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# HUMAN RIGHTS, TRANSITIONAL JUSTICE, AND INTERNATIONAL PEACEBUILDING: A VIEW FROM POST-9/11 AFGHANISTAN

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## **Summary**

- The failure of the new Afghan Republic and international community to enact transitional justice allows past acts of violence to remain unacknowledged and unaddressed, contributing to further violence and national instability.
- The “peace first justice later” approach created a culture of impunity for war crimes and human rights violations. The new intra-Afghan peace negotiations offer a possible opportunity to correct this with the inclusion of transitional justice mechanisms.
- The absence of transitional justice shakes the faith of citizens in the ability of the government to protect them and their rights. Transitional justice provides the mechanisms by which they can participate in peacebuilding and feel heard, contributing to positive peace.

Nearly two decades after the overthrow of the Taliban regime, Afghans continue to suffer grave human rights violations on a daily basis. Since 2009 alone, the United Nations Assistance Mission in Afghanistan (UNAMA) has documented more than 100,000 civilian casualties, with more than 35,000

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killed and 65,000 injured.<sup>2</sup> The ongoing conflict that has plagued the country inhibits the promotion and protection of human rights in serious ways. Despite the many legislative measures and enforcement mechanisms, the robust language of the new constitution, and ratification of international treaties, the efforts to promote and protect human rights have failed to facilitate the realization of human rights for Afghans. Based on an analysis of existing literature, this paper argues that this failure can be attributed to a peace first and justice later approach, a lack of transitional justice mechanisms, and the perpetuation of a culture of impunity. The peace first justice later approach prevented the planning and implementation of transitional justice mechanisms to deal with the grave human rights violations and the underlying issues of the conflict that has plagued the country since the Soviet Union invasion in 1979. The reigning culture of impunity for human rights abusers allows for continuing violations to this day. Since this culture allows abusers to be part of the system, justice reforms are rendered difficult.

### **Peace First and Justice Later**

In the aftermath of the Cold War, the international community launched many peacebuilding efforts in post-conflict transition and recovery states. In the process, it gained much experience and insight into the process for sustainable transitions. According to Norah Niland, Director of Human Rights at UNAMA, these experiences and insights were geared towards helping countries recover and “generate new patterns and structures of societal organization.”<sup>3</sup> However, the peacebuilding efforts in Afghanistan ignored this accumulated experience.<sup>4</sup> Efforts focused on protecting the fragile political stability that resulted from the Bonn Agreement on 5 December 2001. Only factions allied to the US coalition were present at the negotiations— chiefly the Northern Alliance and the Rome Group.<sup>5</sup> As

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2. “Afghanistan Protection of Civilians in Armed Conflict 2019.” United Nations Assistance Mission in Afghanistan, February 2020. [https://unama.unmissions.org/sites/default/files/afghanistan\\_protection\\_of\\_civilians\\_annual\\_report\\_2019\\_-\\_22\\_february.pdf](https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf)

3. Niland, Norah. “Impunity and Insurgency: A Deadly Combination in Afghanistan.” *International Review of the Red Cross* 92 (2010): 931-950. <https://doi.org/10.1017/S1816383111000014.933>

4. Hakimi, Aziz, and Suhrke, Astri. “A Poisonous Chalice: The Struggle for Human Rights and Accountability in Afghanistan.” *Nordic Journal of Human Rights* 31, 2013. Pp: 201-223. <https://www.cmi.no/publications/4801-a-poisonous-chalice>

5. Rubin, Barnett. “Afghanistan from the Cold War Through the War on Terror.” Oxford: Oxford University Press, 2013. Pp: 133-148.

a result, the agreement resembled more of a political exchange between the elite and major military factions.<sup>6</sup> Furthermore, UN Special Envoy to Afghanistan, Lakhdar Brahimi, also decided on a “light footprint” strategy—smaller resource investment in the expectation that the US-led coalition would perform normally UN-run duties.<sup>7</sup> However, Brahimi realized that the Bonn agreement failed to address the central problem of impunity and ignored the need for accountability. Niland recounts Brahimi’s regret in 2007: “Lakhdar Brahimi concluded that it was flawed, as the overall arrangement was not premised on a genuine reconciliation process that would have enabled Afghans to deal with deeply engrained patterns of abuse.”<sup>8</sup> Later in 2009, Brahimi recognizing the negative consequences of the flawed approach stated: “We are now paying the price for what we did wrong from day one ... the popular base of the interim administration put together in Bonn under President Karzai was far too narrow..”<sup>9</sup>

In order to produce a sustainable transition, a shared history of truth and reconciliation must be established and the peacebuilding effort must move beyond negative peace. While positive peace is defined by influential political figures like Jane Addams, Dr. Martin Luther King Jr., and Dr. Johan Galtung (father of “peace research” and major intellectual of modern peacebuilding) as “peace built on justice for all peoples”, negative peace is defined as “peace without justice.”<sup>10</sup> Ignoring grievances and the needs of victim for justice and accountability does not lead to positive peace, which is the main objective of peacebuilding. This sentiment is shared among the Afghan people as well.<sup>11 12</sup> A nationwide consultation, ‘A Call for Justice’, by the Afghanistan

6. Sevastick, Per. “Rule of Law, Human Rights and Impunity: The Case of Afghanistan.” *Hague Journal on the Rule of Law* 12, 2020. Pp: 93-145. <https://doi.org/10.1007/s40803-019-00089-z>

7. Hakimi, Aziz, and Suhrke, Astri. “A Poisonous Chalice: The Struggle for Human Rights and Accountability in Afghanistan.” *Nordic Journal of Human Rights* 31, 2013. Pp: 201-223. <https://www.cmi.no/publications/4801-a-poisonous-chalice>

8. Niland, Norah. “Impunity and Insurgency: A Deadly Combination in Afghanistan.” *International Review of the Red Cross* 92 (2010): 936. <https://doi.org/10.1017/S1816383111000014.933>

9. *Ibid.*

10. Herath, Oshadhi. “A Critical Analysis of Positive and Negative Peace.” Department of Economics, University of Kelaniya, Sri Lanka, 2016. P. 106. <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104107.pdf?sequence=1&isAllowed=y>

11. “Enduring Freedom Abuses by U.S. forces in Afghanistan.” Human Rights Watch, 2004. <https://www.hrw.org/report/2004/03/07/enduring-freedom/abuses-us-forces-afghanistan>

12. “‘I Had to Run Away’: The Imprisonment of Women and Girls for ‘Moral Crimes’ in Afghanistan.” Human Rights Watch, 2012. [http://www.hrw.org/sites/default/files/reports/afghanistan0312webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/afghanistan0312webwcover_0.pdf)

Independent Human Rights Commission (AIHRC) in 2004 found that more than 75% of Afghans considered that accountability processes were needed to end a long history of violence.<sup>13</sup>

However, the Bonn agreement contained no references to transitional justice to cope with past or even ongoing abuses. This resulted in the Northern Alliance members present at Bonn granting immunity to each other in exchange for a power-sharing arrangement with no provisions against amnesty for human rights violations and war crimes.<sup>14,15</sup> Additionally, by 2003 President Hamid Karzai shifted his focus away from holding perpetrators of violence during the 90s civil war accountable towards, instead protecting the fragility of the newly established government.<sup>16</sup> In 2007, the National Reconciliation, General Amnesty, and National Stability Law was adopted by the Karzai administration. This law granted immunity from criminal prosecution to those involved in war crimes and human rights violations over the past 30 years including to insurgents who pledge cooperation with the government.<sup>17</sup> Lastly, in order to protect this fragile stability (being preserved with foreign assistance), the Afghan government prevented the publication of the “Conflict Mapping Report” by the Afghanistan Independent Human Rights Commission (AIHRC), a crucial document that accounted for all human rights violations between 1978 and 2001.<sup>18</sup> This report has been referenced by many scholars as representing a critical account of violations of human rights law and humanitarian law, shedding light on those responsible.<sup>19, 20</sup>

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13. “A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan.” Afghanistan Independent Human Rights Commission (AIHRC), Kabul, January 2005. P. 13.

14. Rubin, Barnett. “Afghanistan from the Cold War Through the War on Terror.” Oxford: Oxford University Press, 2013. Pp: 133-148.

15. Sevastick, Per. “Rule of Law, Human Rights and Impunity: The Case of Afghanistan.” Hague Journal on the Rule of Law 12, 2020. Pp: 93-145. <https://doi.org/10.1007/s40803-019-00089-z>

16. Rubin, Barnett. “Afghanistan from the Cold War Through the War on Terror.” Oxford: Oxford University Press, 2013. P 140.

17. Sevastick, Per. “Rule of Law, Human Rights and Impunity: The Case of Afghanistan.” Hague Journal on the Rule of Law 12, 2020. P 101. <https://doi.org/10.1007/s40803-019-00089-z>

18. Gossman, Patricia. “Human Rights, Security and Afghanistan’s Peace Process: The Justice- stability Nexus.” Accord: An International Review of Peace Initiatives 27, 2018. Pp: 122-127 <https://www.c-r.org/accord/afghanistan/human-rights-security-and-afghanistans-peace-process-justice%E2%80%93stability-nexus>

19. Ibid.

20. Rubin, Barnett. “Afghanistan from the Cold War Through the War on Terror.” Oxford: Oxford University Press, 2013. Pp: 133-148.

## Absence of Transitional Justice and the Persistence of Human Rights Violations

Transitional justice scholars and practitioners define transitional justice as measures by which a society accounts for past abuses as it moves from a condition of dictatorship or conflict (where the perpetrators of violence enjoy impunity) to one of civil peace (where the state seeks to provide justice and security to its citizens).<sup>21</sup> However, the absence of transitional justice has been one of the main reasons human rights have faced resistance in Afghanistan.<sup>22</sup> Among other scholars, Eleanora Testi, drawing from the lessons of the Colombian Peace Process, has flagged the dangers of keeping agreements as a political exchange between local elites and the international community in a transitioning society.<sup>23</sup> Furthermore, she has asserted the necessity of incorporating the victim's needs, alongside political agreements, to reach the required social stability needed to ensure lasting peace.<sup>24</sup>

Dr. Elham Atashi, professor and co-director of the Peace and Justice program at Georgetown University, has argued that the implementation of transitional justice in Afghanistan by human rights advocates must fight assumptions that war crimes and violence must be left to the past when they in fact impact the present.<sup>25</sup> She also notes that Afghanistan remains in a state of war and questions the applicability of transitional justice in this context.<sup>26</sup> However, what is missing from Atashi's analysis is that Afghanistan did in fact transition to a post-war regime in 2001, at least until the escalation of violence around 2006. Had the peacebuilding effort included transitional justice mechanisms in this earlier phase, the transition would have been able to give way to justice for Afghans and prevent the violations of human rights post-2001. Instead, the needs of the victims of war crimes and crimes against humanity were overshadowed by "War on Terror" rhetoric<sup>27</sup>, setting in motion new cycles of violations of human rights

21. Ibid.

22. Sevastick, Per. "Rule of Law, Human Rights and Impunity: The Case of Afghanistan." *Hague Journal on the Rule of Law* 12, 2020. Pp: 93-145. <https://doi.org/10.1007/s40803-019-00089-z>

23. Testi, Eleanora. "What Future for Transitional Justice? Colombia and the Balkans as Case Studies." *Zeitschrift Für Internationale Strafrechtsdogmatik*, 2018.

24. Ibid.

25. Atashi, Elham. "Afghanistan: Transitional Justice in The Midst of War." *Nationalities Papers* 41, no. 6, 2013. Pp: 1046-1064 <https://doi.org/10.1080/00905992.2013.801414>.

26. Ibid.

27. Rangelov, Iavor, and Marika Theros. "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18, no. 4, 2019. Pp: 403-418 <https://doi.org/10.1080/14754835.2019.1629889>

and international humanitarian law. In addition to these current cycles, Dr. William Maley, professor of diplomacy at the Australian National University, has extensively documented the negative consequences of lack of justice under the communist regime (1978-1989), the civil war (1990-1996) and the Taliban regime (1996-2001) and concludes that they have had a ripple effect preventing the realization of human rights today.<sup>28</sup>

### **Culture of Impunity and Failure to Uphold the Rule of Law**

In Afghanistan, the culture of impunity has grown stronger since 2001. Those responsible for the most atrocious human rights violations (besides having never been held responsible for their past crimes) are more politically powerful than ever, hence rendering future justice difficult if not impossible.<sup>29</sup> The Amnesty Law of 2007 signaled they could continue their acts of aggression knowing that they will not be prosecuted. This has resulted in a high perception of impunity, leaving victims faithless in the justice system. According to the World Justice Project, overall perception of impunity varies across the country with the South-West region having the most positive perception of accountability (49%) while Kabul has the least positive perception (9%), relatively low compared to neighboring countries.<sup>30</sup>

The measures used by the government to seek accountability on behalf of victims are inadequate to investigate, take appropriate steps to protect victims, and bring perpetrators to justice. According to UNAMA, civilian casualties from armed conflict in 2019 alone reached more than 10,000.<sup>31</sup> However, the impact of the conflict goes beyond civilian casualties—extensive and durable harm was caused to the physical, mental, and socio-economic well-being of individuals, families and communities. Children are continuously exposed to extreme harm. According to UNAMA, children constituted 30% of all civilian casualties in 2019. In addition, they are also victims of recruitment by armed forces and victims of sexual exploitation

28. Maley, William. "Transition in Afghanistan: Hope, Despair and the Limits of State Building." London: Routledge, 2018. <https://doi.org/10.4324/9781315143071>

29. Sevastick, Per. "Rule of Law, Human Rights and Impunity: The Case of Afghanistan." Hague Journal on the Rule of Law 12, 2020. <https://doi.org/10.1007/s40803-019-00089-z>

30. "The Rule of Law in Afghanistan." World Justice Project, 2016. P. 6. [https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Afghanistan%20GPP%20%20JSS%20Report\\_2May2017%20%283%29.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Afghanistan%20GPP%20%20JSS%20Report_2May2017%20%283%29.pdf)

31. "Afghanistan Protection of Civilians in Armed Conflict 2019." UNAMA, February 2020, Kabul, Afghanistan. [https://unama.unmissions.org/sites/default/files/afghanistan\\_protection\\_of\\_civilians\\_annual\\_report\\_2019\\_-\\_22\\_february.pdf](https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf)

and violence.<sup>32</sup> For instance, in 2019, UNAMA verified the recruitment and use of 64 boys by the Taliban, Afghan national security forces, and other pro-government armed groups.

Women are also disproportionately affected. Lida Ahmad, gender adviser to Humanitarian Assistance for the Women and Children of Afghanistan (HAWCA), and Priscyll Avoine illustrate in their research that the lack of formal mechanisms of accountability for the former Mujahideen has enabled them to maintain positions in the political institutions, such as dominating the majority of seats in Parliament.<sup>33</sup> This major example of impunity, according to their analysis, helped normalize a culture of impunity for violence against women, further enabled by the continued power of misogynistic warlords in state structures.<sup>34</sup> While the US-led NATO invasion of Afghanistan was ideologically justified under the banner of democracy and women's rights, Ahmad and Avoine have claimed "it appears that violence against women has increased on a large scale with foreign presence and recent peace talks" due to the militarization of society and lack of accountability.<sup>35</sup> Violence perpetrated by family members such as honor killings constitute a high risk for women, resulting in further victimization from social exclusion, suicide, or forced prostitution.<sup>36</sup>

Making advances in the human rights arena requires significant investment. This includes the development of strategies for strengthening existing accountability mechanisms to disrupt and combat the culture of impunity. In cases where perpetrators of abuse deny violations or the state is incapable of dealing past atrocities, international actors can support or set up truth and reconciliation commissions in delivering justice and acknowledging the harms done to victims with guarantees that abuse will be prevented in the future. Truth and reconciliation commission cases from Chile, South Africa and El Salvador can provide many lessons learned in the way of implementation.<sup>37</sup>

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32. Ibid.

33. Ahmad, Lida and Priscyll Anctil Avoine. "Misogyny in 'Post-War' Afghanistan: The Changing Frames of Sexual and Gender-based Violence." *Journal of Gender Studies*, 27, no. 1, 2018. Pp: 86-101 <https://doi.org/10.1080/09589236.2016.1210002>.

34. Ibid.

35. Ibid.

36. Ibid.

37. Sevastick, Per. "Rule of Law, Human Rights and Impunity: The Case of Afghanistan." *Hague Journal on the Rule of Law* 12, 2020.. <https://doi.org/10.1007/s40803-019-00089-z>



### **Conclusion: Looking Ahead**

Nineteen years after the Bonn agreement, Afghanistan's human rights record continues to be a cause for deep concern. The Bonn agreement, while replete with references to human rights and rule of law, failed to acknowledge and address the structural flaws that had given rise to decades of political turmoil and instability, condemning Afghans to a repetition of an era marked by human rights violations. The peace first and justice later approach sidelined transitional justice mechanisms in the peacebuilding strategy, making the advancement of human rights difficult if not impossible. As tempting as it may be for policymakers to sweep the past under the rug after so many decades of war, the failure to address the past and disrupt impunity will contribute to ongoing insecurity and violations of human rights. In the meantime, while it is important to draw lessons from other post-conflict countries and their mechanisms for dealing with past atrocities, Afghanistan's own failure (perhaps inability) to deal with the past provides valuable lessons for the intra-Afghan talks. The recommendations below are for the consideration of the parties of the intra-Afghan talks of the coming months (potentially years):

### **Policy Recommendations**

- Ensuring the Inclusion of Human Rights in the Agenda of the Intra-Afghan Talks and Beyond: By adopting a framework that works towards building positive peace and including human rights in the peace agreement, conflict resolution discussions on contested issues can move in a positive direction. The examination of the recent eight peace agreements by the International Council on Human Rights Policy concludes that human rights discussions can make practical and positive contributions to many areas of conflict resolution. Understandably, the integration of human rights discussions, particularly minority and women's rights, in the negotiations remains challenging. Nonetheless, to break the cycle of abuse, negotiating parties must ensure the inclusion of human rights in the intra-Afghan talks.
- Including the Victims and Their Voices in the Intra-Afghan Talks: Inclusion of victims and survivors of the conflict will ensure the

legitimacy of the peace agreement while their exclusion will render any peace fragile. To ensure the sustainability and durability of the peace agreement, it is vital to develop mechanisms for including victims and their voices in the delegation and the intra-Afghan talks. Working closely with the AIHRC to leverage its experience and influence can be a good starting point.

- **Implementing Transitional Justice Mechanism(s):** The implementation of transitional justice mechanisms must be considered in the intra-Afghan talks. While providing recommendations on the specific mechanisms of transitional justice is outside the scope of this article, it is important to remember that addressing the legacy of massive human rights violations is necessary to avoid the persistence of abuses. There is growing evidence that sidelining the calls for dealing with past atrocities will jeopardize any settlement with the looming shadow of unresolved grievances.<sup>38</sup>
- **Disrupting the Cycle of Impunity:** A democratic state should not be built on impunity for human rights violators. The legitimacy of the state depends on its ability to serve and protect citizens as well as give them meaningful avenues to voice grievances. Putting an end to the cycle of abuse must include addressing the impunity that too often allows abuses to continue undeterred. Further, impunity has served as a mechanism to not only exacerbate violations of human rights, but to reproduce and diffuse the insecurity as has been illustrated in this article. At this critical juncture, as the parties to the conflict are nearing a political settlement, it is vital for human rights advocates to assimilate these lessons and focus on developing strategies for strengthening and activating accountability mechanisms. Furthermore, human rights advocates must focus on instruments for combating impunity, not only for current violations but also for violations of human rights since the onset of the recent wave of conflict.
- **Establishing a Shared Understanding of the Conflict and Violence:** As many human rights advocates familiar with the situation in Afghanistan

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38. Thomas Obel Hansen. "In Pursuit of Accountability During and After War." *Journal of Strategic Studies* 42, no. 7, 2019. Pp: 951. DOI: 10.1080/01402390.2019.1588120.

have highlighted, it is critical that the Afghan government support the release of the AIHRC Conflict Mapping Report which will initiate a dialogue about the legacy of war and establish a shared understanding of history of the conflict that goes beyond their own community, tribe or ethnic group. This will be a step forward for Afghans to understand how and why the war began and has continued for so long, reflecting different perspectives across conflict lines. The transitional justice mechanisms can be built over this report, such as the establishment of a shared truth and reconciliation commission.

- **Protecting Women's Rights Advances:** To protect hard-won gains and further guarantee women's rights, it is crucial to support local initiatives that will not only denounce the structures exacerbating the conflict, but also rearticulate women's capacity and leadership rooted in local knowledge and expertise. More importantly, protecting women's rights in any peace process will require a commitment by the participants not to weaken existing constitutional guarantees for women's rights.