus, there is no single strategy likely to be good at all times.

47. In the context of transitional justice, not adopting a prioritization strategy may be particularly detrimental. The main risks include: (a) institutions severely weakened by repression and/or conflict, with low levels of credibility, capacity and resources, may end up dispersing and duplicating investigations and multiplying caseloads; b) acting on the implicit promise of addressing cases in the order received may lead to large numbers of poor investigations, weak indictments and, as a result, acquittals and/or low sentences not in line with underlying evidence, further eroding the trustworthiness of the judicial system; (c) individuals bearing the greatest

1. Doc 12

2. Doc 3

3. Based on doc 12.

responsibility may end up being the major beneficiaries of the resulting de facto limited criminal liability, while low-level perpetrators are the focus of whatever investigations are launched; (d) failing to address cases taking into account the pattern and systemic nature of the violations results in victims testifying in several cases in a unorganized manner, leading to their possible re-traumatizing, re-victimization and even security risks; (e) specific crimes requiring specialized prosecutorial and investigatory efforts, including sexually-related crimes and the recruitment and use of children in hostilities, are frequently not sufficiently brought to justice; (f) the case-by-case approach renders it difficult to establish links between the different cases, identify patterns of violations and ascertain chains of command, all of which are essential precisely wherever violations are not isolated occurrences but the result of systems of crime. This approach, therefore, is not an effective means for disabling the structures that enabled the violations to occur in the first place, one of the most urgent aims of a transitional prosecutorial strategy.

48. Among the main advantages of adopting a prosecutorial strategy are the following: (a) enhancing the performance of criminal institutions through a more deliberate allocation of scarce resources, which in turn enables institutional strengthening, resulting in increased confidence in institutions that demonstrate positive outcomes, leading, in turn, to increased resources; (b) making available a tool to explain to the public and victims, in an accessible and transparent manner, why some cases will have to be processed before others, helping to minimize otherwise frequently defeated expectations; (c) helping shield prosecutorial decisions from undue influence; (d) providing a tool for more accurate evaluation of the work of criminal law actors. A defensible prosecutorial strategy cannot close itself off from the possibility of pursuing cases on any side of a conflict, even with the rationale that the violations of one party are less serious than those of others.

49. The use of inadequate or unjustified criteria in the distribution of prosecutorial resources can result in new or renewed ways of discrimination and rights violations. For instance, focusing only on readiness to proceed has obvious drawbacks. But there are other criteria to be commented:

a) *Set of cases*: there is much to commend in the idea of prosecutors having a sense of the potential impact of prosecuting a particular case or the make-up of a whole set of cases. However, the eventual impact is heavily contingent on, among other things, how the particular case is in fact decided, and on the jurisprudential fate of that decision.

b) *Most serious violations*: prioritizing the most serious violations presents the clear advantage of acknowledging the gravity of the most outrageous crimes, distinguishing them from lesser ones. The term “most serious crimes” is however not unproblematic as the strategy’s organizing criterions as it remains under-conceptualized and underspecified.

c) *Most responsible perpetrators*: a prioritization strategy can focus on pursuing those who were most responsible for serious violations. Prioritizing the most responsible sends the key message that the greatest responsibility does not necessarily require direct involvement in a criminal act.

d) *Structure crimes*: a criticism that may be leveled against all the above-argued elements is their insufficient attention to the contribution that all transitional justice measures should disable the structures that made the initial violations possible. International crimes, notably crimes against humanity, genocide and war crimes, are not the crimes of lone individuals, but require networks in which the individual authors of those acts are embedded. Thus, a strategy for prosecution should be particularly concerned with the systemic or structural dimensions of massive violations. The challenge here is not only to establish individual criminal accountability for isolated violations, but to zero in on the structures or networks that enabled the various actors to jointly make the horrific violations happen.

50. There are several reasons to celebrate an emphasis on victim participation in criminal procedures. They include: (a) victim participation implies the recognition of victims as rights holders, which is tremendously empowering for them and others in the experience of being afforded the respect of formal State institutions. This contributes to victims gaining a space in the public sphere; (b) such participation both manifests and strengthens the right to truth; (c) formalizing methods of victim participation represents an acknowledgement that victims have played a crucial role not only in initiating procedures, but in collecting, sharing and preserving evidence; (d) victim participation increases the likelihood that the needs of victims will be taken seriously in processes that have had a long tradition of treating them solely as sources of information, as “mere” witnesses; (e) allowing for the participation of victims in criminal procedures increases the likelihood that those procedures can be integrated better into other transitional justice processes, including truth-seeking and reparations; (f) the sense of empowerment that victims derive from participating in criminal procedures can catalyze demands for justice which, in turn, may have beneficial non-recurrence effects. The effective participation of victims in the articulation of prosecutorial strategies depends, as does their participation at all stages in the criminal justice process, on the ability to guarantee their safety.

51. Last but not least, an effective prioritization strategy requires capacities that most countries in a transitional setting are unlikely to have and there is no legal mechanism that can completely neutralize unequal power relations or that can make up for the lack of so-called “political will”. Prosecutors must ensure that criminal justice does not become an instance of mere “turn-taking”. Prosecutorial investigations must follow credible indicia and abide by due process standards, and decisions to prosecute must be based on evidence alone, assessed in an even-handed manner. All explicit and implicit bars leading to one-sided prosecutorial activity must be removed. However, the independence and impartiality of prosecutors are tools for preventing criminal justice from becoming an instrument of the powerful. Common crimes in domestic jurisdictions are generally accompanied by prescription regimes. The reasons to make “atrocities crimes” imprescriptible are, first, that atrocity crimes raise particular investigatory and prosecutorial challenges that usually cannot be met on the same schedule as common crimes; and second, that imprescriptibility helps signal that such crimes constitute an

affront to humanity, communicating that, in theory, neither space nor time will provide escape from responsibility. The incorporation of international legal obligations should at least cover the following basic issues: the typification of relevant crimes; statutes of limitations and retroactivity questions; and the introduction of reforms leading to de-incentivizing violations, including regarding anti-terrorism legislation. A special unit to investigate allegations of war crimes, crimes against humanity and serious human rights abuses, could be established

52. Reparative justice (or reparations) is another way to end impunity. However, reparation has so far been lacking in Afghanistan, though it must be acknowledged that in an environment where so many people can claim to be victims, a comprehensive reparation policy would be an enormous task for any government.¹ A financial compensatory policy has been the pensions for the disabled and survivors of martyrs organized through the Ministry of Labour, Social Affairs, Martyrs and Disabled. But eligibility for disability and survivorship is war-related; moreover, there are no robust mechanisms to substantiate evidence of war-related casualties, which leaves it open not only to fraudulent claims but to the discretion of the community or authorities to direct the eligibility assessment process. As such, it is questionable whether this policy could be considered part of a genuine reparative transitional justice policy designed to acknowledge the suffering of *all* victims.²

53. Collective reparations could begin to address the wider impacts of individual violations. For example, sexual violence in conflict is often employed to break the bonds of families and communities and to instill terror, an intended harm that reaches beyond the individual. Measures of symbolic reparation could include public apologies, memorials, reburials and the renaming of streets and public buildings and other similar acts. One such example of this was Vice Presidential candidate, Rashid Dostum's apology to the Afghan public in October 2013 for his involvement in past war crimes – though some called this mere political manoeuvring, others welcomed it as a step in the right direction and hoped others would follow his path.³

54. Reparations programs must be both targeted and transformative: targeted in that priority should be given to specific vulnerable or in-need groups, and transformative in that they should aim to redress underlying inequalities. Land restitution is a key example of the transformative potential of reparations programs. The idea of transformative reparations is also a concept based on the argument that reparation for massive violations should focus not only on restitution, but on a democratic transformation. Reparations should be linked to social services and respond not just to past crimes, but also to present needs and on-going violations, including economic, social and cultural violations. There is also a question of balance. What is a fair balance between symbolic and material reparations? Community and

1. Doc 2

2. Ibid.

3. Doc 14

individual reparations? While reparations and development constitute two distinct and separate rights, creating linkages with development actors and programs could be beneficial for delivering sustainable and transformative reparations, particularly in countries affected by mass violations and poverty.¹ 55. Providing more funding to ex-combatants than victims can be a sensitive topic, although combatants can also be victims, particularly in the case of child soldiers. A possible option is to focus on communities instead of individual combatants or victims, in line with the 2006 Stockholm Initiative for Disarmament Demobilization and Reintegration - an initiative of the Swedish government that proposes the idea of two funding windows for peace-building.²

International justice and human rights mechanisms

56. Prosecution can be complemented by processes of international justice; one of the roles of the latter is to contribute to, and provide an incentive for, national processes. Either way, very little has been achieved in Afghanistan. The International Criminal Court, in spite of the ratification of the Rome Statute by the Government in 2003, has remained inactive; universal jurisdiction, which is another channel through which justice can be delivered at an international level, has hardly been used.

57. Afghan civil society organizations are now approaching the International Criminal Court more than during the earlier years of the post-2001 transition. Such a trend coincides with growing criticism against the Court's work in Afghanistan, but it is primarily the result of all other avenues having been seen to fail.³ At the same time, Afghan civil society organisations that are aware of the Court's preliminary examination seem to be expecting too much from it. For instance, they expect that it approaches them rather than the opposite, which reflects their little understanding of how limited the Court's preliminary examination resources are.⁴ While the appointment of a prosecutor for Afghanistan at the International Criminal Court can for instance currently not be considered, an affirmation of the Office of the Prosecutor's mission and a public declaration on national proceedings are needed in order to reassert the Court's jurisdiction and take action in Afghanistan. It also has to be noticed that the Court's lack of involvement is mainly due to the State of Afghanistan itself, which signed the Rome Statute on 2002 but has yet to draft cooperation laws with the Court. In fact, according to an AIHRC Commissioner, the Ministry of Justice ignored a draft law prepared by the AIHRC. Perhaps the clearest indication of the government's disinterest is its vacant seat at the Assembly of State Parties (ASP) to the International Criminal Court.⁵

1. Doc 4

2. See: http://reliefweb.int/sites/reliefweb.int/files/resources/ED1EF744FE93A788C1257428003110CB-gvtSweden_feb2006.pdf

3. Doc 3

4. Ibid.

5. Doc 2

58. Some argue that the assertion of the International Criminal Court's jurisdiction over the most serious crimes committed since 1 May 2003 would be both timely and useful, and would contribute to deterring any further crimes from being perpetrated and going unpunished in Afghanistan. The Prosecutor of the International Criminal Court would thereby respond to victims' desperate need for justice and thus contribute to breaking the vicious circle of impunity.¹ But there are several reasons why Afghan civil society should not be over-enthusiastic about what to expect from the International Criminal Court:

a) Investigation and potential prosecution by the International Criminal Court would necessarily ignore the two and a half decades of conflicts and abuses committed before the signing of the Rome Statute. The impact on dealing with the past and of satisfying victims' demands for justice is therefore questionable. More dangerously, by placing emphasis on crimes committed after 2003, some of the worst perpetrators of human rights abuses would consequently be ignored.²

b) Proponents on marginalization as one of the mechanism of international justice have argued that international tribunals facilitate peace and deter atrocities by marginalizing their targets. In the absence of an international enforcement capacity to make arrests, however, the mechanism through which targets lose power remains unexplained.³

c) Many of the worst crimes committed since July 2002 are part and parcel of conflicts that have not yet ended. Consequently, the Court, for better or worse, has become actively engaged in conflict situations. Although international tribunals do not take the side of any particular warring party and in this sense are neutral, where peace processes have been in play and conflict ongoing, the Court indictments have therefore rarely been seen as neutral.⁴

d) The indictment of sitting heads of state and rebel leaders engaged in *ongoing* conflicts has been more exceptional than normal; it has nonetheless galvanized attention around the role of international justice in conflict while at the same time fundamentally altered the terms of debate.⁵

59. Universal jurisdiction refers to the fact that certain crimes, such as crimes against humanity and genocide, are considered so grave that they can be tried universally, under the jurisdiction of one country. After a period of rapid progress, however, there has been a recent regress in this area, in which some "pioneer countries" have opted to be more restrictive in their legislation regarding the extraterritorial jurisdiction over international crimes.⁶ Still, there are precedents linked to Afghanistan. In July 2005, Zardad Faryadi Sarwar, a former Hezb-i-Islami commander, was sentenced

1. Doc 27

2. Doc 2

3. Doc 9

4. Ibid.

5. Ibid.

6. Doc 12

to 20 years in prison in the United Kingdom for conducting a campaign of torture and hostage-taking in Afghanistan between 1992 and 1996. This was the first trial of its kind in the United Kingdom under the UN Convention against Torture. On the 14 October 2005, the Netherlands sentenced two Afghan asylum seekers who had held senior positions in the secret police in the 1980s for torture. The Netherlands has continued to investigate Afghans believed to be guilty of war crimes. Although knowledge about such trials is sometimes weak, the prosecution of Afghans abroad has sent a powerful signal to others in hiding, or in power, that there is no safe haven. However, although there was no official reaction from the Government of Afghanistan to these earlier universal jurisdiction trials, raising the profile of these cases could potentially incite opposition in the future and could threaten the continuation of these types of trials.¹

60. The United Nations also have had a critical role in promoting justice and respect for human rights in Afghanistan. Despite the UN's concerted efforts to monitor and support human rights, some of the UN's other activities in the country have nevertheless worrisome records.² In particular, relevant UN Security Council Committees, including the Committee established pursuant to UN Security Council Resolution 1267 (1999), the Counter Terrorism Committee, the United Nations Office of Drugs and Crime, and the Counter-Terrorism Executive Directorate have failed to, in collaboration with international organisations and expert groups, set up appropriate institutions and transparently implement efficient mechanisms to guarantee full respect for human rights in fostering regional security and coordinating the fight against international terrorism. The Security Council sanctions regime against the Taliban and Al-Qaida, originally established under Resolution 1267, lacks transparency and standardized criteria for listing and delisting, and was designed with serious human rights shortcomings, which have been denounced by certain judicial bodies, the UN Human Rights Committee and the UN Special Rapporteur on human rights and counter terrorism. The UN Security Council Resolution 1988 on the Taliban should be reviewed so as to ensure, at least, that all individuals suspected of being responsible for, or complicit to, international crimes as defined by the Rome Statute, be investigated and, where applicable, stand before an independent tribunal for their alleged crimes before being delisted.³

61. In general, attempts by the international community to support the reconciliation process have included highly dubious components at a time when the Taliban-led insurgency remains violent and harmful to Afghan and regional stability.⁴

Guarantees of non-recurrence

62. Paragraphs 63 to 67 only contain theory and quote a report of the

1. Doc 2

2. Doc 27

3. Ibid.

4. Ibid.

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the main elements of a framework for designing State policies regarding “guarantees of non-recurrence”.¹ Though not referring to the Afghan context, these paragraphs are included in order to provide concerned stakeholders with the basic elements they need to know in order to promote guarantees of non-recurrence, which lie at the core of transitional justice processes:

63. International standards on guarantees of non-recurrence have grown significantly since 1993, when the term was first used in a United Nations report. This is demonstrated, inter alia, by the explicit reference to “guarantees of non-repetition” in the International Convention for the Protection of All Persons from Enforced Disappearance. But too often obscured by heated debate over the value of truth commissions and criminal prosecutions, this particular objective – to provide guidance on avoiding a repetition of past abuses – stands out as perhaps the most important contribution the field of transitional justice can make in a country, which threatens to erupt in renewed large-scale conflict. Conceptually, there is also a difference between guarantees of non-recurrence and the remaining three core elements of a comprehensive transitional justice approach, namely, truth, justice and reparation. While those three elements refer to measures, guarantees of non-recurrence represent a function that can be satisfied by a broad variety of measures. The foundational texts already demonstrate this variety, pointing to, inter alia, reforming institutions, disbanding unofficial armed groups, repealing emergency legislation incompatible with basic rights, vetting the security forces and the judiciary, protecting human rights defenders and training security forces in human rights. The institutional context that frames guarantees of non-recurrence, its characteristics, capacities and history all matter, as do the cultural circumstances and individual dispositions. Preventing mass violations does not call for the same specific measures regardless of those factors. Similarly, the (risk of) prevalence of some (patterns of) violations should naturally shape a prevention policy for a given country.

64. Most discussions of guarantees of non-recurrence have focused on the reform of official State institutions. However, in contexts of past mass violations, State institutions are often weak, inefficient and/or corrupt. Even if they are honest and relatively competent, they may have very limited reach, as in some countries the majority of conflicts are settled through informal mechanisms. It is therefore somewhat surprising that judicial reform has not played a more prominent role in discussions about guarantees of non-recurrence. In particular, changes in personnel are insufficient to turn ineffective or complicit judiciaries into trustworthy arbiters and reliable guarantors of rights. Prospectively, structural changes are necessary, including means to strengthen judicial independence, as many truth commissions have recommended. Without such reforms, the likelihood that courts will (at least) dare to check executive powers will not increase

1. document 6

significantly, and will be entirely dependent on the virtue of particular individuals. For the adjudication of cases involving mass violations, judicial systems need to build and further develop specialized capacities regarding the widespread and systemic nature of violations and the identification of respective patterns and nodes in networks of systemic crimes, as they require a change in investigative, prosecutorial and adjudication techniques and practices. In many jurisdictions, familiarity with international human rights and humanitarian law is weak to non-existent. Familiarity with the peculiarities of “structure crimes”, such as genocide, crimes against humanity and war crimes, which rest upon a network of actors, is even scarcer.

65. Dismantling networks of such criminality, some of which are ensconced in State institutions, i.e. in torture cases, through the implementation of an appropriate strategy ably pursued by prosecutors and competently adjudicated by judges is one of the most effective contributions a judicial system can make to prevent the recurrence of violations. Such capacities are sometimes best expressed and built in the establishment of specialized (pre-) investigatory offices, courts or tribunals.

66. Despite the significant growth of the relevant international standards, the term “guarantees of non-recurrence” requires elaboration regarding the following conceptual questions: (a) the “offer”, as it is not clear what is meant by a “guarantee”; (b) the “object”, as the reference in the foundational texts to the non-recurrence of gross violation of human rights by States has widened to include the non-recurrence of “international crimes” committed by State and non-State actors, the non-recurrence of atrocities and even of the non-recurrence of violent conflict; (c) the “subject”, or who the beneficiaries of the guarantees are supposed to be, i.e., the victims, a wider group of “potential” victims or society at large; (d) the “duty bearers”, i.e., those supposed to fulfil their obligation to provide said guarantees. The “object” is not the prevention of isolated violations, but of gross human rights violations and serious violations of international humanitarian law. Such violations presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up. The “subject” of the guarantees is the previously victimized society, seen at large, thus not limited to the direct or indirect victims.

67. Finally, lasting societal transformations that support non-recurrence require interventions not only in the institutional sphere but also in the cultural sphere and at the level of personal, individual dispositions. Economic conditions and their relation to non-recurrence with a view to meaningful transformation is another topic that does not receive sufficient focus. In contexts where continuation in power of an abusive regime makes it impossible to guarantee that violations will not be repeated, lack of economic opportunities outside government-paid posts raises decisively the stakes of losing power. This motivates the entrenchment of abusive regimes, increasingly also observed through the subversion of democratic processes, and consequently undermines the possibility of offering effective guarantees of non-recurrence. In transitional contexts, education also has the potential to act as a powerful tool for non-recurrence. Because of

its formative potential, education can contribute to shaping new norms, mediating between contending narratives of the past and nurturing a culture of dialogue and democratic citizenship across generations. A transitional justice approach to education can greatly contribute to contextualizing the aims of educational reform after conflict and/or repression, with an eye to strengthening its potential for preventing the recurrence of violations, for example, by identifying the patterns that fuelled conflict, especially in relation to exclusionary and authoritarian practices in school systems. Finally, addressing the challenges of legal registration in the aftermath of conflict or repression provides an opportunity to establish, restore or strengthen the foundations of a national registry that is compulsory, universal, permanent and continuous, which secures the confidentiality of personal data and is sensitive to cultural circumstances, including of minorities and religious groups. Addressing legal identity concerns in post-conflict or post-authoritarian contexts provides a way for transitional justice mechanisms to have an impact beyond their direct sphere of influence.

Institutional reform

Strengthening the rule of law

68. The idea of the rule of law calls for the establishment of a complex set of institutions and procedures, including an independent and impartial judiciary that treats like cases alike and scrupulously observes guarantees of due process. It is noteworthy that the most prevalent definition of the rule of law within the United Nations system was laid down, precisely, in a report of the Secretary-General to the Security Council on the rule of law and transitional justice. The rule of law is conceived as: “A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” At the conceptual level, the measures that make up transitional justice can be seen to be part of a whole by virtue of sharing some goals, which happen to be important for the promotion of the rule of law (which is indeed one of the final goals of transitional justice, on this conception) and to efforts to achieve justice by means of formal systems of law. To contribute to the strengthening of the rule of law, the design, establishment and functioning of all transitional measures should comply with all its requirements, including all procedural guarantees of fairness.¹

69. Justice sector reform is particularly important in any immediate post-conflict period, in particular when it comes to restoring the rule of law.

1. Doc 16

Unfortunately, the problems plaguing the justice sector and the administration of justice in Afghanistan have remained huge. First, insufficient resources have fuelled endemic corruption: studies have shown the judiciary to be considered by respondents to rank among the most corrupt institutions in the country. Second, lack of resources has also meant that there are many vacant positions in the formal judicial system - only about 50% of all judicial positions are occupied, and two-thirds of those serving as judges do not have university-level training. Third, perhaps even more infamous than the rule of law situation has been the general discourse justifying its abandonment. The judicial system needs systematic rebuilding at every level. Strategies and plans have been put forward for its reform, yet as a whole, the reform of the justice sector lags behind. The confusion, inefficiency and corruption of the formal justice systems mean that the majority of Afghans turn to it as a last resort; most cases, whether civil or criminal, are considered and settled within customary tribal mechanisms.¹

70. There are several sources of law in Afghanistan. They include the Constitution and statutory law in general, Sharia (Islamic law) and the tribal customs of the informal justice system. To this should be added enclaves of extraordinary justice, such as partially US-run detention centers. Many of the legal processes stemming from these different sources of law are not mutually compatible. This creates a situation of legal ambiguity, compounded by the lack of a forum for authoritative clarification. Although the Supreme Court may be partially charged with this function under the 2004 Constitution, the relevant provision is both vague and overly restrictive. To further complicate matters, other adjudicative bodies have also claimed this power. Although some work to streamline and harmonize the multiplicity of laws has been done under the aegis of the Ministry of Justice, the pace of work has been slow and halting. One of the most enduring fiascos of the post-2001 arrangement has therefore been the failure to establish a clear, apolitical protocol on the hierarchy of various applicable legal norms. Moreover, under Karzai's government, the Supreme Court has repeatedly shown its subservience to political orders, a near complete neglect of human rights, and, most worrying, legal incompetence. The Court has also been dominated by Islamist hardliners since its inception in 2004, particularly under the leadership of Chief Justice Fazl Hadi Shinwari, the former head of a Peshawar medresa.²

71. The Afghan tribal system has not only profoundly changed in nature following decades of conflict; its influence in many parts of the country has also eroded. The tribal system is considered to be an anachronism by many educated Afghans. The Islamic legal system in Afghanistan also reveals serious flaws, gaps in jurisprudential understanding, and a tenuous grasp of the vast, cumbersome body of law that constitutes Sharia. Lack of access to basic and higher education, even for religious scholars or judges, has ensured the disintegration of most formal Islamic learning and has

1. Doc 27

2. Ibid.

impoverished the debate over religious and legal issues in Afghanistan.¹
72. The weakness of Afghanistan’s democratic institutions and the absence of rule of law in the country have enabled the Taliban to present themselves as an alternative political/military force. One has to remember that under their regime, sentences for “moral” and ordinary crimes — often manifesting in brutal and highly visible ways such as public stoning for adultery or amputation of limbs for theft — also came from the harshest readings possible of Sharia.² In this sense, they have reinforced the reality that traditional justice processes are often inherently gender-biased, and reinforce inequalities. In Afghanistan as in other countries, the rape of a woman often remains dealt with ‘informally’ either by ‘compensating’ the family or forcing the woman to marry her rapist in order to preserve her (and by implication her family’s) honor.³

73. Local, traditional or informal justice processes can contribute to accountability for the broad range of crimes committed during armed conflict and support transformation to a more peaceful and stable society, when the State has entrusted such process to carry out certain legal tasks in its legal order. In such settings, community or religious elders use a restorative justice approach by including all parties involved to promote reconciliation as a way to avoid revenge and restore harmony in the community. However, such processes must conform to international human rights standards, in particular with regard to judicial guarantees, gender equality and the protection of children’s identity and well-being.⁴ Some argue that many Afghans trust the informal justice system more than they trust the formal justice system. This does not, in and of itself, prove much: indeed, it can be understood as speaking more to the failures of the formal justice system, than extolling the successes of the tribal system. These ‘opinion statistics’ are often interpreted as a preference for the informal over the formal system – yet often it may simply be that the informal system is the only mechanism accessible to the rural majority.⁵

74. The recent support to tribal law as the solution to the ills affecting the justice system seems to be an attempt to divest the international community of its share of the responsibility for the failure of judicial reform. The Afghan Government and the international community have now endorsed the informal justice system as a valid source of law and a way of administering justice. While the political decision to endorse such tribal law rests on dubious motivations, it offers no genuine solution to the issues plaguing the Afghan justice system. A draft law on the integration of the informal justice system is currently being circulated, but very few safeguards as to the role of women and the impact on their human rights seem to have been integrated into this

1. Ibid.

2. Ibid.

3. Doc 1

4. Doc 22

5. Doc 27

draft.¹

Vetting

75. The idea of ridding institutions of abusers and collaborators in the aftermath of conflict has a long (albeit not particularly distinguished) history. Massive purges after periods of conflict are familiar all over the world, but that model should not be followed if one of the aims is not to strengthen the rule of law.² When it does, it is called vetting.

76. Vetting involves formal processes to screen the behavior of individuals and assess their integrity on the basis of objective criteria, so as to determine their suitability for continued or prospective public employment. Of all transitional justice measures, vetting has lent itself most to political manipulation. This can be explained by various factors. Vetting usually involves many cases; vetting bodies operate less publicly than truth commissions and, as administrative bodies, less publicly than court procedures; and vetting also determines access to State power and resources. Accordingly, it is particularly important to design and implement vetting programs scrupulously, heeding exacting procedural standards, in consultation with civil society, and with as much transparency as possible, while ensuring the confidentiality to which both those who are screened and potential victims are entitled.³

77. Vetting initiatives in Afghanistan have included the one-off vetting of provincial police chiefs in 2005, the vetting of political candidates adopted through the Electoral Law and the establishment of the Presidential Special Advisory Board for Senior Appointments.⁴ Since the establishment of this board in January 2007, 268 people have been vetted and 58 excluded. Although its success and robustness is yet to be proven, it is operational.⁵

78. In the months leading up to the first national parliamentary elections in 2005, an estimated 1,800 illegal armed groups (IAGs) were believed to be operating in some capacity throughout the country. In a transitional political culture where some level of intimidation by candidates was virtually guaranteed, the concern was that such groups could pose a security threat to the elections. In response election organizers instituted a system to screen potential candidates for links to IAGs and other criteria constituting violations of the electoral law and the Afghan Constitution.⁶ The vetting process was based on data collected through the Disbandment of Illegal Armed Groups, a project of the United Nations disarmament effort, the Afghanistan New Beginnings Program. After candidates were nominated, Afghans could challenge their eligibility by submitting statements to the Electoral Complaints Commission (ECC), the agency charged with investigating eligibility claims.

1. Ibid.

2. Doc 15

3. Doc 16

4. Doc 3

5. Doc 2

6. Doc 3

During the months it was in operation, the ECC was flooded with complaints, a large number of which alleged human rights violations and war crimes by candidates rather than the more narrowly defined charge of association with an illegal armed group. Although more than one thousand candidates were identified with links to such groups, few were disqualified.¹

79. In the end, vetting efforts failed for several reasons. First, the legal framework established to disqualify candidates on the basis of links to armed groups was incomplete and poorly defined. For example, the Afghan constitution provides that anyone convicted of a crime against humanity is ineligible to run for any public office. This legal bar, however, is set extremely high, and no one has ever faced charges for such crimes. It also provides no mechanism for vetting candidates. Thus there were no judicial grounds for vetting candidates on allegations of human rights abuse. Second, the institutions charged with running the process did not have the resources or the capacity. Third, the Afghan government and the international community lacked the political will to make sure that people were vetted fairly. Finally, the provision barring candidates who have links with illegal armed groups was deleted from the draft electoral law adopted by the Wolesi Jirga on 22 May 2013.² Although the 2014 presidential elections represented the first peaceful transition of power in the history of Afghanistan, the backgrounds of some of the presidential candidates in previous conflicts and war crimes, combined with the absence of any debate on the issue of transitional justice, has created frustrations and concerns amongst many voters.³ These weaknesses resulted in a highly selective process that left many armed commanders to run for office. Besides, encouraging former combatants to work out their differences in the sphere of politics rather than on the battlefield is long-accepted wisdom, but its success depends on some measure of institutional checks on the power of those accommodated in this way.⁴

Security sector reform

80. In post-conflict environments, security sector reform or SSR usually comprises members of the police, military, secret police, intelligence agencies, armed rebel groups and militia – the groups which are often the most responsible for serious and systemic human rights violations during conflict. SSR projects should not stand-alone, but rather an integral part of any transitional justice approach and of security sector reform projects seeking to establish effective and accountable public institutions. These approaches focus on four main areas of reform within a broader SSR program: building the integrity of the security system; establishing effective accountability; strengthening its legitimacy; and empowering citizens. Crucial elements in the area of security sector reform aiming at the prevention of violations in the

1. Doc 18

2. Doc 3

3. Doc 14

4. Doc 3

future pertain to: (a) defining the different roles of the police, the military and the intelligence services; (b) strengthening civilian control over the armed forces; (c) the elimination of military “prerogatives”; and (d) the vetting of the security forces. The pillar approach to security sector reform, where each institution within the security system is addressed in isolation from the others, has therefore been challenged and should be systematically replaced in order to enable a more holistic approach to reform, including of the justice sector.¹

81. In Afghanistan, the security sector is not held accountable for its actions, and is not subject to rigorous democratic oversight. Ongoing violence between state security agents and non-state actors, or the threat of a return to fighting, has been and is a serious challenge to security sector reform. This is partly due to the fact that the government and international actors have allowed a culture of impunity to go unchecked in the pursuit of short-term concerns for stability. Security agents often lack the basic skills required to do their job. Criminal networks associated with the drug trade operate within the system. The lack of clear command and control of the security forces is believed to hide a complex web of illegal economic activities, for example, particularly connected to drugs, in collaboration with other armed groups. As long as these informal, powerful and highly lucrative structures continue to exist, they will present a major obstacle to unity of command and control, and democratic oversight. Corruption is endemic. The disarmament of militia and private security firms has happened in isolation from security sector reform projects, which should be urgently addressed and rectified, as the two processes are directly connected.²

82. The Afghan Peace and Reintegration Program, launched by the Afghan Government in July 2010 and completed in 2014, aimed to weaken the insurgency and its leadership through the negotiation process. Whilst by late August 2011 the program had already re-integrated 3,000 rank-and-file insurgents in their communities, having renounced violence, broken their ties with terrorists, and agreed to peacefully abide by the Afghan Constitution, it has failed to resolve their grievances or provide them with adequate livelihoods. Added to a lack of effective vetting mechanisms, this may lead to the increasing presence of former local militia members with links to so-called war lords and a history of perpetrating serious human rights violations, in the national security forces. The question is whether it is even feasible to build an autonomous and effective Afghan army and police force in such a short time span. Indeed, the country has never had a long standing, stable security force, and many factors clearly demonstrate a high risk that the present force may be unable and/or unwilling to stop the insurgency, or refrain from engaging in human rights violations.³

83. Public trust in the security system is fundamentally undermined by a culture of impunity. The reputation of the police as human rights abusers

1. Doc 24

2. Ibid.

3. Doc 27

undermines their capacity to do their job. For instance, if women do not report incidents of rape because they fear being raped again by officers at the police station, rapes will go unreported and there can be no investigation, regardless of the technical capacities of the police to investigate the crime. At the risk of simplification, it may be fair to say that Afghan police fail to recognize crimes against women, or detain women for activities that are not crimes at all. When women flee their homes, they are often arrested even though no such crime exists in any of Afghanistan's legal codes.¹

84. In the future, building the integrity of the security system may not be sufficient in itself to overcome the fundamental crisis of trust that is characteristic of a legacy of serious abuse. Security institutions can only be successful if they are responsive to the security needs of the public and earn the confidence of the population by treating all citizens fairly and addressing their security concerns effectively. Efforts are needed to assist subjects of state oppression and victims of violence to recognize themselves as rights-bearing citizens include, among others, empowerment measures such as public information campaigns, citizens' surveys to identify their security and justice needs, and training civil society organisations to monitor the security system. Short-term and ad hoc solutions, such as the establishment of the Afghan Public Protection Force in 2012 to replace all non-diplomatic Private Security Companies as the sole provider of pay-for-service security requirements in Afghanistan, should be avoided. Restructuring the Ministry of Interior is necessary, and renewed emphasis needs to be given to ensuring merit-based appointments, adequate pay grades, vetting of senior political appointments and monitoring the reform process. There must be renewed emphasis on training of police in criminal investigations, community policing and literacy.²

85. It will not be feasible to vet every member of the police or army, so strategic choices will need to be made. It may be most appropriate to vet only the most senior ranks, and/or members of internal disciplinary units. The potential security threat of those excluded from the institutions will also be an element that has to be taken into account. Removing abusive officers is therefore insufficient in itself; internal disciplinary mechanisms and effective civilian oversight are necessary for sustainable reform. Effective reform efforts must also result in the delivery of more effective security, and must not become preoccupied only with dealing with past crimes.³

Thematic issues

The role of civil society

86. The field of transitional justice originally took shape through civil society efforts, and the role of civil society remains critical in promoting

1. Doc 29

2. Doc 24

3. Ibid.

transitional justice processes. But “civil society” should not be reduced to “non-governmental organizations”. In all transitional processes, a variety of other stakeholders, including groups of victims, trade unions and religious organizations, have made essential contributions.¹ In general, obstacles to civil society’s work on transitional justice are the following:

a) It can be isolated if transitional justice is not articulated with the mainstream peace building and state building efforts, reducing it to a “narrow objective” followed by human rights organizations.²

b) Lack of a clear and well structured common demand for action on transitional justice, which necessitates consensus among stakeholders developed through sustained opportunity for debate and analysis, may result in citizens’ omission from the transitional justice processes perceived as donor-oriented or state-run initiatives.³

c) Support is also needed to ensure increasing transparency through oversight by civil society institutions and by ensuring access to information, properly maintained court records open to the public, legal requirements to report conflicts of interest, and raising public awareness.⁴

d) The strengthening and enhancing of the preventive potential of civil society are likely to come from factors, which are often lacking, such as: (a) the active promotion of the fundamental freedoms of expression and opinion, of peaceful assembly and association and of religion; (b) the establishment of an education system that provides opportunities to develop not just marketable skills but critical thinking; and (c) the preservation of traditions of openness, transparency and consultation, more than from the mere removal of obstacles to the operation of non-governmental organizations.⁵

87. Challenges specific to the Afghan context are the following:

a) Most civil society initiatives remain restricted to Kabul and outreach to the regions has been limited. Beyond a few Kabul-based public demonstrations and some media discussions, the public debate about the conflict has been muted. Extensive dislocation of large segments of the population and poor communication throughout the war years means that Afghans often have had no way of knowing what was happening in different parts of the country. Civil society needs to know what people think in the provinces.⁶

b) Civil society is fragmented and its activities are sporadic and dispersed. Instruments used in gathering evidence, documents and witness accounts are not harmonized. Donors’ “seasonal approach” to transitional justice has also weakened CSOs and reduced their trust in the process. As a result, there is no roadmap or sense of what direction should be taken and not all options for transitional justice have been explored or laid out by the

1. Doc 6

2. Doc 10

3. Ibid.

4. Doc 24

5. Doc 6

6. Doc 28

various stakeholders¹ including civil society, parliament, government, etc.

c) Civil society may come to consensus on the need for documentation, but Afghan groups have never taken up the issue with the kind of urgency found in other countries struggling to implement transitional justice mechanisms, such as Cambodia.² Over time, groups have tended to document better-known incidents, going over the same ground covered by another organization, rather than investigate less well-known or newer incidents.³

d) All stakeholders (civil society organizations, political parties, parliamentarians, victims groups, students and professors) have suffered from a lack of knowledge and technical expertise allowing them to explore alternative options and engage with different layers of the Afghan society. Even the AIHRC has severely lacked technical capacity to deal with the issue.⁴ There is too little outreach, theory, experiences from other countries.

e) There is a lack of resources on transitional justice. Most of the available material is not available in Dari. There is also no dedicated national space for debate and exchange of views on transitional justice and related issues, which doesn't encourage action that is sustained by social demand and competence but sporadic and personality-led initiatives.⁵

88. Civil society groups, particularly women's based groups, have however not sat silently and some have actively voiced their concerns. When the Amnesty Law was adopted, civil society organizations seem to have realized that the stakes were higher; while not managing to deter the government from adopting the law. But civil society advocacy did help introduce an important change in the law. Bowing to protests from some civil society and victims' groups that the law violated Islamic precepts specifying that only the relatives of a victim could grant forgiveness, the government amended it to provide that individuals could bring suits against alleged perpetrators.⁶ In the current climate, the odds against anyone pursuing such a claim on his or her own are formidable, but the possibility remains an important one. In 2009, the creation of the Afghan Transitional Justice Coordination Group, bringing together over twenty representatives of Afghan CSOs, backed by AIHRC, UNAMA, the International Center for Transitional Justice and other international organisations, has helped to strengthen the individual voices of organisations and of Afghanistan's victims of war and oppression; facilitate information sharing; strengthen advocacy and strategic coordination. The early energy of the TJCG quickly faded, due to internal tensions over leadership of the group and the role of international organisations.⁷ The TJCG does, however, continue its work – although at

1. Doc 10

2. Doc 18

3. Doc 7

4. Doc 10

5. Ibid.

6. Doc 3

7. Ibid.

lower intensity.

Women and children

Women

89. Paragraphs 90 to 97 present key theoretical elements to understand how to ensure the inclusion of a gender dimension to all transitional justice processes:¹

90. Gender inequality is one of the most pervasive forms of societal inequality and is often exacerbated by conflict and situations of gross human rights violations. The majority of violations are then actually suffered by women. This includes heightened domestic violence; lack of access to basic services and means of survival due to destroyed or non-existent infrastructure; forced displacement leading to homelessness or the seeking of shelter in camps, which can facilitate conditions for increased levels of violence and insecurity; and lack of access to justice as a result of the deterioration of an already weakened criminal justice system. Using transitional justice measures to identify and recognize the factors that make women more vulnerable to particular types of abuses, and recommending or implementing reforms, can contribute to empowering women and reducing their vulnerability to future or ongoing violence.

91. The social stigma and trauma associated with reporting sexual violence crimes and women's exclusion from public decision making processes make it particularly challenging for women to engage with transitional justice mechanisms. Until recently, rape was not treated as a war crime against women or as the *actus reus* for genocide but rather as a crime against dignity and honor. This has changed in the last decade as the jurisprudence of the international tribunals have recognized that rape and other forms of sexual violence can constitute genocide, torture and other inhuman acts. The groundbreaking judgment of the ICTR in the *Akayesu* case (1998), though exceptional, marked the first conviction for genocide by an international court, the first time an international court punished sexual violence in an internal conflict.

92. Progress has taken place at the conceptual level, with the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007) and the Special Rapporteur on violence against women, its causes and consequences, advocating for gender-sensitive reparations. In his 2011 report on Women, Peace and Security, the Secretary General committed to ensuring all Commissions of Inquiry and related investigative bodies established by the UN and truth commission supported by the UN have "dedicated gender expertise and access to specific sexual violence investigative capacity". Also, in June 2014, the UN Secretary-General issued a guidance note on reparations for conflict-related sexual violence, to provide further policy and operational guidance for United Nations

1. Mostly based on document 1.

engagement in this area.¹

93. Without the consultation and participation of women and girls, transitional justice initiatives are likely to reflect only men's concerns, priorities and experiences of violence. However, to express free and frank opinions, women should be consulted separately from men and, as appropriate, by other women and without haste. Protections from backlash and stigmatization, including strict safeguards of confidentiality and anonymity, are essential. To avoid re-traumatizing victims, consultations must be held in safe, neutral spaces by people trained in working with victims of gender-based and sexual violence. As women and children make up the vast majority of persons displaced by conflict, efforts should also be made to consult in camps for internally displaced persons and refugees. With regard to the establishing mandate of a truth commission, core elements to ensure a gender-sensitive institution should include: a) the inclusion of women's groups on the commissioner selection panel; b) a minimum quota for women in all staffing positions; c) identification of sexual violence as a specific crime to be investigated; d) the establishment of a gender unit; and e) gender-sensitive witness protection and psycho-social support policies. The final reports of truth commissions represent another avenue for ensuring that women's experiences of conflict are documented and recommendations are made for suitable redress. These reports should have both dedicated chapters on women's experiences in conflict, as well as a mainstreamed gender analysis throughout.

94. Topics to be covered in gender chapters of truth commission reports are: a) gendered patterns of human rights violations; b) gender-differentiated impact of human rights violations and the broader conflict; c) national and international law addressing crimes against women; d) enabling conditions for women's vulnerability to human rights violations; e) ideologies of femininity and masculinity that permeated the conflict in relation to nationalism and violence; f) gender dynamics of racial oppression and other kinds of social exclusion/marginalization that characterized the conflict; g) role of women activists, both as individuals and through women's organizations; h) gender dimensions of psychosocial trauma in the affected community; i) issues that emerged in individual and thematic public hearings; j) recommendations for reparations and reform that address women's specific needs and goals; k) gender-differentiated statistical analyses of commission findings; l) challenges commissions faced in investigating crimes suffered by women; and m) gender-specific limitations of the commission's work and findings.

95. The criminalization of all forms of gender-based and sexual violence, including rape in marriage and domestic violence has been recognized as necessary to break the silence around and create a mandate to prevent and punish such violence. National laws should be harmonized to ensure consistency and clarity, while achieving accountability for gender-based and sexual violence requires sustained political will, targeted prosecution

1. <http://www.unwomen.org/~media/headquarters/attachments/sections/news/stories/final%20guidance%20note%20reparations%20for%20crsv%203-june-2014%20pdf.ashx>

strategies and timely collection of all types of relevant evidence, including forensic evidence. Policy and contextual obstacles, such as requirements for medical certificates in rape cases, should similarly be reformed. Other obstacles include the often prohibitive cost of filing complaints, and the geographic inaccessibility of police stations, medical services needed to obtain forensic evidence, and courts, particularly for women victims living in remote areas without transportation and with childcare responsibilities. Victims also need free legal assistance to pursue cases, medical care and support to manage the health impact of gender-based and sexual violence, and education about the criminal justice system so that cases are not abandoned or withdrawn due to mistaken assumptions.

96. Reparation efforts have historically overlooked women and girls' needs and concerns. However, there has been an increasing recognition in recent years of the need for, and potential of, gender-sensitive reparations. Provision of reparation needs to have as a starting point an accurate mapping of women's position in society as well as their roles and experiences before and during conflict. Violations covered should correspond with women's experiences. Most programs have implicitly discriminated against women by leaving out reparations for reproductive violence, including forced pregnancy, forced sterilization and forced abortions. They have also neglected the range of socio-economic violations women disproportionately experience during conflict. In many contexts, however, women's access to land titles and property was either legally denied or denied in practice. Restitution in these cases must include providing equal land title and inheritance rights to women, rather than reinstating an unjust system. One particularly important insight of recent years is that gender-sensitive reparations should strive to be transformative, and combine individual, collective, material and symbolic benefits that maximize the possibilities of redress for a larger number of victims. Regarding the different forms of benefits distributed, experience shows that women victims often prioritize service-based benefits, such as educational opportunities and access to health and psychological rehabilitation services. Care must again be taken not to blur the distinction between reparations and social rights, services and development measures to which the general population is entitled. By reflecting the diverse roles played by women in a nation's history - not simply portraying women as caregivers or victims - symbolic reparations can be used to challenge dominant femininities and masculinities that are produced in times of armed conflict and in its aftermath. Compensation to sexual violence survivors should ensure confidentiality so that women are not exposed to further stigma. Victims' confidentiality must not be breached by measures of public recognition. Besides, progress in securing gender-sensitive reparations continues to be accompanied by serious gaps and challenges: reparations are rarely paid out in a full and comprehensive manner; problems of access (including for women residing in remote locations, lack of transport, language barriers, illiteracy and a lack of knowledge about their rights and what is due to them) limit women's claims to reparations.

97. Institutional reforms are necessary to prevent the repetition of

gender-based and sexual violence, and re-establish trust between victims and State institutions, which may have perpetrated gender-based violence. Key elements of institutional reform from a gender perspective raise the question whether: a) the mandate of the transitional justice institution includes crimes against women as a matter of core concern; b) the staff of transitional justice institutions have adequate incentives to respond to new mandates on gender issues; c) adequate steps have been taken to remove practical obstacles that women may face in accessing transitional justice, etc.

98. According to the UN Special Rapporteur on Violence Against Women, Yakin Ertük, who conducted a mission to Afghanistan in 2005, there are four major dynamics were at the root of the “dramatic and severe violence” Afghan women face: Afghanistan’s patriarchal social order, the erosion of protective social mechanisms, the absence of rule of law and poverty and insecurity. The report highlighted a series of ongoing, widespread violations such as domestic violence, rape, trafficking, abduction, forced marriage, selling or trading girls to settle debts, “honor killings” and lack of access to education, health services and due process. The levels of violence against women in Afghanistan is such that 90% of them are estimated to have suffered psychological abuse and/or physical and sexual violence.¹ Describing the situation of women in Afghanistan through the lens of past and present conflict only therefore runs the risk of hiding the production of unequal gender relations through a complex web of conflict, religion, custom and poverty.²

99. While women have suffered from the various phase of conflict, their conditions under the Taliban regime could not be worse as the latter pursued stringent policies toward women by restricting freedom of movement, prohibiting them from attending schools or getting jobs, and enforcing mandatory veiling through its Ministry of the Prevention of Vice and the Promotion of Virtue. Since 2001, the Afghan government has taken several steps at the highest levels to promote the rights of women. Constitutional reform, the creation of ministry to deal with women’s issues, and attempts to mainstream gender into the country’s development strategies are the Karzai administration’s most high-profile endeavors. Yet close observers realized that removing the Taliban from power was not the end of the struggle for women’s rights. On the contrary, on-going talks regarding a reintegration and reconciliation plan that will pay Taliban forces to return to their communities of origin risks perpetuating injustices for women on numerous levels.³

100. Meanwhile, the Afghan Government has not recruited a sufficient number of women into its security forces. Currently around 1,200 women serve, constituting less than 0.5% of total personnel. Moreover, specific long-term programs to educate the police on women’s rights are needed for a mind change. Most importantly, there are still many discriminatory

1. Doc 27

2. Doc 29

3. Doc 1

laws against women, notably the Shiite Personal Law, the law on marriage, discriminatory provisions in the Criminal Code and property law, and discriminatory customary laws, to be repealed. The implementation of the Elimination of Violence against Women (EVAW) Act must be strengthened.¹ 101. While unofficial civil society initiatives have played an important role in furthering truth-seeking and accountability for violations against women in Afghanistan, the specific role of Afghan women as victims has been ignored mainly because of segregation, existing taboos and weak grassroots support.² Besides, sexual violence and mutilation also concern atrocities committed against men and boys—even if this is a minority of cases. There needs to be more participation of men working on the issue of sexual and gender-based violence, but also a better understanding of masculine vulnerability in conflict and peace-building contexts.³

Children

102. Children are among the most affected in countries suffering from conflict or massive human rights violations; indeed, the range of crimes that are covered by transitional justice always affect children, either directly or indirectly. Yet, the full range of serious violations that affect children, including displacement, illegal recruitment of children, enslavement and sexual violence is not always considered by transitional justice. Children often face significant difficulties regarding their access to justice and treatment by the justice system. These difficulties are exacerbated in transitional and post-conflict contexts. While there have been positive initial steps, more needs to be done, both at the domestic level and internationally, to foster the prosecution of those responsible for crimes against children. A fuller range of crimes suffered by children should be prosecuted, and procedures should be made child-friendly. The right to reparations also extends to all victims of gross human rights violations, including children, but few reparations programs have explicitly recognized children as beneficiaries. Others have struggled with effectively designing and administering child-sensitive reparations.⁴

103. To date, the focus of the work on children and transitional justice has been on those under 18. However, given the time lag between when violations occur and transitional justice mechanisms are established, those who were victimized as children often no longer meet the legal definition of children by the time the process is in place. As a result, a crucial group of youth are falling through the cracks and not receiving the attention they need. A priority going forward should be to address children and youth in transitional justice, including those who were children at the time of the violation.⁵ Last but not least, there is emerging consensus that children

1. Doc 27

2. Doc 10

3. Doc 36

4. Doc 13

5. Ibid.

associated with armed forces or armed groups who may have been involved in the commission of crimes under international law shall be considered primarily as victims, not only as perpetrators.¹

104. Children have the right to express their views and be considered in processes concerning them. In many contexts where transitional justice operates, including Afghanistan, those under 25 represent over half the population. Such demographic realities highlight the importance of developing targeted outreach efforts to cater for this considerable part of the public. Among the various means available to disseminate the results of transitional justice mechanisms and implement their recommendations, schools and the education system are a privileged medium.² Already in the first years after the 2001 intervention, efforts started to reform Afghanistan's school curriculum. In this process it was decided not to in any detail discuss the decades' of conflict. The new history books were the first in decades that depoliticized and de-ethnicized Afghanistan's history.³ But until there is an opportunity to discuss the events of the past and work toward real national reconciliation, there is a risk that Afghan parents will continue to pass on their own histories and hatreds as a poisoned gift to their children.⁴

Social and economic rights

105. Transitional justice as a field is only beginning to take on the challenge of social and economic rights, although a number of truth commissions, including those in Sierra Leone and Liberia, have focused at least partially on corruption and lack of development. One of the consequences of this broadening of the scope of development thought has been increased attention to questions concerning the relationship between the rule of law, justice, rights and development. While it may be true that transitional justice can make a contribution to development, the developmental preconditions of the implementation of transitional justice measures have also not been sufficiently explored. It should not be forgotten that trials require operative courts; reparations programs require, among other things, resources to distribute; even the mildest form of institutional reform, vetting, requires institutions strong enough to withstand having personnel removed. It is not clear that these preconditions obtain everywhere that massive human rights violations have taken place. In particular, post-conflict countries may fail to satisfy these preconditions.⁵

Highlighting the possible contribution that justice and rights-related measures make to development, does not justify justice and rights-related measures based on their ability to contribute to development goals. Justice and rights-related measures are the subjects of existing legal obligations, and beyond this, are firmly grounded in moral arguments that are as compelling as they

1. Doc 22

2. Doc 13

3. Doc 3

4. Ibid.

5. Doc 17

are broadly based.¹ However, the [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#), newly adopted in December 2008 by the UN General Assembly, provides a framework for broadening the lens of transitional justice to incorporate social and economic rights, creating an impetus for transitional justice measures to address the structural inequities that lead to violations of social and economic rights. A concern exists though that a broader agenda for transitional justice measures would dilute or undermine efforts that are undertaken.²

106. These questions are particularly relevant to the context of Afghanistan, where poverty, and associated signs of under-development such as poor health, illiteracy, unemployment and recurrent humanitarian crises, has been both a cause and result of Afghanistan's instability and the prevailing conflict. Efforts to build peace in Afghanistan will therefore need to be sustained over the long-term, and take into account the complexity of socio-economic situation in the country.³ There is an additional challenge in addressing impunity for international actors, particularly economic actors, such as multinationals, which makes transitional justice an important topic, not just for post-conflict countries, but also for "donor" or home countries.⁴

107. To end on a positive note, it is important to note that many progressive social transformations have also occurred in Afghanistan since 2001. There is no evidence that these had or may have in a positive impact on conflict dynamics in the country, but they certainly contribute to the hopes of Afghan for a better future. In particular, Afghanistan's diversity is cultural and artistic. A young generation of independent artists, writers, poets, musicians and film makers has been extremely active in the last few years. Numerous clubs, groups and companies have been set up around the country and have been very vibrant. Hundreds of civil society, culture and human rights and media organisations have also grown rapidly. There are now several umbrella and coordinating bodies boasting hundreds of member organisations. Besides, more than 200 print media (including newspapers, magazines, journals and other publications), 44 TV stations, 141 radio stations and 8 news agencies have been established in Afghanistan since 2001. The proliferation of Internet-based media, including social networks and blogs, reflects the will of the population both to access more diverse sources of information and to express themselves freely, while the adoption in 2006 of a new media law was a positive development towards promoting press pluralism in Afghanistan, although Afghan legislation still prohibits material deemed to run counter to Islamic law.⁵

1. Ibid.

2. Doc 36

3. Doc 27

4. Doc 36

5. Doc 27

CONCLUSION

108. The issue of transitional justice is not an “old or forgotten issue” in Afghanistan. On the contrary, the continued failure to address issues of impunity and implement a comprehensive process of transitional justice shapes how the country looks today. Transitional justice therefore remains a constant demand of the Afghan people, who do not want to forget the past and know it must be addressed in order to envision a better future. Now, in the midst of escalating political tensions and ongoing violence, documenting the scale of abuses with an emphasis on the suffering of the victims rather than the guilt of the perpetrators, remains a priority. It will gradually support a debate at national level on how to reconcile the Afghan society with its history and the transitional justice process moving. It doesn’t mean that its other segments, beginning with the prosecution of perpetrators, must not progress. In the end, the main lesson from the post-2001 transition is that all the fragmented efforts by various stakeholders over the past 15 years are not lost. They have already partially restored a sense of truth and dignity for the victims, which was completely lacking until then; and they will serve the cause of future efforts, which will eventually give to the words justice, peace and reconciliation their full meaning in the context of Afghanistan.

109. The Government of Afghanistan should:

- a) Revive and implement the victim-oriented Action Plan for Peace and Reconciliation, as originally drafted in 2005.
- b) Abolish, through the Parliament, the Public Amnesty and National Stability Law as it clearly violates Afghanistan’s Constitution and the country’s international treaty obligations, and is an obstacle to a just and lasting peace.
- c) Strengthen the Afghanistan Independent Human Rights Commission (AIHRC) and guarantee its independence; ensure that the AIHRC is fully involved in all processes related to peace and reconciliation, and immediately release AIHRC’s Conflict Mapping Report.
- d) Fulfil its duty to guarantee the safety of victims and all other participants in processes meant to redress serious violations. Perpetration of serious crime, including sexual violence, by security agents and other

actors, must be addressed with highest priority. The prosecution of at least the most serious abusers must be encouraged, preferably through the domestic system.

e) Reactivate vetting as a popular mechanism.

110. The international community and the United Nations system in particular, should:

a) Place transitional justice at the core of their interventions in Afghanistan, and continue efforts to provide financial and other types of support to victims and Afghan civil society organizations working on transitional justice.

b) Establish or use all appropriate mechanisms to examine, monitor, advise and publicly report on the human rights situation in Afghanistan, to respond to individual victims' complaints, and to streamline, in cooperation with the Afghan authorities, a roadmap for the implementation of recommendations by the United Nations on human rights and transitional justice.

BIBLIOGRAPHY

1. UN Women, *A Window of Opportunity: Making Transitional Justice Work for Women*, 2012 (**document 1**)
2. Winterbotham, Emily. *The State of Transitional Justice in Afghanistan. Actors, Approaches and Challenges*. Afghanistan Research and Evaluation Unit, 2010 (**document 2**)
3. Gossman, Patricia and Kouvo, Sari. *Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan*. Afghanistan Analysts Network, 2013 (**document 3**)
4. Report of the Office of the United Nations High Commissioner for Human Rights: “Analytical study focusing on gender-based and sexual violence in relation to transitional justice” (A/HRC/27/21), 30 June 2014 (**document 4**)
5. Armanshahr/OPEN ASIA internal notes (**document 5**)
6. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42, 7 September 2015. On key activities undertaken by him between July 2014 and June 2015, and main elements of a framework for designing State policies regarding “guarantees of non-recurrence” (**document 6**)
7. Arthur, Paige. *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*. *Human Rights Quarterly* 31, 321–367. The Johns Hopkins University Press, 2009 (**document 7**)
8. De Weijer, Frauke. “Rebuilding fragile States: Changing the rules of the game”. *The Broker*, issue 26, October/November 2011 (**document 8**)
9. Vinjamuri, Leslie. “Deterrence, Democracy, and the Pursuit of International Justice”, *Ethics & International Affairs*, 24, no. 2, pp. 191–211. Carnegie Council for Ethics in International Affairs, 2010 (**document 9**)
10. Armanshahr/OPEN ASIA internal notes (**document 10**)
11. Armanshahr/OPEN ASIA internal notes (**document 11**)
12. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/27/56. 27 August 2014. On key activities undertaken by him between August 2013 and June 2014. And prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law (**document 12**)
13. Aptel, Cécile and Ladisch, Virginie. *Through a New Lens: A Child-Sensitive Approach to Transitional Justice*. International Center for Transitional Justice, 2011 (**document 13**)
14. Safi Mariam. “Is transitional justice a forgotten issue in Afghanistan?”, 10 February 2014. Article informed by a policy note, “Transitional Justice in Afghanistan: ‘We Should not repeat old issues’?” written by the author for the Global Partnership for the Prevention of Armed Conflict, October 2013. (**document 14**)
15. Report of the Special Rapporteur on the promotion of truth, justice, reparation

and guarantees of non-recurrence, A/67/368, 13 September 2012. On ways in which the promotion of truth, justice, reparation and guarantees of non-recurrence, conceived as a set of mutually reinforcing measures, contribute to strengthening the rule of law **(document 15)**

16. Armanshahr/OPEN ASIA internal notes **(document 16)**

17. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/68/345, 23 August 2013. On relevance of justice and rights considerations to sustainable development **(document 17)**

18. Gossman, Patricia A. "Documentation and Transitional Justice in Afghanistan". Special Report 337, United States Institute of Peace, 2013 **(document 18)**

19. Teitel, Ruti G. *Transitional justice genealogy*. Harvard Human Rights Journal, volume 16, 2003 **(document 19)**

20. Armanshahr/OPEN ASIA internal notes **(document 20)**

21. Armanshahr/OPEN ASIA internal notes **(document 21)**

22. *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* Edited by: Sharanjeet Parmar Mindy, Jane Roseman, Saudamini Siegrist, Theo Sowa. Published by the Human Rights Program at Harvard Law School, UNICEF Innocenti Research Centre, 2013 **(document 22)**

23. Armanshahr/OPEN ASIA internal notes **(document 23)**

24. Davis, Laura. *Transitional Justice and Security System Reform*. Initiative for Peacebuilding, Adelphi Research/ International Alert, 2009 **(document 24)**

25. Atashi, Elham. "Afghanistan: transitional justice in the midst of war". Nationalities Papers: The Journal of Nationalism and Ethnicity, 41:6, 1049-1064, DOI: 10.1080/00905992.2013.801414, 2013 **(document 25)**

26. Anders, Gerhard and Zenker, Olaf. *Transition and Justice: An Introduction*. Development and Change 45(3): 395–414. DOI: 10.1111/dech.12096. International Institute of Social Studies, 2014 **(document 26)**

27. *Human rights at a crossroads: The need for a rights-centred approach to peace and reconciliation in Afghanistan*, FIDH and Armanshahr/OPEN ASIA, 2012 **(document 27)**

28. Armanshahr/OPEN ASIA internal notes **(document 28)**

29. Ayub, Fatima; Kouvo, Sari and Sooka; Yasmin. *Addressing Gender-specific Violations in Afghanistan*. International Center for Transitional Justice, 2009 **(document 29)**

30. Armanshahr/OPEN ASIA internal notes **(document 30)**

31. *National Assembly Resolution regarding Reconciliation and General Amnesty*, Kabul (Hout 1385 / 10 March 2007) **(document 31)**

32. Coburn, Noah. *Losing Legitimacy? Some Afghan Views on the Government, the International Community, and the 2009 Elections*. AREU Post-Elections Brief 2, 2009 **(document 32)**

33. Statutes of the Afghanistan Citizen Platform for Truth and Justice (ACP/TJ), Kabul, August 2007 **(document 33)**

34. Armanshahr/OPEN ASIA internal notes **(document 34)**

35. Armanshahr/OPEN ASIA internal notes **(document 35)**

36. "Beyond Peace versus Justice: fighting impunity in peacebuilding contexts". Conference outcome document, Netherlands Ministry of Foreign Affairs, The Hague, 16-17 September 2009 **(document 36)**