

# In War, No One Distributes Sweets

ASSESSING TRANSITIONAL JUSTICE RESPONSES & APPROACHES  
IN POST-2001 AFGHANISTAN



## ABOUT THE PROJECT

The [Institute for Integrated Transitions \(IFIT\)](#) is an international think tank that brings together under one roof the best of theory and practice in relation to successful negotiations and transitions out of conflict or authoritarian rule.

This paper is part of a project that aims to fill a major gap in policy making: the failure to integrate lessons learnt and best practices from the field of transitional justice in relation to conflict resolution strategies with two kinds of unconventional armed actors: 1) “violent extremist” groups, such as jihadists; and 2) organised crime groups, such as mafia, gang networks and drug cartels. IFIT’s work on the former began in 2017 with the UN University Centre for Policy Research (UNU-CPR). The project was concerned with the fact that, to date, what has reigned is an overwhelmingly punitive and dragnet approach which, rather than helping address root causes and break cycles of resentment and violence, instead risks renewing or reinforcing them. This resulted in [three jointly-published](#) case studies ([ISIS in Iraq](#), [Al-Shabaab in Somalia](#), and [Boko Haram in Nigeria](#)) and an initial [policy framework](#).

Building on this initial work, IFIT launched a second phase of research in 2019 on the same broad topic, drawing on lessons from a wider range of country situations where comparable challenges have been grappled with, in order to provide expanded guidance for policymakers. This involved fieldwork-based reports covering Libya (focused on the LIFG), Uganda (focused on the LRA), and Afghanistan (focused on the Taliban), all of which examine the intersection of negotiation and transitional justice goals. IFIT commissioned additional taxonomy research to plot identifiable similarities and differences of motivation, structure, and context along a wide spectrum of different archetypes of non-state or unconventional armed groups. All of this informed a final framework that aims to help policymakers tailor more effective negotiation and transitional justice strategies to address root causes, break cycles of violence, and strengthen the rule of law in settings affected by violent extremism.

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## ABOUT AREU

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institute based in Kabul that was established in 2002 by the assistance of the international community in Afghanistan. AREU’s mission is to inform and influence policy and practice by conducting high-quality, policy relevant, evidence-based research and actively disseminating the results and promote a culture of research and learning. In 2018, AREU was awarded Best International Social Think Tank by Prospect Magazine.

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## Acronyms

<b>ACJC</b>	Anti-Corruption Justice Centre
<b>AIA</b>	Afghan Interim Administration
<b>AIHRC</b>	Afghanistan Independent Commission for Human Rights
<b>AMF</b>	Afghan Militia Forces
<b>ANA</b>	Afghan National Army
<b>ANBP</b>	Afghan New Beginnings Programme
<b>ANSF</b>	Afghan National Security Forces
<b>ANDSF</b>	Afghan National Defence and Security Forces
<b>APRP</b>	Afghanistan Peace and Reintegration Program
<b>AREU</b>	Afghanistan Research and Evaluation Unit
<b>ARHDO</b>	Afghanistan Human Rights and Democracy Organisation
<b>BSA</b>	US-Afghanistan Bilateral Security Agreement
<b>CIA</b>	Central Intelligence Agency
<b>DDR</b>	Disarmament, Demobilization and Reintegration
<b>DIAG</b>	Disbandment of Illegal Armed Groups
<b>ERW</b>	Explosive Remnants of War
<b>HIG</b>	Hezb-i-Islami Gulbuddin
<b>HPC</b>	High Peace Council
<b>HRW</b>	Human Rights Watch
<b>ICC</b>	International Criminal Court
<b>IED</b>	Improvised Explosive Devices
<b>ISK</b>	Islamic State of Khorasan
<b>MSF</b>	Médecins Sans Frontières – Doctors Without Borders
<b>NATO</b>	North Atlantic Treaty Organisation
<b>NDS</b>	National Directorate of Security
<b>OSF</b>	Open Society Foundations
<b>PDPA</b>	People's Democratic Party of Afghanistan
<b>PPC</b>	Provincial Peace Committee
<b>PTS</b>	Projay-e-Tahkeem-e Solha - Program Tahkeem-e-Sulh
<b>RiV</b>	Reduction in Violence
<b>SAAJ</b>	Social Association of Afghan Justice Seeker
<b>SIGAR</b>	U.S. Special Inspector General for Afghanistan Reconstruction
<b>UF</b>	United Front

<b>UNAMA</b>	United Nations Assistance Mission to Afghanistan
<b>UNDP</b>	United Nations Development Programme
<b>UNMAS</b>	UN Mine Action Service
<b>UNU-CPR</b>	United Nations University, Centre for Policy Research
<b>USIP</b>	United States Institute of Peace

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# Introduction

*In a warzone, no one distributes  
sweets or cookies.*

AFGHAN PROVERB: *Pa Jang Ki Halwa Na Taqseemizhi*

Over 40 years, every side in Afghanistan's armed conflict has violated fundamental human rights or international humanitarian law. This is the grim reality that has shaped the country and underscores the stakes of the incipient intra-Afghan peace talks.

Afghanistan became known as the "Great Game" in the 19th century, a buffer at the core of prolonged political and diplomatic confrontations between the mutually suspicious Russian and British empires. After independence in 1919, the 40-year reign of King Zahir Shah (1933–1973) saw some reforms until his constitutional monarchy was overthrown by his first cousin and former prime minister, Sardar Mohammad Daoud Khan, who declared Afghanistan a republic. Daoud Khan's unsuccessful efforts to play off the West and the Soviet Union culminated in the 1978 coup that launched a civil war and led to the Soviet invasion of 1979 (1979–1989).

But the victorious Mujahideen failed to maintain unity and peace, opening the way for the hard-line Islamic movement, the Taliban, to gain power in 1996. Its rule, based on a strict interpretation of Sharia law and recognised by only three states, was ended by the 2001 U.S. invasion following the September 11 attacks. Since then, the Taliban has violently opposed the government established by the 2001 Bonn Agreement, also known as the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions.

Plagued by political instability, systemic corruption, a culture of impunity, poverty and a deteriorating security environment, Afghanistan today is arguably much farther away from securing peace than it was in 2001. State institutions are still weak, economic development is slow, and large sections of the population are affected by food insecurity. The government controls Kabul, provincial capitals and most district centres, while the Taliban dominates vast amounts of less densely populated territory.<sup>1</sup> The population has experienced only limited relief from the violence and instability, such as during the Eid al-Fitr ceasefires (2018 and 2020) and a temporary reduction in violence in the week prior to the 2020 signing of an agreement between the U.S. and the Taliban.

Battle-related fatalities have increased greatly since 2001 and there have been more than 10,000 civilian casualties for six years in a row. These have been carried out mainly by anti-government armed groups such as the Taliban and the Islamic State of Iraq and the Levant – Khorasan Province (ISIL-KP), but also by government and international military ground and aerial attacks, the latter mainly U.S.



The economic development situation is also alarming. Afghanistan ranks 170th out of 189 countries in the UN's 2018 Human Development Report, and foreign aid has decreased since 2011. While Kabul is still a leading recipient of net official development assistance, many experts believe that, without a sustained flow, security and economic institutions and sectors may collapse, precipitating state failure. Afghanistan also ranked 173rd out of 180 on Transparency International's Corruption Perceptions Index in 2019. The government is accused of misusing foreign aid, and high-profile scandals have rocked past and present administrations.<sup>2</sup> Amidst very limited efforts by the current government, major corruption cases are not investigated, and there has been a lack of clear mechanisms to avoid further corruption, particularly after the second presidential term by outgoing officials.

Within this context, it is challenging to implement laws and policies that address war crimes, egregious human rights violations, victims' rights and concerns, and past and present injustices. Demands for accountability have mostly not been acted upon.<sup>3</sup> Besides policy and legal inaction, inability to reach consensus on the best-suited approach to transitional justice, if any, is a major gap in the response to human rights abuses by both state and non-state armed groups.

The 2001 Bonn Agreement highlighted the importance of identifying systematic human rights violations and war crimes and prescribed formation of the AIHRC, which has undertaken some initiatives. However, the prevailing approach to addressing war crimes since then has been to forget the past (*Ter Pa Heyr*) and focus on the future.

Promoting truth disclosure and accountability may threaten elites and thus is not well favoured. The U.S. has feared that opposing strongmen and warlords in the absence of a strong central state would be detrimental to counterterrorism and stoke instability, possibly igniting a new cycle of civil war. Military and political imperatives thus have trumped the need to address victims' and survivors' grievances through effective transitional justice mechanisms. Justice has been sacrificed to secure help from local elites and forces viewed as vital partners for the U.S.-led war effort and state-building project. The international community has prioritised short-term political and military stability, so accommodated actors accused of egregious human rights violations and war crimes.<sup>4</sup>

On 29 February 2020, after a year and a half of negotiations, the U.S. and the Taliban agreed on a conditional U.S. troop withdrawal. Among other things, the signed deal provided for a prisoner swap, lifting of sanctions and a commitment that the Taliban would not host terrorist organisations like al-Qaeda. The deal also set the stage for a dialogue between the Taliban and the Afghan government.

While multiple local and international actors have emerged and disappeared from the conflict, this paper aims to contribute to an understanding of the war and its parties since 2001, mainly the Taliban, the government and pro-government forces; unpack the transitional justice approaches applied to human rights violations;<sup>5</sup> and draw lessons on preventing or reducing violent extremism, as well as on transitional justice's role in furthering that objective. First, it provides historical background, identifying each party's views and approaches to addressing grave violations in the immediate and longer-term contexts of a peace deal and political settlement. Second, it analyses the opportunities and challenges

of the transitional justice options: how these are understood by the parties and how decisions have been made and with what intent. Third, it develops ideas on opportunities, challenges, and lessons learned that may be applicable for the present context.



# Methodology

This paper is part of a series of country case studies led by the Institute for Integrated Transitions (IFIT) on how well-tailored transitional justice mechanisms and policy may contribute to viable moves away from conflict with “violent extremist groups”. It is based on a comprehensive review of relevant literature on transitional justice in Afghanistan; 15 semi-structured confidential interviews with a diverse high-level group of Afghan and international stakeholders; an Afghanistan Research and Evaluation Unit (AREU) 2016 study on Afghans’ transitional justice perceptions;<sup>6</sup> and AREU’s years of continuous on the ground conversations with key actors on all sides of the conflict. The questionnaire used for the interviews (see Annex 1) was designed to address the study’s main questions, namely 1) what approaches did parties to the Afghan conflict follow when addressing past abuses?, and 2) how are issues of reconciliation and transitional justice addressed in the context of sustainable peace?

Given the subject’s inherent sensitivity and the moment in time when interviews were held (during Taliban-U.S. negotiations), the authors have excluded parties’ military and formal political representatives for security and safety reasons. Interviewees were ex-government and Taliban officials, human rights activists, civil society actors, journalists, and personnel and representatives of international organisations working on justice. Their comments are anonymised, but their views are expressed throughout.

# Historical Background of the Conflict

Afghanistan has been embroiled in violent conflict for four decades – the pro-Soviet coup in 1978, followed by Soviet invasion (1979–1989), intra-Mujahideen fighting (1992–1996) and internal conflict during Taliban rule (1996–2001), the 2001 U.S. invasion, to the current government-Taliban struggle. The country and its people have witnessed the collapse of a functioning state and its public institutions and endured widespread human rights violations. The Soviet invasion followed the 40-year reign of King Zahir Shah, who was toppled in a bloodless 1973 coup. General Mohamed Daoud's republic was overthrown in a pro-Soviet counter coup in 1978 led by the People's Democratic Party of Afghanistan (PDPA), which established the Democratic Republic of Afghanistan that lasted until 1987.

Opposition to PDPA rule grew as it introduced land redistribution reforms and modernisation policies impacting civil and marriage laws. The Mujahideen who opposed these reforms received Pakistani and U.S. backing, while the Soviet Union brought in thousands of military advisers. Ultimately, Moscow invaded to prevent PDPA collapse in 1979. The resulting conflict produced a million deaths and injuries, and the displacement of some six million Afghans, who mainly fled to Pakistan and Iran.

With Soviet casualties growing, Moscow sought to withdraw via a negotiated settlement without giving the impression of defeat. Dr Muhammad Najibullah Ahmadzai, from the People's Democratic Party (PDPA), was installed to pacify the Mujahideen through a national reconciliation policy that relied on economic incentives. Social reforms included changing the name of the country from Democratic Republic of Afghanistan to the Republic of Afghanistan and helping to restore its Islamic identity, but they did not go far enough to win over the anti-Soviet fighters and different leaders.<sup>7</sup>

Following the Soviet withdrawal in 1989, the country devolved into a regional conflict that led to a civil war between Mujahideen fighters, mainly supported by Western opponents of the Soviets or by regional powers such as Pakistan and Iran. That conflict peaked between 1990 and 1996 with widescale atrocities and grave human rights violations.

The fighting between Mujahideen factions caused discontent and provided space for the Taliban ("students" in Arabic) – a new group under Mullah Mohammad Omar's leadership (and made up of former mujahideen fighters) – to emerge around 1994. With military, financial and political support from Pakistan and later Saudi Arabia and the United Arab Emirates, it took over the vast majority of Afghan territory by September 1996. During their period in power, and though they maintained a monopoly over violence, human rights violations were widespread across the country.

The Taliban government was not recognised by the UN or the majority of the international community due to violations stemming from its harsh rule and strict interpretation of Sharia law. Public executions, amputation and mutilation of petty thieves, stoning to death of women accused of adultery, prohibition of girls' schools and severe limitations on women's access to public life were among the reasons why international recognition was withheld. The Taliban hosted and protected Osama Bin Laden, whom the U.S. held responsible for the September 11 terrorist attacks. For these reasons, the U.S. and its allies, including NATO member states, launched Operation Enduring Freedom in October 2001. Working alongside the Northern Alliance and the Afghan United Military Front, which had been in consistent opposition, they overthrew the Taliban within two months.

The past four decades have thus created a complex, internecine conflict with an ever-changing set of belligerents, overlaid with the implications of international patronage and intervention. While questions about war crimes and accountability have been raised since the 1980s, they have never found adequate political support – internationally or otherwise.

# Actors in the Conflict

Multiple local and international actors have emerged and disappeared from the conflict scene. Currently there are several pro-government forces, such as the Afghan National Security and Defence Forces (ANDSF), international military elements (U.S. and the NATO Resolute Support Mission) and pro-government armed groups also known as militias or local uprising members. Anti-government entities include the Taliban and the ISIL-KP, which in the last eleven years have been responsible for over 100,000 civilian casualties and the displacement of more than two million Afghans (half internally displaced). This paper mainly focuses on the violations committed by the pro-government forces and the Taliban as two major parties in conflict who are aiming to enter a negotiated settlement covering the recent years.

## Government and Pro-Government Forces

A week after the 11 September 2001 attacks, U.S. President George W. Bush approved the use of force against those responsible. Operation Enduring Freedom, with Northern Alliance support, entered Afghanistan a month later, prioritising counter-terrorism, later counter-insurgency and ultimately short-term stability.

### The Curse of the Militias

For many decades, and especially since the fall of the Taliban, the Afghan government has been unable to maintain a monopoly of violence. Armed groups roam the countryside, often unchecked and with confidence boosted by system-wide impunity and lack of accountability. Following the 2001 invasion, the government and the international coalition called upon local proxies – informal or quasi-formal militias – to defeat the Taliban, which meant balancing the mission's urgency with the local partners' questionable human rights records.<sup>8</sup> Local militias found themselves with a bolstered arsenal, which was supposed to reduce the chances of a significant Taliban resurrection. Some local commanders, by then accused of multiple war crimes, used the support to strengthen their hold over territory and solidify criminal enterprises such as human trafficking, forced evictions and extortion. The militia were expected to leave areas controlled by the International Security Assistance Force (ISAF) but did not. Very slow U.S. support for ISAF expansion in 2003 (which a host of international actors and donor nations supported) allowed insecurity to breed.

The actions of international military forces ultimately prevented the government from expanding its writ nationwide: the emphasis on fighting the Taliban (and their affiliates) – and later, an exit strategy – saw international forces support informal militias allied with local power brokers and strongmen, in effect de-monopolising the use of legitimate

violence. In some cases, the Americans had a direct interest in preventing effective demobilisation. Since 2005, and throughout south, south-eastern and eastern Afghanistan, U.S. forces have provided support for some non-state militias.<sup>9</sup>

Human rights abuses by the U.S.'s Afghan allies have a long, sordid history. Pro-government militias trained and supported by U.S. intelligence agencies are known for egregious human rights violations and frequent use of excessive force. They operate at arm's length from the state and are difficult to control and discipline, making them more likely to pursue corrupt or private goals. Also, some warlords have been awarded important positions within the national security forces. An example is the late Kandahar province police chief, General Abdul Raziq, once championed by Coalition forces as a key actor in the fight against the Taliban. The UN Committee Against Torture insisted he should be prosecuted for war crimes.<sup>10</sup>

Prior to his assassination in 2018 by the Taliban, Raziq controlled several thousand men and operated within the Afghan chain of command, but with little to no accountability. His well-known hatred of the Taliban and ruthlessness in fighting them won many admirers among foreign troops, but he was long suspected of drug trafficking, corruption, extrajudicial killings, torture and illegal imprisonments.<sup>11</sup> More often than not, his victims were Pashtuns, framed as Taliban fighters. Investigative journalist Matthieu Aikins wrote that he often administered retributive justice against personal enemies whom Raziq described as insurgents and terrorists.<sup>12</sup> Nevertheless, he and his militia continued to receive U.S. military training and support.<sup>13</sup>

While the engagement of U.S. allies in rights violations extends far beyond the case of one individual, Raziq's position as Kandahar's police chief warrants special mention because it highlights the illicit practices of militias. His role in abuses against Pashtuns, who may or may not have been affiliated with the Taliban, helps in understanding why the Taliban view Washington as directly complicit in training and supporting forces that commit crimes against Pashtuns. Little wonder, then, that the Taliban consider U.S. withdrawal essential to any viable peace agreement.

There are numerous studies on militia involvement in torture and extrajudicial killing of Taliban or other opponents and virtual freedom from accountability.<sup>14</sup> Another militia group reportedly involved in such violations was led by the former first vice president, General Abdul Rashid Dostum, who recently got a Marshal title as a result of a political deal. Dostum was part of the Northern Alliance and assisted U.S. military operations against the Taliban after September 11. Under his command, Northern Alliance forces carried out a massacre in the north; mass graves in Dasht-i-Leili indicated that hundreds of Taliban prisoners of war were likely suffocated or shot.<sup>15</sup> These graves probably received more attention than similar ones due to claims that U.S. forces were present at the killings, and because they indicate that serious violations also occurred under the post-2001 power structures. Physicians for Human Rights assisted in the preliminary forensic examination and urged then President Hamid Karzai and the UN Security Council to preserve the sites. Doing so, and acknowledging that hundreds of Taliban prisoners were killed, would have constituted a welcome indication that the state was ready to apply a modicum of transitional justice.

## Night Raids

Night raids are a military tactic used by U.S. and Afghan special forces against non-state armed groups like the Taliban. Per the 2015 U.S.-Afghanistan Bilateral Security Agreement (BSA), they are a critical part of the Coalition’s counter-terror operations and objectives. Using night vision equipment, troops forcibly enter civilian homes and kill, capture or detain suspected enemy combatants. The operations are controversial because they tend to result in civilian casualties and are anathema to Afghan culture. Tactics considered particularly offensive include troops entering homes when women are present or using dogs. For many years, the U.S. led such raids in joint operations with Afghan counterparts. In 2014, President Ashraf Ghani lifted a 2012 moratorium on the raids, after which time government and pro-government forces have led a significant proportion of them.

The UN Assistance Mission in Afghanistan (UNAMA) documented that raids carried out by National Directorate of Security (NDS) Special Forces, and pro-government militias/armed groups, such as the Khost Protection Force and Shaheen Forces, have significantly higher civilian casualty figures and death rates than those run by the Afghan army.<sup>16</sup> This suggests that the former may lack proper command and control structures; clear rules of engagement; and/or accountability for wrongdoing. Human Rights Watch documented 14 cases in which foreign and Afghan forces conducted night search operations in civilian homes, causing terror and killing family members.<sup>17</sup>

These issues are not new. Both UNAMA and civil society groups have raised concerns. In 2019, UNAMA documented 360 civilian casualties from such operations. As far back as 2010, *The Washington Post* reported that night raids might be fuelling the insurgency. Similarly, a 2011 Open Society Foundations report stated that the malpractices reinforced Afghan perceptions that military forces use night raids to “kill, harass, and intimidate civilians with impunity”.<sup>18</sup>

The raids are not merely a source of public grievance. The Afghan government has failed to investigate alleged war crimes committed by its security forces. The few times an investigation has been promised, no information has been made public, and there have been no convictions.

## Air Strikes

The Afghan government and the U.S. have increasingly deployed airstrikes resulting in serious civilian harm. UNAMA identified aerial operations as the leading cause of civilian deaths in the first quarter 2019.<sup>19</sup>

In October 2015, one of many painful examples, a “U.S. Airforce AC-130U gunship attacked the hospital known as Kunduz Trauma Centre that was operated by Médecins Sans Frontières in Kunduz. The attack killed at least 42 people and injured over 30 people, including medical personnel and patients or patient’s visitors”.<sup>20</sup> On 2 April 2018, the Afghan Air Force targeted senior Taliban leaders in Kunduz province in midday during an open-air *dastar bandi* religious ceremony next to a madrassa where hundreds of men and boys



were gathered, killing 30 civilians and injuring 65 others, including 79 children. UNAMA documented 162 civilian deaths and injuries from aerial operations in 2014; this increased to 1,045 in 2019, mostly caused by the U.S. military.<sup>21</sup>

## Corruption and State Economic Crimes

Despite establishment of the Anti-Corruption Justice Centre (ACJC) in 2016, there have only been periodic arrests and prosecutions and limited dismissals of subversive civilian and military officials. Corruption clearly remains a major problem. An October 2018 report from the U.S. Special Inspector General for Afghanistan Reconstruction (SIGAR) confirmed that the ACJC was failing to prosecute senior officials.<sup>22</sup> Allegations of top-level corruption increased after the 2019 presidential election, with members of the government, including presidential candidates accusing each other of misappropriating funds to pay for campaigns.<sup>23</sup> SIGAR's July 2020 report indicates that the post-2019 government led by President Ghani lacks serious commitment on anti-corruption.<sup>24</sup>

Slow progress in addressing impunity has not only helped alleged perpetrators of corrupt practices to strengthen their positions, but also given them the platform to participate in other forms of crime such as illegal land grabs. Although land grabbing started during the civil war, when properties belonging to Hindu/Sikh communities were seized, it became more prevalent after 2001. Many powerful Afghans have engaged in such activities. In September 2003, when 100 police officers demolished 30 houses in Shirpur, a number of high government officials reportedly divided up the land.<sup>25</sup> This is not the only instance: a parliament-commissioned 2013 report assessed that high-level officials had seized lands worth approximately \$7 billion.<sup>26</sup> A separate report by Afghanistan Freedom House stated that 1,966,411 *jiribs* of land were seized unlawfully in 18 provinces.<sup>27</sup>

The U.S. special representative and former ambassador to Afghanistan, Zalmay Khalilzad, wrote that he travelled to various areas on missions to convince warlords to join the political process by surrendering their militias in return for political positions.<sup>28</sup> What he does not mention is the concession given to the warlords in the form of impunity for continuing engagement in many economic crimes, including mining theft, corruption, land grabbing and drug trafficking. Impunity and failure to investigate and prosecute these crimes (reinforced by the Amnesty Law discussed later in this paper) have enabled this situation to continue and may have even emboldened Afghan special police forces to carry out forced disappearances, summary executions and routine torture of detainees.

## The Taliban

### Origins

The Taliban emerged in 1994 in response to infighting among Afghan Mujahideen who had opposed the Soviets with U.S. and Pakistani support, and younger Pashtun tribesmen who are the predominant ethnic group in the south and east. The Taliban was initially welcomed for dissolving several militias and promising stability after four years of war among rival Mujahideen factions. They took over the southern city of Kandahar in November 1994,

ending violence and rampant crime. Two years later, they entered Kabul to remove President Burhanuddin Rabbani, an ethnic Tajik and the rest of the Mujahideen leaders they considered corrupt, and established the Islamic Emirate of Afghanistan.

The Taliban, who do not recognise the legitimacy of the current government, brought their own form of governance based on a strict interpretation of Sharia, causing fear and violence. They implemented their own interpretation of Islamic *hudud* punishments. The atrocities previous groups committed were used to validate harsh Islamic rule.<sup>29</sup>

As the Taliban gained more power, the Northern Alliance resurfaced in opposition, formed from parties based mostly in the north. These included Jamiat-e-Islami, Etehad-e-Islami (in Kabul and Parwan), Junbish-e-Milli, Hezb-e-Wahdat, and Shora-e-Nizaar. The conflict between the Taliban and the Northern Alliance to seize territorial control in northern and central Afghanistan resulted in serious atrocities. While the Taliban killed, displaced, tortured and detained many ethnic and religious minorities, many Northern Alliance commanders were also implicated: Uzbek and Hazara militias killed, raped and displaced Pashtuns in the north.<sup>30</sup> Among the most known atrocities by the Taliban in this period are incidents in Mazar-e-Sharif in August 1998 and in Bamyan in central highlands in January 2001 where the Taliban carried out summary executions of thousands of people.<sup>31</sup> Both incidents, which targeted mainly non-Pashtun communities among Tajik, Hazara and Uzbek, were widely considered as a form of ethnic and religious cleansing at the time.

The Taliban regime was toppled in 2001 by the U.S.-led international military intervention. It did not resist, as some members moved to sanctuaries in Pakistan, while others returned to villages. The U.S. detained several of the leaders in Guantanamo Bay prison. No reconciliation plan was implemented let alone contemplated. Instead, violence against these individuals and their communities were among the driving factors for the Taliban's re-emergence in the mid 2000s. Other factors include the lack of accountability for violations during operations by Afghan and NATO forces; bombardments of houses; and the torture, cruel and inhuman treatment of detained Taliban members. Local conflicts between Taliban commanders and ex-Mujahideen warlords were crucial in garnering support for a revitalised Taliban.

Regional factors cannot be ignored either. Iran used Taliban fighters to attack U.S. bases in western Afghanistan, while Pakistan continued to provide safe haven for Taliban leaders, whose main political councils (Shura-e-Quetta and Shura-e-Peshawar) are named after two Pakistani cities.

### **The Taliban's Constituency and Narrative**

The Taliban cannot be easily identified with a single ideological constituency or a unique ethnic group. Instead, it has social support among different communities. Considering the public nature of its violence, it is thus relevant to look at the push and pull factors for people to join the movement.

First, while initially religious devotion and jihad were primary motives for joining (many fighters considered jihad a religious duty to fight against foreign forces), since 2001 many

recruits appear to have been motivated by exclusion from the political system, retaliation against perceived military aggression, opposition to abuse of power and impunity, economic necessity and forced recruitment.<sup>32</sup> But it remains difficult to separate out religious and political factors, both of which merge with questions of national identity, nationalism and sovereignty in times.

Second, some individuals who lost family members and friends in the conflict simply sought revenge and saw the Taliban as a path for acting on that. Anger at the air strikes and night raids by U.S. and Afghan special forces, for example, provided a steady supply of new combatants. Emotions and traumas played key roles.<sup>33</sup>

Aside from individual motivations, the dominant narrative propagated by the Taliban is that the group is a symbol of defiance, an anti-occupation force with Islam as its unifying ideology. While there are smaller groups, such as ISIL-KP, the Taliban is visibly the country's main insurgency group.

### **The Taliban's Structure**

It is estimated that the Taliban has around 60–65,000 fighters (with an upper estimate of 85,000) and half that number or more of facilitators and non-combatant members, for a grand total of some 100,000 as of mid-2019.<sup>34</sup> As it has re-emerged, it has proven to be highly organised and bureaucratic. Its highest body is the Leadership Council, which sits above several commissions and organs. According to the UN's Analytical Support and Sanctions Monitoring Team, internal divisions within the Taliban's Political and Military Commissions have grown more pronounced. There is notable discontent among rank-and-file soldiers, who resent the safe havens leaders enjoy in foreign countries away from the front line.

Some report this as the main reason for a recent spate of desertions. Those in the Political Office in Doha recognise a need to interact with the U.S. and other internationals, whereas fighters do not see the utility in moderation. Nevertheless, it appears that most Taliban fighters will follow orders from their leadership, whatever those may be.<sup>35</sup>

### **The Taliban's Main Violations**

Since its resurgence in 2006, the Taliban has used intimidation, threats, physical coercion (including kidnappings and targeted killings), and suicide bombing and other terror tactics against civilians in its war against the Afghan government and its international partners. Because of such acts, there has been a growing demand among Afghans to hold those responsible accountable.

Suicide bombings and non-suicide improvised explosive devices (IEDs) are the leading cause of civilian casualties attributed to the Taliban, followed by ground engagements and targeted killings. As reported by UNAMA, 62 per cent of civilian casualties in 2019 were attributed to anti-government actors, 42 per cent of which correspond to IEDs, including suicide and non-suicide together. This was equivalent to 4,336 casualties due to IEDs in 2019.<sup>36</sup>

Though the Taliban has historically been receptive to some forms of aid, it has also deliberately targeted humanitarian and medical workers. One reason could be that it does not view aid workers as impartial and altruistic, but rather as having hidden agendas.<sup>37</sup> The group has also made death threats to journalists to pressure them to stop reporting abuses and violations.<sup>38</sup> Such targeting appears to be part of a strategy to intimidate local populations and dissuade national and international assistance from reaching those in most need.

The Taliban has also targeted those affiliated to the government, including civil servants, tribal leaders and religious clerics. For example, the Taliban carried out an ambulance-based suicide bomb attack in January 2018 in the centre of Kabul city which is also home to government offices. The attack claimed the lives of at least 95 civilians and injured 158 others.<sup>39</sup> Attacks also tend to increase during moments of heightened civic and political activity, like elections. For example, a string of bombings was reported across the country both during the 2019 election campaign and on polling day to dissuade the public from voting. Voters were threatened, in order to deter participation. Back in 2014, the Taliban cut off the fingers of at least 6 voters in the lead up to election day.<sup>40</sup> Then, during the 2018 parliamentary elections, they again cut off the fingers of another 8 men as a punishment for having voted.<sup>41</sup> As the Taliban does not recognise the government's legitimacy, it views any elections as unlawful.

The Taliban has sought to distance itself from ISIL-KP, which it criticises for cruelty. For example, a troop leader was quoted in 2017 as saying, "ISIS [ISKP] kills anyone that they think is not supporting them, without having any evidence. They even kill children and elders, whom we respect and protect".<sup>42</sup> However, some have blamed the Taliban for the attack on a maternity hospital supported by Médecins Sans Frontières (MSF) in Kabul in May 2019 that ISIL-KP claimed. There are sources indicating that the Taliban and ISIL-KP are both part of a broader "jihadist movement industry" operating within the same areas, involving internal rivalries while also targeting the state.<sup>43</sup>

## Treatment of Women, Girls and Gender-Based Violence

Women and girls have long suffered rights violations at the hands of different parties to conflict throughout the years of war. However, the Taliban's treatment of women during their rule and in the post-2001 context is uniquely extreme as they applied a more systematic form of discrimination against women, even controlling their dress code.

Girls were generally not allowed to go to school after puberty under Taliban rule. Women's access to public spaces and political participation was constrained by threats and harassment. Social restrictions on travelling alone and appearing in public further compounded the situation.

In the post-2001 context, despite a women-friendly constitution (with 25 per cent reserved seats in the parliament and 30 per cent in the public administration) and a relatively supportive government, the proportion of women registered as voters declined from 41 per cent in 2010 to 34 per cent in 2018.<sup>44</sup> Gender-based violence against women and girls

– including rape, murder and mutilation – persists as a result of insecurity, weak rule of law and harmful traditional practices. Women in key political positions have often been attacked or assassinated at national and provincial levels. These include women who served as government officials, journalists, police officers and members of civil society organisations.<sup>45</sup> Systematic discrimination remains evident, despite enormous efforts to close the gender gap in representation, political participation and access to jobs and basic services.

It was perhaps the violent subjugation of women and attacks on Afghanistan's cultural heritage (such as the destruction of the Buddha statues) that most raised the Taliban's worldwide notoriety. From beginning to end of their rule, the Taliban never meaningfully evolved or adapted their positions. The only slight change since then has been in the tone of statements (mostly verbal) that they are not against women. Twenty-six years on, however, there is no female representation in their group.

# Negotiating Transitional Justice in the Early Years

Following their military defeat in 2001, Taliban leaders took flight, while some, from senior members to rank-and-file soldiers, surrendered to the new government. This surrender contributed to the December 2001 Bonn Agreement, which brought hopes that the country would transition from war to peace, from disarray to a new type of political order, and from disunity to unity.

## The Bonn Talks

In December 2001, the UN Envoy to Afghanistan (Lakhdar Brahimi), the U.S. Envoy to the Afghan Opposition (Ambassador James Dobbins), and a carefully selected delegation of Afghans met at the Hotel St Petersburg in Bonn, to chart a course for Afghanistan that became the Bonn Agreement.<sup>46</sup>

In attendance were delegations of four Afghan factions that had opposed the Taliban:

The Northern Alliance or United Islamic Front (UIF) – the only party which arrived directly from Afghanistan. It controlled much of the country, including Kabul, and had been the main recipient of U.S. support during military operations. Its head, Burhanuddin Rabbani, had installed himself in the Presidential Palace. He apparently wanted the talks to happen in Kabul, without outside interference in selection of the interim government, so did not attend. Yunus Qanuni, a younger man, led the delegation. The Northern Alliance subsequently received around half the posts in the interim administration.

The “Rome group” – a contingent of eleven members loyal to former King Mohammad Zahir Shah, who remained in exile in Rome. The Northern Alliance was apparently opposed to his return, so it supported Abdul Satar Sirat, an ex-justice minister under the king. According to a participant, however, Sirat was not accepted to lead the interim administration for two reasons: disagreement with the international military presence and being an ethnic Uzbek rather than Pashtun.<sup>47</sup>

The “Cyprus group” – Afghan exiles with close ties to Iran, led by Humayoon Jarir, the son-in-law of Gulbaddin Hekmatyar and others from the anti-Soviet resistance, including Jalil Shams and Aziz Ludin.



The “Peshawar group” – seven mostly Pashtun individuals led by Pir Sayed Ahmad Gailani and including Sheik Asif Muhsini and Anrwar-ul-Haq Ahadi.

The confidential negotiations were limited to 25 participants and were not fully representative of Afghan society. Brahimi later called the Taliban’s exclusion “the original sin”, while recognising that agreement would not have been possible with their involvement and that the other parties, especially the U.S., would not have accepted their participation.<sup>48</sup> There was also no direct survivor representation. The UN and various foreign governments played key facilitative roles, and the UN Security Council blessed the agreement.

## The Bonn Agreement

The Afghan Interim Administration (AIA) was formed pursuant to the agreement, and political leadership was redistributed among pre-Taliban leaders, including Mujahideen, technocrats, a few ex-PDPA members and other influential personalities. The AIA consisted of a chairman (Pashtun leader Hamid Karzai), five vice chairs and 24 heads of departments equivalent to ministries. A Supreme Court was formed, as was a Special Independent Commission for the Convening of an Emergency Loya Jirga (a traditional grand assembly). The Loya Jirga took place in July 2002 and put in place an Afghan Transitional Authority to replace the AIA.

The Bonn Agreement set out a three-year roadmap for the transition that the executive and judicial authorities were to establish. Some important milestones were achieved: in July 2002, the Emergency Loya Jirga took place and the AIHRC and Afghan Transitional Authority were created; in 2004, a Supreme Court judiciary council was formed and a new constitution ratified; and in 2004 and 2005, presidential and parliamentary elections took place.

The various independent commissions did not start well, however, due to scepticism about their independence. For example, Judiciary council members had connections with the Supreme Court as well as various ministries, and the government dissolved the body within three months.<sup>49</sup> The Independent Commission for Convening the Emergency Loya Jirga had made it mandatory for applicants to sign a disclaimer stating they had not engaged in homicide, terrorism or drug trafficking. Yet, there was no realistic way to enforce this, as most powerful leaders simply brought in their own loyal aides.<sup>50</sup>

## Bonn and Transitional Justice

The Bonn Agreement avoided references to transitional justice, including neither accountability mechanisms nor amnesty. However, the AIHRC enabled the start of a conversation on past abuses. Created by presidential decree, its mandate was to develop a National Human Rights Plan, monitor and report on human rights and state institutions’ performance, and promote human rights through training and other capacity building. It was also to undertake “national consultations and propose a national strategy for transitional justice and for addressing the abuses of the past”.<sup>51</sup>

# Transitional Justice and Peace in the Post-Bonn Period

The period immediately after the signing of the Bonn Agreement offered a moment – though one with little chance of success – to tackle deep grievances and demands for justice and accountability by victims and survivors, and help state and society begin to heal wounds and move toward state-building and a shared future.<sup>52</sup> But neither the Afghan government nor the U.S. had much interest in justice. While the former, particularly President Karzai, briefly considered a selective approach, the overriding U.S. priority was to combat terrorism. Moreover, victims and survivors were divided about whom to hold accountable and how best to get justice. An immediate challenge for the state was finding a balance between achieving peace and addressing victims’ and survivors’ demands. Later this “peace versus justice” dilemma became a “war on terror versus justice” conundrum. The ultimate approach prioritised supporting the U.S.-led war on terror and ending conflict, while sacrificing serious action on accountability or broad reconciliation. All approaches also excluded the Taliban, who were treated only as perpetrators and war criminals and never consulted about their own grievances or victimisation.

## War Crimes Documentation and Victim Consultations

The AIHRC and civil society have been at the forefront of documentation efforts for past war crimes.

The AIHRC was established pursuant to the Bonn Agreement to oversee the areas of promotion, protection and monitoring of human rights in Afghanistan. It publishes regular annual reports and thematic papers covering areas of its monitoring work, and conducts training sessions for government departments and civil society groups. It is also mandated to visit prisons and report on the condition of the facilities as well as the treatment of detainees; and to push forward a national strategy of transitional justice to address past abuses.

Perhaps its most significant report is “A Call for Justice” (2005): an ambitious national project that polled Afghans on whether they wanted accountability and justice. Its origins trace to the first national human rights workshop, held in 2002 and organised with participation of religious leaders and civil society groups. The workshop discussed ways to craft a nation-building process on transitional justice and address justice and accountability issues pertaining to human rights violations. The AIHRC then designed a survey that received 4,151 individual responses and organised 200 focus groups involving over 2,000 people. The consultation, incorporating qualitative and quantitative research, lasted eight

months, and covered 32 of 34 Afghan provinces and refugee communities in Pakistan and Iran. It gave war survivors and victims an opportunity to speak out and share grievances.

Some 70 per cent of respondents said that either they or their direct families were victims of human rights abuses during the conflict.<sup>53</sup> The report found that:

More than a million people lost their lives and almost the same number became disabled in the course of the war .... Thousands of people were put in jail for their political beliefs and tortured. Thousands of children lost their family members and their fathers. ... Almost all of the country's major cities were destroyed. ... More than seven million people were forced to leave their villages and towns and take refuge in Iran and Pakistan. The miseries of this period of conflict cannot be described in words.<sup>54</sup>

The report concluded that there was substantial support for accountability and removing wrongdoers from power. Its recommendations became the foundation for the government's 2006 "Action Plan on Peace, Reconciliation, and Justice": a combined effort of the AIHRC, the president's office and UNAMA. Its main objective was to promote "peace, reconciliation, justice and rule of law in Afghanistan, and the establishment of a culture of accountability and respect for human rights". It mapped out transitional justice tools to be implemented over three years and focused on themes such as acknowledgement, accountable state institutions, truth-seeking and reconciliation.

Another ambitious AIHRC effort was a "Conflict Mapping" project launched in 2005 to identify the types of atrocities each party had committed during each phase of the war. For unknown reasons, however, the report has not been published, although it is known to have been presented to President Karzai in 2011. Not long after the report was submitted, AIHRC spokesperson Nader Nadery was removed.<sup>55</sup>

The other major actor involved in war crimes documentation and victim consultations is civil society. Relevant groupings include the Afghanistan Justice Project,<sup>56</sup> the Transitional Justice Working Group, the Civil Society and Human Rights Network, and victims' associations such as the Afghanistan Human Rights and Democracy Organisation (AHRDO) and the Social Association of Afghan Justice Seeker (SAAJs). These and other non-governmental actors continue to push forward processes of documenting past crimes, identifying mass graves, recording the names of the missing, mobilising families of the victims and raising awareness domestically and abroad. These efforts, however, are challenged and remain limited. Most civil society organisations are in Kabul, and even when acting alongside the AIHRC, it has been difficult to promote awareness and engage broader sectors of society, especially victims and families of the Taliban side of the conflict.

## Amnesty and Reconciliation

Peace scholar Johan Galtung defines reconciliation as a process of "closure plus healing; closure in the sense of not reopening hostilities, healing in the sense of being rehabilitated".<sup>57</sup> Reconciliation at a society-wide level aims to restore communal harmony and

peaceful cohabitation between communities or groups previously at war, and rebuild trust between the state and its citizens. Some express concern, however, that political actors may see reconciliation as a way to engage belligerents in a new political order while avoiding any form of justice or accountability.

After the Taliban's removal from power, some chief lieutenants surrendered, including Tayeb Agha, Mullah Omar's secretary; Mullah Beradar Akhund, Mullah Omar's deputy Sirajuddin Haqqani; Mullah Abdul Salam Zaeef, former ambassador to Pakistan; and many others. They wrote Karzai that they accepted him as interim leader and admitted that their Islamic Emirate had no possibility of surviving.<sup>58</sup> They continued to communicate with the new government, which a number of other ex-Taliban viewed at the time as legitimate and Islamic. Those who did not accept this nevertheless did not turn to violent jihad as an immediate response. Their main request was for amnesty in return for staying away from political life.

Instead, the U.S.-led coalition and its proxies launched an operation against the ex-Taliban, pushing many into Pakistan and an eventual new insurgency.<sup>59</sup> Even the former governor of Kandahar, Gul Agha Sherzai, who had initially taken a less hostile approach toward the Taliban, changed his stance due to close links with U.S. special forces. Torture, harassment and intimidation of ex-Taliban became prevalent. Some commanders previously ousted by the Taliban wanted vengeance and opposed amnesty. Many signatories of the letter to Karzai became top figures in the insurgency that emerged after 2006. For instance, Haqqani became an important member on its political side; Agha assumed a leading role in the financial committee and served on the Quetta Shura; and Beradar became the day-to-day leader of the whole movement. Growing insecurity thwarted efforts for transitional justice, as Afghanistan drifted back toward intractable conflict.

There was a general sense among both top Taliban leaders and rank-and-file members that they were removed from Afghan political life. Journalist and author Anand Gopal argues that the opportunity to integrate ex-Taliban into the political system was abandoned, and the group's marginalisation and deliberate targeting was a key factor in its revival.<sup>60</sup> Even after escaping to Pakistan, many former members were still receptive to the idea of returning to Kabul and abandoning the new insurgency. But the government's lack of political will to deal with the legacy of conflict, opposition from some parts of U.S. leadership, regional countries' interest to remobilise the Taliban against foreign troops, and general social marginalisation, drove the Taliban to regroup and focus on toppling the Kabul government and regaining power.

In 2009, the National Assembly approved a highly contested Amnesty Law (also known as the National Reconciliation, General Amnesty and National Stability Law) proposed by members of parliament who had themselves been parties to war and conflict. Taking effect in late 2008, it provided immunity from prosecution for crimes committed before 2001, without specifying or limiting their type, in exchange for ceasing armed activity against the state. It also stipulated that all involved in the war forgive each other in the interest of peace and stability.<sup>61</sup> The law allowed many warlords accused of atrocities to benefit from immunity and re-enter politics, including eight men accused of war crimes who stood for

the presidency in 2014. Tellingly, the law did not refer to the Taliban's atrocities and how to deal with them.

By 2008, efforts at reconciliation with the Taliban and other insurgent groups could be seen. Many identified two streams: the first involved rank-and-file members; the second aimed at high-level discussions to bring senior leaders to the negotiating table. A former U.S. general, David D McKiernan, has referred to the first group, whose primary concerns are social and economic needs, as "small-t Taliban". Reconciliation with them could involve economic and financial incentives, prospects for political participation and removing their names from target lists.<sup>62</sup> The Afghan government in fact drafted a program for such reconciliation, and presented it in 2010 at an international donor conference in London. Known as the Afghanistan Peace and Reintegration Program (APRP), it marked a first formal acknowledgement about the limits of the war on terror and signalled the eventuality of peace talks with the Taliban.

Apart from that, in May 2017, the government reached a deal with Gulbuddin Hekmatyar, an important warlord involved in rocket attacks on Kabul that cost thousands of lives. The deal included an amnesty, the release of prisoners linked to him, and the possibility to participate in politics and contest elections.<sup>63</sup> However, this was more of a political deal than one related to peace, and there is nothing in it addressing the past crimes attributed to Hekmatyar's militia.

## Vetting

Since 2001, the government has applied several vetting programs for senior political appointments, parliamentary candidates and provincial police chiefs. The electoral law also stipulated a vetting process in presidential and provincial council elections.<sup>64</sup>

Political expediency has prevailed, however, and the efforts have not been successful. This is again related to the fact that the whole post-2001 order is contingent on the distribution of power among leaders who had committed various violations during the war. Any vetting process could jeopardise the political balancing act. A significant example is General Abdul Rashid Dostom's case. Despite advances in vetting capacity, he remains highly important in politics and oversees a significant portion of seats and power positions.<sup>65</sup>

## Reintegration

Reintegration programs are usually undertaken to persuade ex-combatants to lay down arms and help reintegrate them into society. They are part and parcel of the broader reconciliation process. This report understands reintegration as "the long-term process of an ex-combatant gaining acceptance from his or her community and finding a sustainable livelihood".<sup>66</sup>

Afghanistan has had four programs: 1) Disarmament, Demobilisation and Reintegration (DDR, 2003-2005), 2) Disbandment of Illegal Armed Groups (DIAG, 2005-2011), 3) Program Tahkim-e-Sulh (PTS, 2005–2011), and 4) the Afghanistan Peace and Reintegration

Program (APRP, 2010–2016). The first of these started when the UN Development Programme (UNDP) managed the Afghan New Beginnings Programme (ANBP) with the aim of selecting 100,000 soldiers and officers for DDR work. DDR was, therefore, implemented through the ANBP.<sup>67</sup> A major goal was to decrease the power of mid-level commanders by removing the bulk of their troops. However, the program was a voluntary process of selecting fighters from the Afghan Militia Forces (AMF) and did not include Taliban fighters.<sup>68</sup> Some ex-fighters received vocational training packages; others could join the army or police. Reportedly, thousands of former fighters had given up their weapons by 2006, the number of militias had decreased, and 11,000 children had taken part in a reintegration program focused on education and vocational training. Even female relatives of ex-fighters received education and employment opportunities.<sup>69</sup>

Overall, the initial DDR actions had a mixed public response. Some found them useful at least to disarm certain powerful groups, while others viewed them as a complete failure. While permitting ex-combatants to join the security forces and reintegrate into society risked undermining justice and accountability, DDR has the benefit of constricting militia capacity to engage in further organised armed violence because stockpiles of heavy weapons are reduced dramatically.<sup>70</sup>

Though DDR did not extend to Taliban fighters, there was an attempt to reintegrate them through the PTS program in 2005.<sup>71</sup> It was criticised, however, for failing to provide safeguards and genuinely reintegrate Taliban militants.<sup>72</sup> Concerns were expressed in some quarters that its chairperson and others used it to provide leverage and resources to their former party commanders.<sup>73</sup>

For its part, the Taliban considered the national DDR process heavily biased. Even after it was underway, *Jami'at* members' influence over selection of groups to be demobilised and disbanded and which ex-combatants to reintegrate into the state system likely empowered non-state actors. Key members within the defence ministry were under pressure from their local military clients to help protect their interests.<sup>74</sup> This reduced DDR's impact on ground realities, and weapons collection was not imposed strictly. Moreover, political factions within the defence ministry were reportedly able to manipulate DDR and exclude ex-Taliban fighters from the process; this came back to haunt the government, since excluded former combatants joined the revived insurgency in 2006.<sup>75</sup>

The reintegration component of DDR in Afghanistan had similar problems. While combatants had to give up their weapons, little effort was made to prevent them from being reabsorbed into groups run by other strongmen. This further entrenched a system of patronage and military power that contravened the government's and state's legitimacy claims.<sup>76</sup>

In 2010, the Afghanistan Peace and Reintegration Program (APRP) tried to incentivise low-level fighters through reintegration schemes, while leaving the door open for political negotiations with senior leaders to achieve reconciliation. But while the former received U.S. and NATO support, the latter met strong U.S. resistance.<sup>77</sup> In 2019, the U.S. Special Inspector General for Afghanistan Reconstruction (SIGAR) noted that previous reintegration efforts had failed, inter alia, due to lack of a comprehensive peace agreement, security



measures and economic or legal opportunities for the participants, as well as the U.S. partnership with the militias.<sup>78</sup>

Overall, there is scepticism regarding these reintegration programs. A SIGAR report stated that evaluation and monitoring systems were unable to determine their effectiveness: in particular, whether ex-fighters were accepted back into their communities and what eventually happened to them. The report found that: “(N)one of the reintegration programs succeeded in enabling any significant number of ex-combatants to socially and economically re-join civil society. Programs specifically targeting Taliban insurgents did not weaken the insurgency to any substantial degree or contribute meaningfully to parallel reconciliation efforts”.<sup>79</sup>

There are also ongoing reintegration efforts involving Hezb-i-Islami Gulbuddin (HIG) fighters following a 2016 peace deal with the government. However, efforts to help HIG combatants join security forces have been delayed due to changes in the recruitment process, opposition from other factions and the present priority given to peace talks with the Taliban.<sup>80</sup>

In sum, a core component of reintegration is also reconciliation and finding the most effective ways of overcoming the hostilities and enmities among warring factions. Increased attention to reintegration and its fit with broader goals of peace and transitional justice will be important in future.

## Customary Justice

Many Afghans have been sceptical of top-down transitional justice initiatives. This is reinforced when, for example, the appointment of state officials to the Provincial Peace Committees (PPCs) and the High Peace Council (HPC) reflects choices that raise concern about the priority transitional justice will be given in peace talks.

The scepticism of the top-tier application of transitional justice opens an opportunity to explore bottom-up approaches, including using customary justice at the grassroots level. There are possibilities of tapping into customary justice as a tool of conflict resolution to achieve some degree of reconciliation at local and community levels, including through traditional leaders who may provide some guarantee that the voices of victims will be heard and their injustices tackled. This could address part of the demands put forward by rural Afghans; for example, those that relate to the drivers of local disputes and conflicts identified at the Loya Jirga for Peace in April 2019.<sup>81</sup> Customary justice at the local level could also create a substantial foundation of support for bottom-up mechanisms until political will at the national level is strong enough to create a more formal transitional justice process.<sup>82</sup>

Customary law (*rawaj*) involves a complex set of regulations that originate from accepted community practices and vary from locality to locality.<sup>83</sup> While official state law collapsed during the wars, customary justice displayed resilience despite many challenges. Though the government has recognised the importance of incorporating customary structures, and elders have offered to help, the mechanism has been largely unexplored. This is despite

its long history of resolving disputes, owing to its strong cultural value, in Afghanistan's very tradition-oriented society.<sup>84</sup>

Given that the formal court system is time consuming and has been limited to cities or district headquarter levels, the rural majority have relied on customary mechanisms that are deemed more accessible and efficient in delivering context-specific justice. A 2018 Asia Foundation survey found that 45.4 per cent of respondents go to a shura/jirga (up from 43.2 per cent in 2017), 41.9 per cent go to a state court and 27 per cent go to the *huquq* department to resolve disputes. More rural respondents (47.6 per cent) prefer to go to a shura/jirga than their urban counterparts (32.5 per cent).<sup>85</sup>

Religious and community leaders commonly in charge of these traditional mechanisms use restorative justice by gathering all parties to reestablish their relations and inculcate community bonding.<sup>86</sup> Retributive goals are secondary, and most customary justice facilitators in any case are not formal justice specialists. Importantly, the role of religious leaders is beneficial, given the central role religion plays in Afghan society.<sup>87</sup> As such, their involvement in future transitional justice initiatives could help avoid misinterpretation or misjudgement of transitional justice, and instead help build support for it.

One possibility in future could be to integrate customary justice into the mandate and implementation of a truth and reconciliation commission, which could draw lessons from countries such as Sierra Leone and Timor-Leste where this blending was done. Such an approach allows multiple transitional goals to be achieved at once (eg, truth-telling, victim participation, interpersonal reconciliation, and ex-combatant reintegration), helping discover why an individual committed a crime and the conditions to bring him or her back to peace, which under customary justice systems usually involve apology and reparation to the victim as a condition of readmission to the community.

## Memorialisation

Efforts have been underway since 2001 to set up war crimes memorials and museums to pay tribute to survivors and victims. The Afghanistan Centre for Memories and Dialogue is the latest museum created by the Afghanistan Human Rights and Democracy Organisation (AHRDO) in 2019. It seeks to capture the stories of war survivors and victims and increase the government's understanding of their memories. Such initiatives could be amplified in future.

# Negotiations between the Taliban and the U.S.

Starting mid-2018 and for about a year and a half, the U.S. and Taliban engaged in talks on ending the long war. The Taliban initially refused to engage the government directly (viewing it as a puppet regime) and opposed a power-sharing agreement. As a result – and though Taliban representatives, government members and former officials met unofficially – the Afghan government was side-lined.

The Taliban long emphasised that the presence of foreign troops drives the insurrection and is a major impediment to peace. They demanded withdrawal of U.S. forces. In exchange, the U.S. demanded the Taliban stop giving refuge to terrorist organisations and negotiate with the government.<sup>88</sup>

In June 2018, during the three-day Eid-al Fitr period, a temporary ceasefire was agreed. During this time, there was minimum violence and almost no civilian casualties.<sup>89</sup> It was a welcome reprieve, and there were scenes of Afghan soldiers and Taliban fighters rejoicing together. It appeared that Taliban rank-and-file complied with commanders' orders to cease hostilities.

While fighters learned of the ceasefire through various sources, few knew why the Taliban reciprocated the government's ceasefire offer. Speculation was that it wanted to show unity of command amid rumours of fragmentation. For both government and Taliban, the 2018 Eid-ul-Fitr ceasefire was an experiment that showed the potential for a more lasting halt. Unfortunately, it was followed by an uptick of violence in the following months.

However, in February 2020, the U.S. announced a two-stage deal with the Taliban, the first of which would witness a reduction in violence between the two protagonists. As one of this paper's authors wrote at the time:

Beyond a showing of good faith, the most likely explanation is that the US wants demonstrable assurance that the Taliban leaders have full control over their commanders and rank-and-file fighters spread across the nation. It is unlikely that the US would agree to Taliban demands if they suspect that individuals or groups will violate any peace deal in future. And so, on the eve of the first stage of the peace deal, the Taliban political office [issued a decree](#) that explicitly ordered Taliban commanders and fighters to cease attacks against the Afghan government's provincial headquarters and foreigners based in the capital, Kabul.<sup>90</sup>

The deal paves the way for the next phase of the negotiation and disengagement process. There are four main issues: withdrawal of U.S. and NATO forces (the Taliban's major demand; indeed, their very *raison d'être* as a resistance); an intra-Afghan dialogue; a Taliban guarantee not to permit terrorist groups to use Afghanistan as a launchpad; and a permanent ceasefire. The agreement provides for gradual U.S. and NATO withdrawal over 135 days, dependent on Taliban reduction of violence and engagement on counter-terrorism. The parties also agreed on a mutual prisoner release (disproportionately beneficial for the Taliban) and a Taliban commitment to formal talks with the Afghan government.<sup>91</sup>

The agreement has been criticised, among other reasons, for the number of U.S. commitments compared to the Taliban's, as well as the unlikelihood the Taliban can enforce those it made.<sup>92</sup> Many fear Afghanistan will lose its post-2001 gains in human rights, women's rights and transitional justice. There are criticisms that women and civil society have been marginalised, and their grievances will not be adequately addressed in the peace talks. Some are also apprehensive that the U.S. has prematurely made a deal simply to end its military involvement, without considering the uncertain long-term implications. This could be due to U.S. domestic pressure related to elections and shifting public opinion on ending the "endless war".

Others consider this process a turning point that opens a window of opportunity to end the long conflict. The UN welcomed the agreement as importantly advancing hope for peace.<sup>93</sup> Its Analytical Support and Sanctions Monitoring Team noted that though the process increases the Taliban's visibility and political leverage, there are positive signs, such as the release of ten Afghan National Defence and Security Forces personnel and two civilian international hostages, some of whom the Taliban had held for up to two years, in exchange for three Haqqani Network prisoners held by the Afghan government.<sup>94</sup>

As of this writing, the Afghan government and the Taliban are deep into the process of prisoner releases (with 4,600 already released), based on the U.S.-Taliban deal. The U.S. has also drawn down a number of its military forces from Afghanistan. But even as the intra-Afghan dialogue is about to begin, there is little known about the agenda of the talks and both sides have had phases of intensifying violence against each other with high civilian losses.

# Narratives, Views and Expectations of the Parties on Transitional Justice

Key actors understand transitional justice differently. AREU interviews with a diverse group of political actors demonstrate that it is alternately perceived as a “project” to attract donor funding; a means to get revenge against political rivals; a guise for impunity; or a sincere effort to face up to past atrocities. Interviews have also highlighted different forms of justice or injustice, including unequal distribution of resources, patronage-based government appointments and widespread corruption, all seen as linked to the impunity enjoyed by perpetrators.<sup>95</sup>

Since 2010, the Afghan government and its donors have agreed that the war cannot be won by military or coercive means alone. The concern, however, is that the Taliban continue to view the peace talks as an opportunity to build legitimacy for their Islamic Emirate. They have been able to remove some of their top leaders from UN and U.S. terrorist blacklists and have maintained a political office in Doha, while continuing violent operations that have generally targeted Afghan military and government officials.<sup>96</sup>

This section elaborates briefly the perceived multitude of expectations each party has regarding transitional justice and how it intersects with the overall peace process.

## The Afghan Government

The post-Bonn strongmen (mainly Northern Alliance members and ex-Mujahideen) expected attention to be on war crimes committed by ex-PDPA and the Taliban, thus bypassing the civil war period. By 2009, however, the environment had changed: a presidential candidacy while accused of war crimes was no longer acceptable. This led to prioritising the amnesty law’s blanket forgiveness.

Kabul’s current political elite – notwithstanding the disputes around the 2019 presidential election – is largely united on maintaining the government’s status and reaching a political settlement that makes the Taliban part of the political system. There is no clear message on past abuses. The terms “human rights” and “transitional justice” were central for a time in a few strategic public documents, such as the Transitional Justice Action Plan, but have gradually disappeared from the narrative. From the perspective of powerful war crime perpetrators, the main concern is that addressing human rights violations might lead to their own trials. This has been the chief concern since 2001 and likely the biggest obstacle to moving on criminal accountability. The current focus is, instead, power sharing.

The dominant government approach to justice has simply been to forget the past and move on. What is needed is to help policymakers shift thinking from “transition” as a temporary process to “transformation” that seeks sustainable and long-term processes. This could encompass a broad agenda that involves changing political, economic and social processes, and a more community-based approach to justice and reconciliation that respects core principles of human rights and Afghan law.

## The AIHRC

The AIHRC’s new leadership is taking a more proactive approach to monitor and denounce all forms of human rights violations, in particular the targeting of civilians during ongoing violent conflict. The AIHRC endorses the peace process with the Taliban, and advocates holding an observatory seat to ensure that no decision excessively undermines human rights values.

As talks with the Taliban get underway, the role of the AIHRC (regardless whether they become formal observers inside the negotiation) will be critical, both in articulating substantive ideas about the balance of peace and justice and in advocating direct or indirect participation by victims. At the same time, one of its key challenges will be how to earn the full trust of all parties to the conflict in order to be able to take an impartial position in defending the human rights of all Afghan citizens.

## The Taliban

As already noted, the Taliban were excluded from the Bonn Agreement. From 2001 to 2006, they suffered serious attacks: intimidation, arrests, torture, and night raids and bombings that killed not only fighters but also innocent community members. At the time they issued statements that they played no part in suicide attacks or bombings that caused massive civilian casualties. This, however, is in conflict with them claiming responsibility for many attacks that did cause civilian casualties.

Barnett Rubin has long argued that discussion about victims should include Taliban fighters, since their educational and employment opportunities were limited.<sup>97</sup> They were raised to stringently adhere to the jihadi ideology, and taking up arms appeared to be a sensible choice. Rhetorically, the Taliban leadership uses discourses of justice, human rights, war crimes and even crimes against humanity to highlight the violations against their members and violations against civilians under government control.<sup>98</sup> Former leaders interviewed by AREU cited examples from South Africa and Sri Lanka for their vision of justice, insisting that reconciliation is a critical starting point to address the injustices that all actors have experienced.<sup>99</sup>

Taliban demands in the peace talks with the U.S. focused heavily on prisoner release and UN and U.S. sanctions. But while this may suggest a direction of discussion for the incipient intra-Afghan talks, there is reason to be concerned about the war-ending goals that undergird such concessions. The U.S. Institute of Peace (USIP) found in a 2018 survey that



low-ranking fighters – soldiers most of their lives and convinced of the justification for a holy war – would have trouble conceiving a life without guns and violence.<sup>100</sup>

In any case, Taliban political demands to date have centred around the return of their Islamic Emirate. They envision any political settlement as being on their terms, meaning re-establishing the Emirate and revising the constitution. There is no clear public articulation of their position on addressing war crimes or violations, nor have they discussed plans for reconciliation and reintegration of their forces. When some ex-Taliban were asked how they would deal with past war crimes and violations, they refused to respond.<sup>101</sup>

What is clear is that the Taliban is a violent extremist group with which meaningful negotiations are possible; something that cannot as easily be said about many other jihadist groups. This capacity and willingness to negotiate is reflected, *inter alia*, in the fact that a deal has already been reached with the U.S. But it is not only this: the Taliban has governed Afghanistan in the past, and thus likely views the value of negotiation with greater realism and self-interest than a jihadist group that has not. For that same reason, however, the group is more likely than not to view questions of accountability or justice as a threat to its political goals, including the aspirations for power among its leaders.

## Afghan Civil Society

Research for this paper revealed that Afghans have varying understandings of the terms “peace”, “justice” and “reconciliation”. The few civil society organisations that have endorsed and promoted transitional justice have contributed in modest ways to introduce it in debates, mobilise victims groups and raise awareness; but none appears to have developed a resonant and realistic transitional justice vision for a post-conflict future.<sup>102</sup> In addition, members of these civil society groups are not part of the negotiations and thus lack direct access to the peace process.

A 2019 report commissioned by USIP concluded that most Afghan civilians had affinity neither for the government nor the Taliban.<sup>103</sup> Members of civil society and victim groups interviewed for that report felt the state could create better economic opportunities and increase human development, but the Taliban could provide better stability and security in some ways. Many women, however, had reservations about the Taliban, due to the restrictions they impose on their freedom of movement, attire and education. Some respondents were negative toward the U.S., feeling that the presence of its military aggravated the conflict, and that it wanted to control Afghanistan’s natural resources and lacked genuineness in the peace talks. Yet, responses varied by locality: for example, city residents were more favourable to the U.S. and international forces, perhaps because of greater opportunity to benefit from foreign aid than residents of Taliban-controlled areas.<sup>104</sup> One important point across all interviews including civil society was an emphasis to end this war and prioritise peace efforts.

Whether citizens will be able to participate in the peace talks – through written, verbal or combined submissions – is unclear. The prevailing, if malleable, expectation is that the

government and the Taliban will run a closed peace negotiation and place political reconciliation above any form of individual or group accountability.

## International Actors

Afghanistan's allies have never been fully on the same page on human rights, transitional justice, peace support, reconciliation and reintegration. For example, the EU and most EU member states strongly support the government's effort to address human rights and are committed to fund the AIHRC. But the U.S., despite support for multiple accountability and anti-corruption institutions and mechanisms, is largely quiet on war crimes and transitional justice. In addition, until recently it rejected reconciliation via high-level negotiation with Taliban leaders, supporting only reintegration of low-ranking Taliban fighters.

Being with the Bonn process, there is general consensus that both Afghan governments and US/NATO countries have tended to resist implementing accountability and justice processes. Even when Brahimi, the then Special UN Representative, created a long-term justice policy, he focused on "peace first, justice later".<sup>105</sup> International actors engaged with the Afghan political system feared that accountability mechanisms could disrupt the fragile peace and spark another civil war.

That the Bonn Agreement paid little attention to justice and accountability, and that the International Criminal Court (ICC) has not even started an investigation let alone issue arrest warrants for alleged war criminals, are sources of frustration for many Afghan victims. International community reticence is perceived as linked to fear that pursuing charges may drive strongmen to cease cooperation with the state. According to the AIHRC, however, 76 per cent of Afghans believed in 2005 that bringing war criminals to justice would *increase* stability and bring security. Only 8 per cent felt stability and security would decrease.<sup>106</sup>

On 5 March 2020, the ICC Appeals Chamber decided unanimously to authorise the prosecutor to begin an investigation that could include alleged war crimes "committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002".<sup>107</sup> The decision, based on the fact that crimes were committed in Afghanistan, a state party of the Rome Statute, came after the prosecutor asserted a reasonable basis of evidence that the Taliban and affiliated groups, as well as the Afghan National Security Forces and U.S. armed forces, had "committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence" in Afghanistan and clandestine CIA facilities in Poland, Romania and Lithuania.<sup>108</sup> In response, U.S. President Donald Trump has indicated an intention to disrupt the Court's work by imposing sanctions against investigating officials and revoking the U.S. visa of the chief prosecutor, Fatou Bensouda.<sup>109</sup>

This reaction contrasts with the EU, which has generally emphasised the importance of addressing war crimes. It is also possible that, once underway, the mediators of the intra-Afghan talks will encourage the parties to consider a realistic accord that balances domestic peace and justice goals, such that the ICC prosecutor can defer to the national process. After all, the ICC is designed as a court of last resort, which acts only when national authorities fail to act reasonably.

## Conclusion: A Way Forward

Afghanistan is a case study of how a war cascaded into more war and crime. In the deteriorating security situation, the state has arguably prioritised temporary security and stability over human rights, justice and accountability that have always been short lived.

Security and human rights are often seen as conflicting, disparate objectives. While the army and police are responsible for security, human rights and justice are left for the judiciary, human rights commission and NGOs. Transitional justice has suffered the same fate in Afghanistan. This is despite the fact that there is not even agreed understanding of what transitional justice is and how it might contribute to all conflict parties.

The government has seemingly devolved the responsibility for transitional justice to the AIHRC. Yet, transitional justice is a complex process that requires the cooperation and engagement of multiple stakeholders and institutions including those outside the system who are affected by violations. Despite limited capacity, the AIHRC has nevertheless done considerable work. Its early nationwide consultations were extensive and sought to capture the sentiments of various stakeholders. But overall, the political process and transitional justice have developed on divergent rather than convergent tracks.

Afghanistan's situation is more politically complicated than that of many other post-conflict states. Many former commanders and faction leaders who returned to power after 2001 have tried to de-legitimise transitional justice efforts due to fears they would target the Mujahideen, who are viewed as the emancipators of the country from the Soviets and the Taliban. Civil society's weakness, coupled with an insecure environment and culture of fear, has prevented Afghans from seeking redress or pursuing transitional justice. They need their government's commitment to handle the strongmen, the potential "spoilers of peace" who thrive on the insecure environment.

With a new peace process in the making, a new opportunity arises to consider whether or how to face past atrocities. Thinking in terms of what is politically achievable could be critical. Creating a special court or tribunal for prosecution would be politically infeasible, but other mechanisms such as an office of missing persons or collective reparations program might face less resistance. Bottom-up customary processes with an emphasis on restorative justice and community harmonisation could also offer a suitable component of any accord for addressing grievances and accountability at local levels. Customary justice has demonstrated resilience during many years of war and political turmoil. However, some regulatory mechanisms on ensuring that human rights and especially women's rights are not compromised by customary justice approaches to reconciliation will need to be taken into account. The international community should thus try to view such justice in a broader light, given that rural residents prefer jirgas/shuras to state courts. While customary

justice has many limitations and should not be engaged uncritically, if it is applied contextually it can fill important gaps.

Ultimately, any transitional justice plans will need to fit within the peace process, and not the reverse. Fortunately, this is feasible. The parties' presumed expectations of legal forgiveness for past atrocities offer an entry point to raise larger questions about the price of peace in Afghanistan. Being prepared with creative, locally-inspired and internationally-informed ideas is vital for all actors who believe that a different balance is possible and desirable this time around.

## Annex 1: Questions for Interviews

Name	
Position/Title	
Date of Interview	
Place of Interview	
1. How do you define the main themes around injustice, war crimes, and violations of human rights in the post-2001 context? [Note: you can also indicate your personal definition of these terms]	
• Injustice by government	
• Injustice by the Taliban	
• Injustice by other parties	
2. Have you experienced violence and/or injustice in Afghanistan? If 'yes', what is your experience of them (whether directly to you or your close family and or as a part of the constituency you represent)?	
• When	
• Where	
• By whom	
• How/what happened	
3. How do you assess the approaches to (in)justice by the main parties to the conflict?	
• Government's approaches	
• Taliban's approaches	
• International community's approaches	
4. What could be done now and in future to address these injustices?	
• <i>By government:</i>	
a. Now	
b. In future	
• <i>By the Taliban:</i>	
a. Now	
b. In future	
• <i>By International actors:</i>	
a. Now	
b. In future	
5. What are the benefits you envisage in the above-identified recommendations?	
6. Are you familiar with the concept of transitional justice?	
• How do you understand this concept?	
• What comes to mind when you hear about it or discuss it?	
• Are you aware of other countries using and or addressing transitional justices issues?	
• What are the core lessons we can learn from other countries? Which country and which lessons?	

## Annex 2: Chronology of Events

<b>Dec 2001</b>	Bonn Agreement is signed
<b>Jun 2002</b>	Afghan Independent Human Right Commission (AIHRC) is formally established
<b>Jan 2004</b>	The new Afghan constitution is finalised through a Loya Jirga
<b>2002–2005</b>	Many Taliban leaders are arrested and sent to Guantanamo Bay or Bagram Prison
<b>2004–2006</b>	War between NATO forces and Taliban grows; first wave of suicide attacks by Taliban and Al-Qaida
<b>2007</b>	U.S. build-up, ISAF war against Taliban or counterinsurgency operations
<b>2008</b>	Reassessment and renewed commitment and Taliban attacks on supply lines UNAMA launches its first civilian casualties report
<b>2009</b>	U.S. reinforcements and the start of the military surge with troop increase and intensification of war The Amnesty Law (originally known as the National Reconciliation, General Amnesty and National Stability Law) is approved by parliament
<b>2010</b>	American-British offensive and further intensification of war on terror London Conference is held in which Afghanistan roadmap for peace is endorsed by international partners
<b>2011</b>	Withdrawal of international military forces starts
<b>2013</b>	Withdrawal plans implemented and a post-2014 plan also prepared for military engagement Taliban Political Office is established in Doha (Qatar)
<b>2014</b>	Bilateral Strategic Agreement signed between the U.S. and Afghan governments Taliban resurgence and the start of drone strikes by international military forces
<b>2016</b>	Peace deal is signed with Hezb-i-Islami; withdrawal of U.S. troops from Afghanistan
<b>2020</b>	Taliban-U.S. peace deal is signed in Doha

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### COVER PHOTO

An Afghan man wearing a protective face mask walks past a wall painted with photo of Zalmay Khalilzad, U.S. envoy for peace in Afghanistan, and Mullah Abdul Ghani Baradar, the leader of the Taliban delegation, in Kabul, Afghanistan April 13, 2020. REUTERS/Mohammad Ismail.

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