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# The Past as Present: War Crimes, Impunity and the Rule of Law

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Several weeks ago in Geneva, at the annual meeting of the UN Commission on Human Rights, a heated debate took place behind the scenes over a proposal to establish an international commission of inquiry to look into past war crimes in Afghanistan. Much of the debate centered on whether the time was ripe in Afghanistan to begin seriously discussing how to address the past, with some participants pushing for a strong resolution, others opposing any action at this time. In the end, that proposal was withdrawn, to the bitter disappointment of Afghan human rights activists and the new Afghan Independent Human Rights Commission (AIHRC), which has been receiving a steady number of unsolicited complaints from Afghans about past abuses. The country responsible for the proposal's defeat was the US, who worked to see that the UN Commission on Human Rights issued no resolution on human rights in Afghanistan. This session of the UN Commission was a disaster for human rights in many countries, but by blocking any resolution on human rights in Afghanistan – and there has been a resolution most years going back to Soviet times—the US signaled that its priorities did not include accountability for either past or ongoing human rights abuses. It's a position that belies the reality Afghans live with every day, and one that will ultimately undermine the stability the US seeks in the region.

The proposal on a commission of inquiry was quite cautiously worded, and did not spell out any particular mechanism, judicial or non-judicial, for addressing past crimes. Instead, it advocated an approach that would involve international experts to begin mapping the major incidents of the past. Whether this would involve putting together what is already documented, or undertaking new research in Afghanistan was

not specified. There is general consensus among those involved in thinking about the problem of transitional justice in Afghanistan that some kind of stocktaking and analysis of sources and existing documentation would be an important part of creating a record that Afghans can use whenever there is an opportunity to pursue the truth and some measure of justice.

Such a record could be a first step in what will inevitably be a lengthy struggle by Afghans to account for the long legacy of war and atrocity in their country. Good documentation need not at this stage lead to specific recommendations about future mechanisms to deal with individuals responsible for crimes until there is some measure of public debate about the issue, and there are institutions better equipped to address the problem. But if this stocktaking is actually going to represent a step in a process, and not just a gesture to assuage the consciences of some in the international community, then it must be done in such a way that it serves that objective for Afghans. A report that relies solely on documentation that is already available—and does not make use of more direct sources including witness testimony—runs the risk of producing something that would ultimately represent far less than what most Afghans already know about what happened in their country over the 23-year war. It could also be dangerously skewed. Published material about specific abuses is uneven in its coverage of the war. Little has been documented about specific incidents from 1978 and 1979. International human rights groups did not begin to produce reports until well into the 1980s. Deterred by the difficulty and dangers of investigating violations after Kabul descended into chaos in 1992, human rights groups did very little monitoring and documentation in that period. And even with the international interest in Taliban abuses with respect to women, most massacres carried out by Taliban forces went unremarked by the international press.

On the diplomatic front, the US and its allies condemned human rights violations by Soviet forces and their Afghan counterparts during that phase of the war, but there was little political engagement on Afghanistan among Western countries after the Soviet withdrawal. Thus, the atrocities that took place, including mass rape, systematic summary executions and indiscriminate shelling, largely escaped scrutiny. Those responsible for the abuses of this period include many leaders who have returned to power either directly or indirectly as a consequence of the Bonn Agreement. A UN report

that fails to include those abuses could be used by members of the current transitional administration, and international actors, including UN officials who have opposed digging up the past, to close the door on any future efforts toward accountability. All this is not to say that a good report that documents past abuses cannot be done. It depends on how it is done and how it relates to sentiments and activities of Afghans engaged on the issue.

The proposal for a commission of inquiry came from the report of Asma Jahangir, the UN Special Rapporteur on Extrajudicial Executions, who is mandated by the UN Commission on Human Rights to examine situations of extrajudicial, summary or arbitrary executions and to submit her findings, together with conclusions and recommendations.<sup>1</sup> The proposal was included as a recommendation in the report on her mission to Afghanistan which took place late last year. But even though the proposal itself came out of a UN body, it has been difficult in this period to find anyone at the UN Assistance Mission on Afghanistan (UNAMA) who acknowledged knowing much about it. There is surprisingly little communication between UNAMA and Geneva, little consultation with the AIHRC, and little transparency within the UN on the subject.

This is part of a pattern. An unfortunate consequence of the Geneva debate has been to push discussions of transitional justice in Afghanistan even further off the international agenda. Indeed, the issue has become a taboo subject among the assistance and diplomatic communities in Kabul—discussed in private offices, or homes but not in public forums. Even in those private deliberations, there is apprehension that too much talk about accountability for the past might drive commanders to abandon politics and return to the battlefield. But in the absence of any pressure from the international community on human rights, some political leaders who have been responsible for serious war crimes have been emboldened, and are consolidating their strength in Kabul or elsewhere to dominate the constitutional process, the judicial reform process, government appointments and other crucial pieces of the political process. Rather than return to the battlefield, they are closing out any space for public debate and participation.

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<sup>1</sup> Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, Addendum: MISSION TO AFGHANISTAN (13 to 23 October 2002), E/CN.4/2003/3/Add.4, 3 February 2003.

To argue that this is the best we can expect in Afghanistan—an argument heard from US and UN officials after the Emergency Loya Jirga last year—is dangerously short-sighted.

A comparison with other examples of societies dealing with transitional justice issue demonstrates that there are clear advantages to beginning a process as soon as possible after the onset of the “transition.” No country that has dealt with a legacy of repression and serious violations of international humanitarian law has done so without the threat of renewed conflict or reprisal. But experience shows that if a process is not started relatively soon after a transition, the momentum to do so, and the international and public support for it may evaporate. In addition, the more delay, the more likely that some evidence will be tampered with or destroyed.<sup>2</sup>

Those who argue that it is too soon to take steps on transitional justice contend that the Afghan Independent Human Rights Commission is not a representative institution and there is no consensus among Afghans about what should be done. Some argue that it is inappropriate for foreigners to be involved, and that if Afghans alone cannot take this on, then it is not time for it to be done at all. Ironically, it is foreigners who are making this argument, and one could reasonably ask why foreigners should make that decision for Afghans, particularly when foreigners armed, and continue to arm some of the very parties who committed atrocities, and are thus also implicated in the crimes. The choice is really between an appropriate role for foreigners, or one that would have foreigners dictating what should or should not be done. Foreigners can play a vital role particularly in specific areas of investigation and advocacy. No foreign involvement can or should replace what Afghans themselves will have to do if they are going to figure out some way to address the growing popular demand for reconciliation and justice.

The AIHRC only began its work at the beginning of this year, but it has already received more than fifty specific complaints related to past abuses. The Commission is under pressure particularly in some districts to tackle the issue more forthrightly. In my experience working on this issue inside Afghanistan it is the foreigners for the most part who are cautious, not those Afghans who have waited a very long time for anyone to hear their story. In some cases, the AIHRC and others I know working on the issue feel they

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<sup>2</sup> For a thorough discussion of truth commissions, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2001), especially pp. 220-222.

have to act as a brake on the demands coming from Afghans. The demand for ways to address the past is likely to increase this year as various institutions—including the AIHRC—begin to grapple with the question, and as the run-up to the elections inevitably raises the problem the Emergency Loya Jirga was unable to handle: whether and how to exclude as candidates those responsible for war crimes.

At the time of the establishment of the AIHRC, discussions on transitional justice centered on the need for two parallel initiatives: one to begin documentation, and one to begin consultation with the aim being that by the time substantial documentation had been carried out, there would be a clearer sense of what the “Afghan street” thought about these things. Unfortunately, neither initiative has yet gotten off the ground. Without international support neither will. The constitution making process is also meant to involve national consultation, as specified in the Bonn Agreement, but there is little evidence that anyone at UNAMA has given serious thought to planning for what that would involve both in terms of financial resources and technical assistance. The AIHRC will also need support—political as much as financial—if it is to survey views about what can be done about the past and when. No one knows yet what will emerge from any such survey, but preliminary discussions indicate that Afghans who are thinking about the issue are aware that questions of guilt and innocence, justice and reconciliation are complex and cannot be resolved by simply importing mechanisms that have worked elsewhere. They are equally aware that one can draw a distinction between the larger numbers of individuals who may have committed crimes during factional fighting but who were not in positions of authority, and a smaller number of individuals who either ordered or acquiesced in crimes against humanity and serious war crimes committed by troops under their command. These would include massacres of civilians or other non-combatants, mass rapes, systematic torture and summary execution, and wanton destruction of the sources of livelihood for entire communities.

Those who are resistant to tackling the issue at all point out that some Afghans will see it as a campaign against the mujahidin as a whole, and discredit any effort aimed at accountability on those grounds. But it is at the very least disingenuous if those in the international community who know better accept that argument at face value. Afghans certainly know that all mujahidin did not resort to crimes like rape and massacring

civilians, though some of them did. People I have worked with on this tell me that many Afghans are quite cognizant of the difference between those who ordered the mass killings and those in the lower ranks who may have engaged in other crimes during some of the factional fighting. Afghans involved in discussions on transitional justice are thinking about different ways that justice and reconciliation might be achieved, depending on the kind of crimes and the position of authority the alleged perpetrator occupied.

Unfortunately, there has been a dangerous tendency lately among diplomats and UN staff in Kabul to adopt a selective vocabulary when talking about security and human rights, distinguishing between the “government” and the “warlords” outside Kabul, with the latter identified as the problem. This would appear to exonerate those in the transitional administration who have abused their authority. What horrifies many Afghans is that those who were in command of operations in which civilians were deliberately targeted, or who ordered mass summary executions, appear to operate now—as they so often did in the past—with the assent if not the support of the international community. At one end are those commanders who have received military support from the US, despite evidence of their involvement in past or current abuses. At the other end are those political leaders or commanders who are also implicated in war crimes, but who have taken up positions of authority in Kabul or elsewhere with little sign of protest from the UN or diplomatic community. Certainly, very senior figures would be difficult to dislodge at this point, but one does not have to start at the top to begin to get a message across.

The bitterness that many Afghans feel about what they perceive as the indifference of the rest of the world to the legacy of the war – not just to the suffering wrought by any prolonged war, but the specific, targeted killings carried out by commanders known to them, with names, ranks and clear chains of command, many of whom walk the streets of Kabul, or haunt certain neighborhoods of Quetta, or visit certain cafés in Delft or Hamburg—was brought pointedly to my attention when I visited Kabul in the summer of 2000. It was the first time I had visited Kabul since the Taliban had taken control, and I was there researching how humanitarian organizations were dealing with (or not) human rights concerns. I was interviewing a Hazara man, who was the

community leader for that part of west Kabul. After describing numerous cases of young Hazara men being detained and jailed by the Taliban for the purposes of extortion, of Taliban police beating and threatening Hazara merchants in order to seize their property, we talked about the legacy of war crimes not only by the Taliban but by the parties that had fought for control of Kabul in the early 1990s. He told me then that the only thing he feared more than the Taliban was if those who had fought over Kabul in the early 1990s came back. He wanted to know why the “international community” was silent about these abuses. Of course, the world condemned the Taliban’s treatment of women, but not the massacres and other war crimes.

International human rights advocacy on Afghanistan has always been selective, with gender discrimination the only issue on which the international community appears capable of sustained attention. The Geneva Accords that finalized the agreement on the Soviet withdrawal made no provision for addressing war crimes; later, no one but the ICRC complained very loudly about the horrific abuses of the 1992-95 period. The role of the UN in dealing with such issues has always been fraught with controversy. When the Office of the High Commissioner for Human Rights failed to follow through with investigations into the massacre of Taliban prisoners in 1997, and the subsequent massacre in Mazar-i Sharif by the Taliban in 1998, human rights groups—as well as many representatives of the UN and humanitarian groups on the ground—were outraged. There is no question that the OHCHR squandered an important opportunity to demonstrate the universality of human rights and to show that the UN in particular would uphold this principle. But there is enough blame to go around: the OHCHR has also been subject to political pressure from other UN agencies as well as member states. The new High Commissioner for Human Rights has signalled his intent to see that some documentation of past abuses takes places under the auspices of his office; it remains to be seen whether the body entrusted with this task will have the mandate and stature required to achieve meaningful results.

The message that came through for Afghans was that such incidents in their country really did not rate very high with anyone in a position to make sure that an investigation was done properly. What that incident, and the subsequent failures of the UN to tackle issues of impunity, has done to the reputation of the UN in Afghanistan is



not irreparable, but it is compounded by what is happening today: I visited Dasht-i Laili in February 2002, and what is striking is not just the evidence of recent mass burials, but the fact that the site is layered with victims going back six years or more, and that no one has ever managed to find out who they are. Last year UN investigators came around asking questions and once again the UN suspended further work because of security concerns. Unfortunately, the pattern that emerges among the internationals involved in these processes is to back off and relinquish ground, sometimes to precisely those persons responsible for the lack of security. Raising the question of security is also a way for those who do not want an investigation—including states who ought to help provide security for the work to continue—to make sure nothing happens. The risks of undertaking an investigation into mass graves in Yakaolang are minimal, but nothing is happening there either. If every time there is a threat, the international community concedes more space to those responsible for the atrocities in the first place, what has that achieved for the Afghans?

What then can and should be done? U.N. Special Representative Lakhdar Brahimi has argued that it is far too early to begin talking about “transitional justice” in Afghanistan because the government is too weak and the security situation too precarious. He also cites the lack of international commitment to peacekeeping and the absence of strong judiciary as reasons for avoiding the issue for the foreseeable future. As with the Loya Jirga process, he argues that it is impossible to sideline the warlords in constructing a new state, and that this is the best that can be done at the present. This argument is echoed by some others in the donor community.

That argument is based on a very short-term vision of Afghanistan’s chances for a stable future, and actually aggravates the very security risks and institutional weaknesses cited as reasons for avoiding addressing the past. Those who benefit most from the international community’s silence on accountability for the past include many figures with links to criminal and/or extremist networks. Among their ranks are political leaders who dominate the security and intelligence machinery, profit hugely from increased poppy production, engineer the constitutional process to suit their politics, suppress legitimate voices of dissent in the provinces, or incite attacks on foreign aid workers. Supporting a process that will lead to some form of transitional justice in Afghanistan is

part of supporting institutions that are crucial to Afghanistan's ability to transition at all to a more representative form of government, an opening of political space, a judiciary that can begin to address the needs of its people. Silence from the international community on the question of accountability in effect erodes the entire process.

In this critical year before nationwide elections are meant to be held, it is possible to begin a process that could assist Afghans in exploring the options available to them, and equipping them with the information and training they need to move it forward. Most important, beginning a process sends the crucial political signal that accountability is central to the rule of law, and that there is genuine international support for at least marginalization of the worst perpetrators. Such a process would have the support of many Afghans. It would include pursuing multiple approaches, among them: a national consultation process on transitional justice spearheaded by the AIHRC; an international panel of inquiry to assemble and analyze existing documentation and receive submissions, including testimony, about past violations that would work in consultation with the AIHRC; following through with the investigations of mass grave sites in Bamiyan, Mazar and, if there is sufficient pressure on states to provide the necessary security, Dasht-i Laili; exposure of more senior figures responsible for war crimes who have taken asylum outside the country; and possibly exclusion from public office of former lower-to-mid ranking members of political groups about whom there is strong evidence of culpability for war crimes—all with the aim of creating some momentum on the question of transitional justice.

International human rights advocacy on Afghanistan has up to now always been inconsistent and inadequate, delinked from any larger political strategy for securing peace and rebuilding the country. As a consequence, principles and practices essential to building the very institutions we expect or at least hope will ultimately provide good governance and promote respect for the rule of law have been abandoned. Transitional justice is among those concerns supported by Afghans that is in danger of being marginalized. But we cannot hope to reverse that process in a vacuum of political engagement on human rights at the international level.

