

AFGHANISTAN WAR CRIMES: GOVERNMENT, ICC AND NGOS

Akbar Nasir Khan*

Abstract

Afghanistan is a state party to International Criminal Court (ICC) and obliged to investigate and prosecute allegations of war crimes, genocide and crimes against humanity in the country. This article looks into war crimes in Afghanistan, the ability and willingness of the Afghan government to prosecute the criminals, and the role of the international community and Non-governmental Organisations (NGOs) in addressing the past and present war crimes. In this context, NGOs can raise their voice for ICC investigations which will pressurize government in taking necessary steps to reform the justice system to enable it to investigate war crimes and nab the perpetrators. This paper argues that, due to the inability and unwillingness of the Afghan government to prosecute, NGOs can play an important role in furthering the aims of the ICC in Afghanistan by holding accountable those most responsible for war crimes. Nonetheless, there has to be close coordination between the local and international civil society to uphold the rule of law and putting an end to the culture of impunity for stability and sustainable peace in Afghanistan.

Keywords: Afghanistan, War Crimes, ICC, NGOs.

Introduction

International criminal law obliges states ratifying the Rome Statute to investigate and, if factual and evidentiary thresholds are met, prosecute allegations of war crimes, genocide and crimes against humanity. The International Criminal Court (ICC) has complementary jurisdiction over these crimes when the country is “unwilling or unable”¹ to initiate and carry out investigations on its own. In other words, the individual states have primary

* MPA, Harvard University, USA and LLM Public International Law, SOAS, UK.

¹ “Article 17 (1,a) of Rome Statute about Admissibility Issues,”

http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

responsibility to investigate and punish these crimes, and the ICC can only assert jurisdiction if domestic courts do not assume their responsibility.

This article will look into war crimes in Afghanistan, the ability and willingness of Afghanistan's government to prosecute these crimes, and the role of the international community and Non-governmental Organisations (NGOs) in addressing this issue. It is argued that due to the inability and unwillingness of the Afghan government to act, NGOs can play an important role in furthering the aims of the ICC. NGOs can exploit the threat of ICC investigations and stress upon strengthening the criminal justice system. However, high expectations should not be attached with NGOs to end the culture of impunity in Afghanistan because of their severe financial and operational limitations during this ongoing conflict. For upholding the rule of law and checking the occurrence of war crimes, Afghanistan would need the support of its own and that of the international civil society.

Afghanistan ratified the Rome Statute in February 2003 and became a state party to ICC. Since 2009, the situation in Afghanistan has been under preliminary examination by the Office of the Prosecutor (OTP) of the ICC. NGOs in Afghanistan have welcomed such an investigation and hope it will put an end to the culture of impunity ingrained in the country's legal system. However, even if the prosecutor opens an investigation, only a handful of people will be indicted given the ICC's capability to target only those "most responsible" for war crimes. Thus, the expectations that the ICC indictments will end impunity will not be fulfilled if domestic accountability mechanisms are not activated and strengthened.

Violence in Afghanistan

"We live in the streets of the dead and die in the street of life." This is how an Afghan poet describes the tragedy of his country that has faced 33 years of war and where every person has experienced loss, ranging from lost opportunities for education to displacement and death.² After the withdrawal of the Soviet forces, civil war broke out in the country. Inter-group disputes for power were decided by guns, rather than through negotiation. This period was put to an end by the atrocious regime of the Taliban. The Taliban claimed to have established peace and tranquility in the country by imposing harsh punishments on the violators of "law."³ In the absence of due process these punishments fell into the category of human rights violations. Lately, the military intervention of the US and NATO has been turning the state of the

² Sari Kouvo, "Transitional Justice in the Context of Ongoing Conflict: The Case of Afghanistan," *ICTJ Briefing*, September 2009.

³ Fida Mohammad and Paul Conway, "Justice and Law Enforcement under Taliban," *Policing: An International Journal of Police strategies and Management* vol. 26, no. 1 (2003): 162-167.

ordinary people “from hope to fear”⁴ who have been the victims of violence for the last three decades. Here is a brief account of the atrocities beginning from 1978.

Communist Era (1978-1992)

In 1978, the Soviet Union invaded Afghanistan. In the fighting between the Communist government’s forces and the Mujahidin supported by the US and Pakistan, ordinary people were killed without distinction of civilian or combatant. The toll inflicted by both sides was devastating. An estimated 870,000 Afghans were killed between 1978 and 1987 – an average of 240 each day.⁵ Bombings, reportedly, were often indiscriminate; between 800 and 1,000 civilians were killed in a single day in one district of Faryab province.⁶ The fighting left an estimated 1.2 million Afghans disabled and three million maimed or wounded. Only land mines killed 25,000 Afghans during the war and up to fifty people were estimated to be injured by mines each week.⁷ During the conflict, over five million people-nearly a fifth of the population - fled to Pakistan or Iran, and two million were displaced within the country.⁸ In 1989, as a result of the Geneva Accord, Soviet forces withdrew. Amid fighting for gaining power, the Communist regime of Dr Najeebullah continued until 1992, followed by a civil war among different factions of warlords in the country.

Civil War (1992-1996)

During the civil war in Afghanistan, all warring parties to the conflict committed human rights violations. Arbitrary killings, kidnappings, imprisonment and sexual violence were common among all groups. Only in 1993, approximately 10,000 people were killed.⁹ Amnesty International reported that in 1995 thousands of people were abducted and very few were seen again.¹⁰ Rape of women and girls was a common practice to humiliate enemies and was probably condoned by militia leaders as a weapon of war to

⁴ Afghanistan Independent Human Rights Commission (AIHRC), “From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan,” Afghanistan Independent Human Rights Commission, December 2008.

⁵ Ashley Jackson, “Cost of War: Afghan Experiences of Conflict 1978-2009,” Oxfam International, November 2009.

⁶ UN Special Rapporteur, “Report on the Situation on Human Rights in Afghanistan,” A/41/778 (1986).

⁷ *Ibid.*, Robert Pear, “Mines Put Afghans in Peril on Return,” *New York Times*, August 14, 1988.

⁸ *Ibid.*

⁹ Ashley Jackson, “Cost of War: Afghan Experiences of Conflict 1978-2009.”

¹⁰ *Ibid.*

terrorize the population.¹¹ It was a symbol of victory over the enemy and a reward for the victors. During these chaotic times, in 1993, a new faction of Pushtun Taliban appeared on the scene from Kandahar and within few years, in 1996, it was knocking at the doors of Kabul.

Taliban Rule (1996 – 2001)

The Taliban gained control of most of the eastern, western and southern provinces and eventually seized Kabul. The Taliban, predominantly Pashtuns, massacred Tajiks and Hazaras, in November 1998 during attacks on Mazar-e-Sharif in the North.¹² Similarly there were reports of killing of 300 Hazara men and women while seeking shelter in Yakaolang in January 2001.¹³ During their rule, the Taliban enforced a strict set of rules, based on an extremist interpretation of Islam not enforced in any other Muslim country so far. The treatment of women, particularly in urban areas, was severe. The Ministry for the Promotion of Virtue and the Suppression of Vice employed brutal tactics, most commonly public beatings of both men and women, to enforce the law.¹⁴ The destruction of cultural heritage sites like the Buddha statues in Bamiyan, and human rights violations, including maltreatment of women and men, caught the attention of the world.¹⁵ The issue of human rights protection was internationally important at that time due to conflicts in Rwanda, Bosnia and Kosovo.

In September 2001, only three countries of the world recognised the Taliban government which was holding 90 per cent of the country's territory and fighting with the Northern Alliance comprising forces of Ahmad Shah Masood, Burhan ud Din Rabbani, the Hazara Shiite, anti-Taliban Pashtun factions of Abdur Rasool Sayyaf joined by Uzbek warlords like Abdur Rashid Dostum, to name a few. The attack on the World Trade Center changed the whole scenario.¹⁶ On October 7, 2001, a coalition of international forces led by the US declared war on the Taliban government.¹⁷

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ahmed Rashid, *Taliban: The Story of Afghan Warlords* (London: Pan Books, 2001).

¹⁵ "Giant Buddha Statues Blown Up," *BBC News*, March 11, 2001, http://news.bbc.co.uk/2/hi/south_asia/1214384.stm.

¹⁶ "Sep. 11, 2001," *New York Times*, http://topics.nytimes.com/top/reference/timestopics/subjects/s/sept_11_2001/index.html?scp=5&sq=wtc%20attacked&st=cse.

¹⁷ "Afghanistan Wakes after Night of Intense Bombing," *CNN News*, October 7, 2001, <http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/>.

The Current Conflict (2001 – Present)

In the autumn and winter of 2001, the US defeated the Taliban. The Northern Alliance was there to reap the fruits of this change. However, the news of relief and optimism for the Afghan people came with serious concerns. These concerns included incidents of ethnically-motivated violence, including rape, robbery and murder of Pashtuns living in the north, as well as the atrocities committed at Dasht-e-Leili, where Northern Alliance forces led by Dostum are believed to have shot, tortured and suffocated up to 2,000 men alleged to be Taliban.¹⁸ Reprisals against Pashtuns, mass killings of Taliban forces and abuses committed by US forces have been documented.¹⁹ Later on, as was published by McClatchy newspapers,²⁰ Dostum was also allegedly involved in destroying the evidence, as verified by the UN²¹ and other authorities. “Physicians of Human Rights” organization has collected evidence and the remains of some 15 bodies from the site.²² The killing of 300 Taliban prisoners of war in Qala-i-Jangi is another incident of war crimes.²³ Human rights organizations and law enforcement agents²⁴ believe that US authorities knew of these violations, yet no action was taken to investigate the cases.²⁵

Other issues related to the violation of international laws of war range from arbitrary detentions at Bagram air base, the equivalent of Guantanamo

¹⁸ Physicians for Human Rights, “Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-I-Sharif, Afghanistan: January 16-21 and February 7-14,” Physicians for Human Rights, 2008, <http://afghanistan.phrblog.org/download/6>. Dexter Filkins, “A Tribe in Fall Prey to Vengeance after Taliban’s Fall in the North,” *New York Times*, March 7, 2002.

¹⁹ Human Rights Watch, “Anti-Pashtun Violence in Northern Afghanistan,” March 5, 2002, <http://www.hrw.org/en/news/2002/03/05/anti-pashtun-violence-northern-afghanistan>. “Enduring Freedom: Abuses by US Forces in Afghanistan,” *Human Rights Watch* vol. 16, no. 3(C) (March 2004), <http://hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf>.

²⁰ Tom Lassater, “As Possible Afghan War-Crimes Evidence Removed, US Silent,” *McClatchy Newspapers*, December 11, 2008, <http://www.mcclatchydc.com/2008/12/11/57649/as-possible-afghan-war-crimes.html>.

²¹ “UN confirms Site of War Crimes Disturbed,” *Associated Press*, December 12, 2008, <http://www.afghanconflictmonitor.org/2008/12/un-confirms-afghan-mass-grave-site-disturbed.html>.

²² “Physician of Human Rights Calls for End to Stalling of Investigation into Afghan Mass Graves,” Physician of Human Rights, August 18, 2002, <http://physiciansforhumanrights.org/library/2002-0818.html>.

²³ Alex Perry, “Inside the Battle at Qala I Jangi,” *Time*, December 1, 2001, <http://www.time.com/time/nation/article/0,8599,186592,00.html>.

²⁴ Tom Lassater, “As Possible Afghan War-Crimes Evidence Removed, US Silent.”

²⁵ Ibid.

Bay, and indiscriminate civilian casualties by NATO air strikes.²⁶ “It’s common knowledge that Afghans perceive US detention operations as secretive and lacking in due process,” said Sahr Muhammed Ally, senior associate at Human Rights First.²⁷ Other human rights organizations have mentioned similar situations in their reports.²⁸ The Afghan Independent Human Rights Commission (IAHRC) reported in December 2008 that pro- government forces were violating the International Humanitarian Law (IHL) by killing innocent civilians including women and children.²⁹

The report found that “some aspects of the rule of law have been taken seriously during US operations.”³⁰ In Alston’s report it was also warned, however, that: “there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings – including possible war crimes – during the United States’ international operations. The Government has failed to effectively investigate and punish lower-ranking soldiers for such deaths, and has not held senior officers responsible under the doctrine of command responsibility. Worse, it has effectively created a zone of impunity for private contractors and civilian intelligence agents by failing to investigate and prosecute them.”³¹ The report recommended forming a “commission of inquiry” to look into the causes and extent of these deaths. It further recommends hiring an independent special prosecutor.³²

Most recently, an American military jury has sentenced some American soldiers for war crimes in Afghanistan on November 10, 2011. Jury found “Army Staff Sgt. Calvin Gibbs guilty of 15 criminal counts, including three counts of murder, in a case arising from the killing of three unarmed Afghan civilians whose bodies were mutilated to provide trophies for US soldiers. The Squad was from the Fifth Stryker Brigade, Second Army Division, based at Lewis-McChord Army Base near Seattle, Washington, where the court-martial was conducted. Gibbs, the leader of the Squad, was convicted on the basis of

²⁶ Philip Alston, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” A/HRC/11/2/Add.4, May 6, 2009.

²⁷ Sahr Muhammad Ally, “Fixing Bagram: Strengthening Detention Reforms to Align with US Strategic Priorities,” November 2009.

²⁸ “Letter to President Obama on Afghanistan,” *Human Rights Watch*, March 26, 2009, <http://www.hrw.org/en/news/2009/03/26/human-rights-watch-letter-president-barack-obama-afghanistan>.

²⁹ AIHRC, “From Hope to Fear.”

³⁰ Philip Alston, “Report of the Special Rapporteur on Extrajudicial.”

³¹ Ibid.

³² Philip Alston, “Report of the Special Rapporteur on Extrajudicial.” Also quoted by Matt Glenn, “US Must Do More to Prevent War Crimes: UN Rapporteur Philip Alston,” *Jurist*, May 29, 2009, <http://jurist.law.pitt.edu/paperchase/2009/05/us-must-do-more-to-prevent-war-crimes.php>.

the testimony of a dozen soldiers, including several who had already pleaded guilty to murder and cover-up.”³³ This is one case in point. Wikileaks indicated about such incidents in 2010 when it published thousands of classified documents which also included the details of violations of international law by US forces in Afghanistan. Julian Assange said:

It is up to a court to decide, clearly, whether something is, in the end, a crime. That said, *prima facie*, there does appear to be evidence of war crimes in this material. An example is the Task Force 373 HIMARS missile strike on a house which killed seven children. This is the equivalent of opening the Stasi archives. No one particular Stasi file has a tremendous impact to change a whole nation, to change the whole nation of Germany, but across all the Stasi files, many individuals are represented, and many people in German society could see their connection to the behavior of the Stasi. And that’s something that came out over time. So I expect that to be the case also in this material. It is the — it is a history. It is an enormous compendium of material that will affect many different people in different ways. We, as a journalistic group, the four media groups who worked on this, have really only just scratched the surface. So I think between us, we’ve probably read about a thousand or 2,000 of these reports properly. So it’s going to take the rest of the world press and academics to look at the statistics that come out of this and the soldiers and returned soldiers from Afghanistan, from coalition forces.³⁴

However, the Taliban, the non-state actors, are also not innocent of such charges. The Taliban started targeting the civilian population, kidnapping and beheading people which constitute war crimes according to the Geneva conventions³⁵ and the Statute of the ICC.³⁶ The Taliban and al Qaeda are accused of suicide bombing [and] killing [of] hundreds of civilians³⁷ and recruiting children³⁸ for the purpose of war.

³³ Patrick Martin, “Army Sergeant Convicted as Ringleader of Afghan War Crimes,” *World Socialist Website*, November 12, 2011, <http://www.wsws.org/articles/2011/nov2011/gibb-n12.shtml> (accessed November 27, 2011).

³⁴ “Evidence of War Crimes” in Afghan War Logs, White House Downplays Leak, Claiming “No Broad New Revelations,” Democracy Now Blog, comment posted July 27, 2010, http://www.democracynow.org/2010/7/27/wikileaks_founder_says_afghan_war_logs.

³⁵ Philip Alston, “Report of the Special Rapporteur on Extrajudicial.”

³⁶ “Rome Statute Article 8, Additional Protocol II, Targeting Civilians.”

³⁷ “Philip Alston, Reports Violations of Laws of War: Perfidy and Other Violations P.13,” *Amnesty International Taliban War Crimes in Afghanistan Report*, April 19, 2007.

³⁸ Nick Owens, “Child Soldiers Trained by Taliban to Kill British Soldiers,” *Daily Mirror*, August 2, 2008, <http://www.mirror.co.uk/news/top->

Talking about sexual violence is taboo in Afghanistan and a stigma for the victims. The majority of people will not talk about it. Neither is it easy to find any documentation about such crimes. Cultural sensitivity to the topic is understandable because of the gender bias against women. In Afghanistan, the sale and purchase of women were not uncommon before the Taliban. During the above-mentioned periods, very few observers would dispute the existence of sexual violence that occurred related to the conflict.³⁹ However, it was linked to other crimes including torture, kidnapping and imprisonment. The civil war period was the worst for rape and killing of women but the Taliban and communist eras were also fraught with such examples. In “Cost of War in Afghanistan”, Ashly Jackson provides the views of victims:

Many individuals portrayed sexual violence against men, women and children as a weapon of war to either inflict terror or to punish the female relatives of men who were targeted because of their ethnicity or political affiliation. Women, in particular, discussed the ramifications of such acts.⁴⁰

After the fall of Kabul in 2001, victims of these war crimes demanded accountability of those most responsible for imposing a reign of terror over the Afghan population since 1978. Everybody hoped that the major Taliban leaders, who committed systematic and widespread atrocities against their opponents in North and other areas would be brought to justice. If nothing in Afghanistan, the killings of thousands of civilians in America on 9/11—the very reason of armed attack on Afghanistan—should have been the main reason for prosecution of those Taliban leaders who were harboring the perpetrators of the 9/11 attacks. Nothing of that sort happened because the Taliban leadership was able to disappear and find safe havens in the border regions of Afghanistan and Pakistan. With the passage of time more and more people are willing to strike a deal with them.⁴¹ In the latest development in Qatar where the Taliban have opened their office, nobody has raised the objection that there might be some people wanted for war crimes. There are no efforts by the government to prosecute domestically the other war criminals, present in the country or abroad, according to the requirements of the ICC. It is important to see the ability of the government of Afghanistan to take this course of action because the tortuous history of violence and war crimes in Afghanistan shows the extent of the real challenge for any government to address the issues of past crimes.

stories/2008/08/02/child-soldiers-trained-by-the-taliban-to-kill-british-soldiers-115875-20681500/.

³⁹ Ashely Jackson, “Cost of War: Afghan Experiences of Conflict 1978-2009.”

⁴⁰ Ibid.

⁴¹ Fotini Christia and Michael Semple, “Flipping the Taliban, 88,” *Foreign Affairs*, 2009.

Ability of Afghanistan Government to Prosecute the War Criminals

For any state, including Afghanistan, the first challenge is to establish the writ of government and the rule of law. This objective cannot be achieved in the absence of physical territorial control of the country.⁴² After nine years of the presence of NATO and US forces, the present government cannot claim control of more than 60 per cent of the areas of Afghanistan. However, many observers say it is limited to a few urban centers. In fact, in December 2008, the UN Security Council after traveling to Afghanistan reported, “almost 40 percent of Afghanistan is either permanently or temporarily inaccessible to governmental and non-governmental aid.”⁴³ In the province of Helmand, US forces started operation only in January 2010⁴⁴ and are eager to leave as early as in 2013.⁴⁵

Security is the fundamental issue in areas that are governed by the state. The UN recently withdrew or relocated its 600 staff members after a suicide bombing on UN rest house in Kabul.⁴⁶ In the east and south, the Taliban still control the territory, cultivate poppy and dispense with state functions like adjudication of disputes, both criminal and civil, and collection of taxes. In such areas, any expectation from government to address the issues of war crimes makes no sense.

In areas under its control, the government of Afghanistan should have a capable professional criminal justice system for fair investigations, proper evidence collection and impartial trials in independent courts to deal with violations of human rights. If Afghanistan wants to proceed on this road, it would be helpful if its domestic laws are made to comply with the requirements of the ICC. The state of the legal framework and the criminal justice system of the state is examined in the following paragraphs:

⁴² Testimony by Mark L. Schneider, Senior Vice President, International Crisis Group to the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives, Washington, DC, February 12, 2009.

⁴³ Ibid.

⁴⁴ Sean Rayment, Patrick Sawyer and Ben Farmer, “Afghanistan: First Stage of Operation Mushtarak Called a Success,” *Telegraph*, February 13, 2010, <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7230940/Afghanistan-first-stage-of-operation-Moshtarak-declared-a-success.html>.

⁴⁵ Elisabeth Bumiller, “US Will Keep Fighting as Afghan Forces Take the Lead, Panetta Says,” *New York Times*, February 2, 2012, <http://www.nytimes.com/2012/02/03/world/asia/nato-focuses-on-timetable-for-afghan-withdrawal.html>.

⁴⁶ “Afghan Strife Make UN Relocate,” *BBC News*, November 5, 2009, <http://news.bbc.co.uk/2/hi/8343716.stm>.

Compatibility of National Laws with the (ICC) Rome Statute

The Rome Statute has obligated the member states to fully cooperate with the Court and OTP regarding investigation and prosecution of the crimes within the jurisdiction of the ICC.⁴⁷ Investigating and prosecuting such crimes is possible when the necessary laws are legislated in the country and the most serious crimes set forth in the statute are criminalized in the national laws. This way, the Afghan courts under provisions of these laws, shall have jurisdiction over these crimes and can prosecute the perpetrators. But in Afghanistan after seven years of its being a state party to the ICC such a law hasn't been drafted yet.⁴⁸ The other issue is to have a developed and functional mechanism to fulfill the international responsibilities and enforce the laws.

It is important to examine the components of the criminal justice system to assess the quantitative and qualitative capacity of the law enforcement mechanism.

Criminal Justice System of Afghanistan

Since the Bonn Agreement of December 2001, the criminal justice institutions of Afghanistan have been substantially improved through support of the international community. Collectively, the formal legal sector consists of about 1,400 judges,⁴⁹ 2,500 prosecutors⁵⁰ and about 450 defense lawyers⁵¹ and a further 40 to 50 paralegals provide legal aid services.⁵² If Afghanistan's population is approximately 24 million, this translates into about 90,000 persons per lawyer/paralegal.⁵³ In comparison, Afghanistan's Human Development Report states there are 370 persons per police officer and 21,317 persons per judge.⁵⁴ Creation of both a National Justice Sector Strategy (NJSS) and Programme (NJP) in early 2008 represents important steps by government

⁴⁷ "Article 54 (3c), 68 Rome Statute," *Rome Statute of International Criminal Court*, http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

⁴⁸ Consultative Meeting on the Obligations of Afghanistan under the ICC, Kabul, October 24, 2009.

⁴⁹ Humayun Hamidzada et al., *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition, The Rule of Law and the Search for Justice* (Islamabad: Army Press for the Kabul University Center for Policy and Human Development, 2007), 71.

⁵⁰ Ibid.

⁵¹ Ibid. About 800 Defense Lawyers Are Under Training According to Participants of the Defence Lawyers Conference.

⁵² Emily Winterbotham, "The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges," Discussion Paper, *Afghanistan Research and Evaluation Unit* (AREU), April 2010.

⁵³ Ibid.

⁵⁴ Humayun Hamidzada, *Afghanistan Human Development Report 2007*.

in the justice reform process.⁵⁵ In late 2007, the Advocates' Law was passed creating the Independent Afghan Bar Association. The Bar Association by-laws outline the requirements to practice as a lawyer and the rights and duties of lawyers.⁵⁶ A code of conduct for lawyers has been formulated to maintain minimum professional standards. The Bar Association is a new component in the formal justice system.⁵⁷ AIHRC is a constitutional body⁵⁸ which is a focal point for receiving public complaints of human rights violations committed by government agencies like police, prison, prosecution and other departments and directing them to legal authorities. AIHRC is also involved in issues of transitional justice since March 9, 2002.⁵⁹

Police

The Afghan National Police (ANP) reforms have received more international attention in recent years. The target is to build a reformed force of 82,000 personnel that is capable of operating countrywide. At the end of November 2008, there were 75,954 assigned ANP personnel. The UN estimated around 57,000 police on the ground.⁶⁰ The rate of absenteeism in police was 20 per cent in 2009, whereas casualties of police officers were five times more than Afghan National Army's officers.⁶¹ However, there are local militias and local vigilante groups who perform similar functions in their communities and share the same jurisdiction as police but informally. While it proves the inability of the police to maintain law and order it also speaks volumes about the role of the warlords and their share in the monopoly over violence in the community which undermines the state authority.

The roles of the various police services span a wide spectrum of policing, law enforcement, and security functions.⁶² Independent observers say that efforts have too often been focused on training and equipping the ANP

⁵⁵ Islamic Republic of Afghanistan, *National Development Strategy, National Justice Sector Strategy* (Kabul: Sedarat, 2008). Islamic Republic of Afghanistan, *National Development Strategy, National Justice Program* (Kabul: Sedarat, 2008).

⁵⁶ Ele Pawelski, "Defining Justice in Afghanistan: Development of a National Legal Aid System," *Windsor Rev. Legal & Soc.* vol 27 (2009).

⁵⁷ Ibid.

⁵⁸ "Article 58 of Constitution of Afghanistan," http://www.aihrc.org.af/English/Eng_pages/X_pages/Constitution%201382%20English.pdf.

⁵⁹ "AIHRC's Program on Transitional Justice," http://www.aihrc.org.af/English/eng_pages/X_pages/T_justice.htm.

⁶⁰ Crisis Group Asia Briefing N°85, "Policing in Afghanistan: Still Searching for a Strategy," *International Crisis Group* (ICG), December 18, 2008.

⁶¹ Philip Alston, "Report of the Special Rapporteur on Extrajudicial."

⁶² Department of Defence (DOD) Report to Congress, "Progress Towards Security and Stability in Afghanistan," *National Defense Authorization Act 2008, Section 1230, Public Law 110-181*, January 2009.

as an auxiliary security force rather than clearly defining and strengthening its role in fighting crime and upholding the law.⁶³

Additional problems associated with the failure to coordinate the various reform support programmes of the foreign donors are: non representative character of police which is highly in favour of Northern Alliance supporters; mushrooming of private militias, and lack of political will in Kabul or foreign capitals to take on corrupt powerbrokers impeding the reforms. The ministry of interior, which oversees the law enforcement apparatus, has become “the locus of interactions between state institutions and criminal interests.”⁶⁴ Meanwhile, the apparent increase in crime in the major population centers of Kabul, Herat and Kandahar, including kidnapping of high-profile businessmen, encourages business flight and helps the Taliban to portray their regime in the 1990s as relatively better in enforcement of law and maintaining order on the streets.⁶⁵

Defence Lawyers

The Constitution of Afghanistan legally obliges the government under Article 31 to appoint a defence lawyer to an indigent person.⁶⁶ A suspect or accused person who cannot afford to employ a defence lawyer must be provided with a free lawyer paid by the state.⁶⁷ It goes on to state that a defence lawyer has the right to be present during investigation procedures, interrogation, searches, confrontations, line-up procedures, expert examinations and during trial.⁶⁸ To meet the shortage of defence lawyers, the Criminal Code allows for a suspect or accused to get assistance from an educated person having legal knowledge, and instructs the president of each court to have a list of such persons available.⁶⁹

But many defendants are tried without the counsel. The 2004 Interim Criminal Procedure Code states that a detainee upon arrest must be charged within 72 hours and that within fifteen days of the arrest, the prosecutor must

⁶³ Crisis Group, “Policing in Afghanistan.”

⁶⁴ Doris Buddenberg and William A. Byrd, eds., *Afghanistan’s Drug Industry: Structure, Functioning, Dynamics and Implications for Counter-Narcotics Policy* (United Nations Office on Drugs and Crime and the World Bank, 2006), 198. Also quoted in ICG Asia briefing no. 89, 8.

⁶⁵ Crisis Group Asia Briefing N°89, “Afghanistan: New US Administration, New Directions,” *International Crisis Group*, March 13, 2009.

⁶⁶ Article 31, Article 19 of the Constitution of Islamic Republic of Afghanistan, Official Gazette No. 820, 2004, Criminal Code (Unofficial Translation).

⁶⁷ “Interim Criminal [Procedure] Code for Courts.”

⁶⁸ Article 38 of the Constitution of Islamic Republic of Afghanistan, http://www.aihrc.org.af/English/Eng_pages/X_pages/Constitution%201382%20_English.pdf.

⁶⁹ Ibid. Article 96 of the Constitution of Islamic Republic of Afghanistan.

formulate an indictment. An extension for detention may be granted for an additional 15 days. Defence lawyers in Afghanistan, however, have told *Human Rights First*, “in reality these timelines are not followed.”⁷⁰ Many trials are also conducted without any prosecution witnesses, thereby denying a defendant the right to confrontation.⁷¹ Not only there is a wide gap between law and practice but corruption is also widespread among defence lawyers.

Prosecutors

According to the law, investigation is the duty of the Prosecutor. Police report crimes to the prosecutor, who investigates on his own or in collaboration with the police.⁷² If the prosecutor finds sufficient evidence against the suspected perpetrator, he submits an indictment to the District Court.⁷³ Until recently there was no coordination between the Police and the Prosecutors.⁷⁴ Afghan criminal procedure law does, on its face, meet international fair trial standards, but the problem lies in its application.⁷⁵ The common problem in criminal trials is the use of coerced evidence. Confessions are barred under Afghan law unless conducted before a judge. Yet, the reliance on confessions extracted largely through torture is common practice. For instance, the law allows pre-trial detention without charge up to one month. Sahr Muhammed Ally, Senior Associate Law & Security Programme of an NGO, *Human Rights First*, says that there is no recourse for persons who are in detention for violation of the pre-trial detention period.⁷⁶ Ally further said, “the recent events about a week-long hunger strike⁷⁷ by hundreds of jailed men in Kandahar should be of concern to the international community. Their complaints are about unfair trials, indefinite detention, and lack of counsel.”⁷⁸

The Prison System

The prison system in Afghanistan is in urgent need of reform. There are 34 prisons (one central prison, Pul-i-Charkhi, and 33 provincial prisons), and 243 legal detention centers throughout Afghanistan, in addition to numerous

⁷⁰ Ibid.

⁷¹ Sahr Muhammay Ally, “Afghanistan: Weak Criminal Justice System Needs Support,” *The Jurist*, University of Pittsburgh school of law, May 2008, http://jurist.law.pitt.edu/hotline/2008_05_01_indexarch.php#6270910345789236082 (accessed April 17, 2010).

⁷² Article 21 and 23 of Interim Criminal Procedure Code (ICPC) of Afghanistan.

⁷³ Article 39 ICPC.

⁷⁴ “Afghan Justice Sector Support Program (JSSP),” <http://www.jssp-afghanistan.com/RPPT.asp>.

⁷⁵ Sahr Muhammad Ally, “Afghanistan: Weak Criminal Justice System.”

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

unofficial jails and detention centers. The majority of these are in a deplorable condition, without separate facilities for women and children.⁷⁹ “All provincial prisons in Afghanistan are under-funded, under-staffed, and under-maintained. Existing staff suffers from a lack of training. In many of the prisons the conditions are inhuman and inmate escapes are frequent. Most prisons in Afghanistan lump pre- and post-trial prisoners together and do not abide by any standards of the U.N. or the International Committee of the Red Cross (ICRC).”⁸⁰ Most of the people in prison are very poor, not represented properly in courts and charged for long terms. Prison population is snowballing. Facilities are much less and people languish even after completion of their sentences because of poor management of prison staff. After Guantanamo Bay, Bagram airbase prison has attracted international criticism. “Because of the classification level of the Bagram Theater Internment Facility (BTIF) and the lack of public transparency, the Afghan people see US detention operations as secretive and lacking in due process.”⁸¹ Only recently, the US has started releasing people after a review process, without charging them with any crime.⁸²

Judiciary

The Afghan Constitution provides for one Supreme Court (based in Kabul) for final appeals, an Appeal Court in every provincial capital (34 in total), and a Primary Court in every district (about 400 in total).⁸³ The Supreme Court is defined as an “independent organ of the state” authorized to review laws, decrees and international agreements for compliance with the Constitution. Article 116 of the Constitution provides that the Supreme Court, as the highest court, is charged with the administration and oversight of the lower courts of Afghanistan.⁸⁴ Almost as a matter of routine cases decided by the Primary Courts are appealed; it is estimated that 80 per cent of Primary Court decisions are appealed. At the Supreme Court, where it is thought that 70 per cent of the cases are appealed, against the decision of the Appeal court, judges

⁷⁹ “UNDP 2007.”

⁸⁰ DOD Report, “Progress Towards Security and Stability in Afghanistan.”

⁸¹ General Stanley McCrystal, Commander ISAF’s Initial Assessment, Initial United States Forces-Afghanistan (USFOR-A) Assessment, August 30, 2009.

⁸² Alisa J. Robin, “US Frees Detainees But Afghan Anger Persists,” *New York Times*, March 19, 2010, <http://www.nytimes.com/2010/03/20/world/asia/20kabul.html?scp=2&sq=RELEASES%20DETAINES%20AT%20BAGRAM%20&st=cse>.

⁸³ Ele Pawelski, “Defining Justice in Afghanistan.” All primary courts are not operational and their cases are heard in provincial headquarters for security or other reasons.

⁸⁴ Constitution of Afghanistan, Specific Organization and Jurisdiction of the Courts is Governed by the ‘Law on the Organization and Jurisdiction of the Courts.’

often send the case back to the Primary Court for a new hearing.⁸⁵ After all these, enforcement of decisions of the court is not guaranteed.

According to the UNDP Human Development Report 2007, little more than half of the judges in Afghanistan have the relevant formal higher education and have completed the requisite one-year period of judicial training. The remaining judges are graduates of *Madrassas* or faculties other than law, with 20 per cent having no university education at all. In addition, 36 per cent of the judges have no access to statutes, 54 per cent have no access to legal textbooks, and 82 per cent have no access to decisions of the Afghan Supreme Court.⁸⁶ ICG reported that all key positions are on sale and functionaries of criminal justice system, from police to judges, are appointed at the sweet will of power holders in the government. This “sweet will” can be bought, with the help of drug money or mustered with ethnic or political alliance. Some good Samaritans who raised voices or tried to change the situation were either expelled⁸⁷ from important positions or murdered.⁸⁸

In the absence of a properly functioning formal judicial system, *jirgas* and *shuras* have filled a large portion of the rule of law gap, especially in rural areas. More than 80 per cent of disputes in Afghanistan are now decided through *jirgas/shuras*, which are perceived by many Afghans as more trustworthy, more cost effective, efficient, and less corrupt than the formal justice system.⁸⁹ Even judges of formal courts get their personal cases resolved by informal justice system.⁹⁰ It is important to mention that informal justice set-up can be very useful in transitional justice, revealing the truth and healing the wounds and bringing the communities closer to build the social fabric of society.

After eight years of international efforts, the formal Afghan justice sector is still weak and faces serious difficulties including, lack of professional

⁸⁵ Livingston Armytage, “Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War,” *67 HJIL* 185, 2007.

⁸⁶ “UNDP Afhansitan Human Development Report 2007,” <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/nhdr2007.pdf>.

⁸⁷ Afghanistan Conflict Monitor, “Afghanistan Vocal Warlord Critic Seeks to Reverse her Expulsion from Legislature,” *Radio Free Europe/Radio Liberty*, April 7, 2008; Pamela Constable, “Top Prosecutor Targets Afghanistan’s Once-Untouchable Bosses,” *Washington Post*, November 23, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/22/AR2006112201889.html>.

⁸⁸ Ethirajan Anbarasan, “Afghan Anti-Drug Judge is Killed,” *BBC News*, September 4, 2008, <http://news.bbc.co.uk/2/hi/7598540.stm>.

⁸⁹ “UNDP 2007.”

⁹⁰ Jasteena Dhillon, “State-building and Human Rights for Afghanistan/Pakistan Program,” *ABC News*, <http://www.abc.net.au/tn/latenightlive/stories/2010/2846112.htm>.

capacity and resources for judges, lawyers, police and prison officers; physical infrastructure devastated by years of war; and institutionalized corruption.⁹¹ In this situation, it is hard to imagine that most serious crimes will be handled according to international standards of ICC. This highlights the inability of the state to build an efficient, sustainable and accountable criminal justice system which can deal with past crimes in Afghanistan. However, regardless of the capacity of the system, it is needed to be seen whether the state has the will to proceed with the most serious crimes or not.

Willingness to Prosecute War Criminals

There are at least seven important indicators to believe that Afghanistan government is not keen on taking up the issue of war criminals in the near future:

Lack of Commitment to Comply with ICC Standards

The Government of Afghanistan has made no concrete efforts to deal with the issue of war crimes. According to the Commissioner of AIHRC, the draft presented by the commission to make domestic laws conform to article 68 of the Rome Statute,⁹² was ignored by the Ministry of Interior. Afghanistan has never invited ICC to conduct any investigations of past crimes.⁹³ In the assembly of the state parties of ICC, Afghanistan's seat is still vacant and nobody has been appointed yet.⁹⁴ This shows that the government is not interested in fulfilling its international obligations and participating against impunity.⁹⁵

Refusal to Implement Action Plan for Transitional Justice

In December 2006, Afghanistan adopted a national "Action Plan for Peace, Reconciliation and Justice" prepared by AIHRC in 2005.⁹⁶ The Plan was adopted by the Cabinet in December 2005 with the efforts of local and international NGOs to bring the transitional justice system on the political agenda of the government.⁹⁷ The Action Plan laid out five key activities: symbolic measures, institutional reform, truth-seeking, reconciliation, and

⁹¹ DOD Report, "Progress Towards Security and Stability in Afghanistan."

⁹² "Article 68 of Rome Statute."

⁹³ Emily Winterbothom, "The State of Transitional Justice in Afghanistan."

⁹⁴ Niamatullah Ibrahim, "The Vacant Seat of Afghanistan at the ICC: A Short Report on the ICC Assembly of States Parties (ASP)," The Hague, Netherlands, November 2009, <http://www.watchafghanistan.org/article017.html>.

⁹⁵ Emily Winterbothom, "The State of Transitional Justice in Afghanistan."

⁹⁶ AIHRC, "Action Plan for Peace, Reconciliation and Justice in Afghanistan," 2005.

⁹⁷ Emily Winterbothom, "The State of Transitional Justice in Afghanistan."

accountability measures. It also categorically rejected amnesty, stating that neither Islam nor international law provides amnesty for crimes, including crimes against humanity.⁹⁸ “The Action Plan was also included as a benchmark in both the 2006 Afghanistan Compact⁹⁹ and the 2008 Afghanistan National Development Strategy.”¹⁰⁰ The Action Plan set an ambitious timeline to achieve the activities outlined in three years, which expired in March 2009.¹⁰¹ President Karzai subsequently refused a request from the AIHRC and civil society for its extension¹⁰² because parliament had passed an amnesty law.

Blanket Amnesty Law to Shield War Criminals

In January 2007, the lower and then upper houses of Afghan parliament (Wolesi and Meshrano Jirga) passed a National Stability and Reconciliation Resolution. The law granted blanket amnesty to “All the political wings and hostile parties who had been in conflict before the formation of the interim administration.” When this law was passed, an excuse was offered that President Karzai had not signed the bill so it was not a law.¹⁰³ In early 2010, the appearance of the Amnesty, National Reconciliation and Stability Law in the Official Gazette (no. 965) around December 2009 removed all doubts that it was not a law. However, its sudden appearance not only surprised the human rights organizations but the then-Special Representative of the UN Secretary General, Kai Eide, also had to admit, in his last speech in Afghanistan: “Two months ago, we all discovered that an Amnesty Law had been gazetted and apparently kept away from the attention of the public for over a year. The process itself gives reason for serious concerns. So does the content. In my experience, amnesty is one way of healing the wounds of a

⁹⁸ AIHRC, “Action Plan for Peace, Reconciliation and Justice in Afghanistan.”

⁹⁹ The Afghanistan Compact, Building on Success: 2006 and London Conference on Afghanistan, January 31, 2006 to February 1, 2006. Also quoted by Emily Winterbothom, “The State of Transitional Justice in Afghanistan,” 7, http://www.ands.gov.af/admin/ands/ands_docs/upload/UploadFolder/The%20Afghanistan%20Compact%20-%20Final%20English.pdf.

¹⁰⁰ Government of the Islamic Republic of Afghanistan, “Afghanistan National Development Strategy (ANDS),” Kabul, 2008.

¹⁰¹ Paul Anderson, “Calls Grow to Tackle Afghan War Crimes,” *BBC News*, February 14, 2005, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/4258343.stm.

¹⁰² “Afghanistan: Justice Plan Heading for Oblivion,” *IRIN News*, April 14, 2010, <http://www.irinnews.org/Report.aspx?ReportId=88807>.

¹⁰³ United Nations, General Assembly, Human Rights Council Working Group on the Universal Periodic Review 5th Session, Geneva, May 4-15, 2009. National Report submitted in accordance with paragraph 15 (A) of Annex to Human Rights Council Res 5/1, paragraph 43.

country. But those wounds cannot be healed if there is no accountability... if it means the sanctioning of impunity and atrocities committed...".¹⁰⁴

Other than transparency of the procedure, there are moral and legal issues associated with this Amnesty law. The parliament which passed the law was actually giving immunity to many of its members who were voting for the resolution.¹⁰⁵ This law is an incentive for committing more crimes. This is an open invitation for Taliban to continue crimes and then to join the government without a timeframe about deadline of the offer. Section 3, Clause 2, extends immunity from prosecution by the government to: "armed people who are against the government of Afghanistan, after the passing of this law, if they cease from their objections, join the national reconciliation process, and respect constitutional law and other regulations of the Islamic Republic of Afghanistan, they will have all the perquisites of this law."¹⁰⁶ Legally, this law contradicts Afghanistan's "duty to prosecute" norm which has been established under different instruments of international laws including Genocide Convention,¹⁰⁷ Convention against Torture¹⁰⁸ and all four Geneva Conventions.¹⁰⁹

Many questions arise about the timing of surfacing of this law and announcement of the national "Peace and Reintegration Program." In February 2010, President Karzai urged for the removal of the names of many leaders of Taliban from the Black list of the UN.¹¹⁰ This law may well apply to Mullah Abdul Ghani Baradar, second in command of Taliban, recently arrested in Pakistan, if he agreed to join the reconciliation process.¹¹¹ "Many Afghans are rightly suspicious of the Karzai government's desire to strike a deal with the leaders of a movement that plunged the country into a period of

¹⁰⁴ Statement by SRSK Kai Eide, "Legislation for Women," Kabul, March 6, 2010.

¹⁰⁵ Human Rights Watch, "Afghanistan: Repeal Amnesty Law," March 10, 2010, <http://www.hrw.org/en/news/2010/03/10/afghanistan-repeal-amnesty-law>.

¹⁰⁶ Amnesty law.

¹⁰⁷ Article VI, Genocide Convention.

¹⁰⁸ Article 7, Convention Against Torture.

¹⁰⁹ Article 49 Geneva Convention I, Article 50 of Geneva Convention II, Article 129 Geneva Convention III and Article 146 of Geneva Convention IV. All these sections are about prohibition of grave breaches which are defined in preceding sections in all conventions respectively.

¹¹⁰ "Karzai wants Taliban off UN Blacklist," *Dawn*, January 26, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/13+karzai-wants-taliban-off-un-blacklist-610-za-09>.

¹¹¹ Editorial, "Mullah Baradar's Capture," *Dawn*, February 18, 2010, <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/editorial/16-mullah-baradars-capture-hs-02>.

repressive isolation, gave succour to al Qaeda, and has killed thousands of Afghan civilians.”¹¹²

However, supporters of the amnesty law said that prosecuting old accusations would risk restarting years of civil war. But critics said that providing a blanket pardon to former warlords would allow them to retain their grip over Afghanistan’s economy and public life.¹¹³ Brad Adams, Asia Director for Human Rights Watch, said, “This law is absolute disgrace. It’s a slap in the face to all the Afghans who suffered for years and years of war crimes and warlordism.”¹¹⁴

We can see that in the face of these circumstances, it is hoping against hope that Afghanistan government will make any effort to touch the war criminals.¹¹⁵ A brief analysis of the political situation of Afghanistan government will highlight the compulsion behind taking such a stand despite the opposition of the human rights community. Though the thesis is constructed to prefer peace to justice but hurdles in the way of ending the impunity are government’s partnership with warlords, corruption and illegitimacy along with the silent support of the international community to not pay heed to any calls from moral and legal standpoints.

Warlords

Mistakes were committed right in the beginning of the US involvement in Afghanistan and these will continue to affect stability and peace. In the quest for quick fixing the Afghanistan problem, the US chose “strange bedfellows.” The US Special Forces pocketed the victory of Mazar-e-sharif with the help of Abdul Rashid Dostum, the man responsible for the “container crimes.”¹¹⁶ Clean partners like the Rome group of former king Zahir Shah, were not brought into power in the early days due to threats of Commander Qasim Fahim of Northern Alliance to part with government.¹¹⁷ Human rights abusers continued to enjoy almost complete impunity. The Afghan parliament is made

¹¹² Candace Rondeaux and Nick Grono, “Prosecuting Taliban War Criminals,” *New York Times*, March 23, 2010,

<http://www.nytimes.com/2010/03/24/opinion/24ihtedgrono.html?scp=5&sq=justice%20system%20in%20Afghanistan&st=cse>.

¹¹³ “Human Development Report 2007.”

¹¹⁴ “Afghanistan Says It Enacted Law to Pardon War Crimes,” *Rueters*, March 16, 2010, <http://www.nytimes.com/2010/03/17/world/asia/17kabul.html?scp=1&sq=war%20crimes%20in%20Afghanistan&st=cse>.

¹¹⁵ Aryn Baker, “Warlords of Afghanistan,” *Time*, February 12, 2009,

<http://www.time.com/time/magazine/article/0,9171,1879167,00.html>.

¹¹⁶ Ahmad S. Yunus, “Imputing War Crimes in the War on Terrorism: US, Northern Alliance and Container Crimes,” *Washington and Lee Race & Ethnic Anc. Law Journal*, 2003.

¹¹⁷ Kathy Gannon, “Afghanistan Unbound,” *88 Foreign Affairs*, 2004.

up largely of lawmakers who once belonged to armed groups, some of which have been accused of war crimes by human rights groups and the general public.¹¹⁸ President Karzai attempted to secure his reelection in 2009 through a series of deals with former warlords from all the main ethnic factions.¹¹⁹ “The choice of Mohammad Qasim Fahim as Karzai’s vice presidential running mate was emblematic of this trend; Fahim has long been implicated in possible war crimes from the 1990s and is widely perceived by many Afghans to be connected to criminal gangs.”¹²⁰

Corruption

According to the World Bank Institute, Afghanistan ranks in the second or third lowest percentile for the control of corruption.¹²¹ In addition to scoring poorly on control of corruption, it remains in the bottom eight of countries with severe governance problems, particularly those related to the rule of law and regulatory quality. “Abuse of political and military power, misuse of public funds, land grabs, abuse of public land management by high ranking government officials, corruption related to the opaque and obscured privatization processes of state-owned enterprises, widespread graft, drugs and other crime-related corruption are major concerns for Afghans. In their eyes, corruption fuels feelings of injustice, along with distrust of reconstruction efforts.”¹²²

Illegitimacy

The Afghan government has continued to lose public support and legitimacy¹²³ because of these abuses, widespread corruption, failure to improve living standards, and lack of progress in establishing the rule of law even in areas under its control. In many areas of the country, local strongmen and former warlords continue to exert significant power over communities, using intimidation and violence to maintain their control and get benefitted from drug money and other organized crime. The recent election of the

¹¹⁸ Marin Stremki, “It’s the Regime, Stupid,” *Georgetown Journal of International Affairs* (Spring/winter 2003): 39-48.

¹¹⁹ Human Rights Watch, “Afghanistan Country Summary,” January, 2010, www.hrw.org.

¹²⁰ Ibid.

¹²¹ “Human Development Report 2007.”

¹²² HDR 2007 quotes Tonita Murray, “Police-Building in Afghanistan: a Case Study of Civil Security Reform,” *International Peacekeeping* vol.14, no.1 (January 2007); US Department of State, Office of Inspector General, Interagency Assessment of Afghanistan Police Training and Readiness, Washington, D.C., 2006.

¹²³ ICG Asia, “Afghanistan: Judicial Reform and Transitional Justice,” Report N°45, January 28, 2003.

President itself cast doubt about the fairness of the process and people do not respect the government's authority to enforce law. This is resulting in public discontent, fragmentation and precarious security situation on the ground.¹²⁴

However, the silence of the US and other NATO countries on enactment of this law is compounding the situation. "The US needs to decide whether they're with the victims or the perpetrators, and make their views known publicly," Brad Adams of Human Rights Watch said.¹²⁵

Support of International Community

Maghferat Samimi, a researcher with the Afghanistan Human Rights Organization, says that the warlords and their militia commanders continue to commit crimes with impunity, protected by their alliances with foreign nations and comfortable positions within the Afghan government.¹²⁶ But human rights activists like Samimi forget the recent history. Accountability of the most responsible for war crimes was not on the agenda of the international community since the beginning of the current Afghan conflict. It was not the part of discussion at the Bonn conference because the selected Afghan participants of the conference were among possible targets of investigations.¹²⁷ Patricia Gossman, the then Project Director of Afghan Justice Programme, mentions that during the meetings of UN Human Rights Commission in Geneva, contrary to the proposal of AIHRC, "the US signaled that its priorities did not include accountability for either past or ongoing human rights abuses."¹²⁸ The stance is understandable because at the moment 43 countries have military presence in Afghanistan, which may turn out as an uneasy situation for NATO if ICC proceeds with the investigation. The ICC prosecutor spoke in unequivocal terms that investigations could lead to both the Taliban and the other members of the coalition forces who have been accused of civilian casualties.¹²⁹ In such circumstances, the international community will not like that the ICC will extend its jurisdiction in Afghanistan. However, it will further the doubts about neutrality of the ICC which is

¹²⁴ HRW, "Afghanistan," 2010.

¹²⁵ Ibid.

¹²⁶ Aryn Baker, "Warlords of Afghanistan."

¹²⁷ Barnett Rubin, "Transitional Justice in Afghanistan," Anthony Hyman Memorial Lecture, School of Oriental and African Studies, University of London, February 3, 2003, 4-5, <http://www.soas.ac.uk/academics/centres/ccac/events/anthonyhyman/past/38149.pdf>.

¹²⁸ Patricia Gossman, "The Past and Present: War Crimes, Immunity and Rule of Law," May 30 – June 1, 2003, speaking in London School of Economics, UK.

¹²⁹ Louis Charbonneau, "ICC Prosecutor Eyes Possible Afghanistan War Crimes," Septemebr 9, 2009, <http://www.reuters.com/article/idUSTRE58871K20090909>.

focused on areas which serve the purposes of the powerful permanent members of the Security Council.¹³⁰ Another legal arrangement made by the US is an agreement with Afghanistan under article 98 of the Rome Statute.¹³¹ This agreement may bar the ICC from investigating any crimes committed by US soldiers in Afghanistan. However, the timing of this agreement and *opino juris* in this issue requires further discussion, which is out of scope of this space.

International Criminal Court (ICC)

Despite some developments, Afghanistan has no substantive process in the rule of law domain. If accountability for war crimes cannot be secured through domestic courts, is there a role for the ICC there? “Renewed interest in the potential role of the ICC in Afghanistan was sparked by the announcement in September 2009 by the Chief Prosecutor, Luis Moreno-Ocampo, that war crimes investigators were in the early stages of an enquiry into “massive attacks, collateral damage exceeding what is considered proper and torture” committed in Afghanistan since the US-led invasion in 2001.”¹³² This opened the possibility of prosecutions by the international court.¹³³ This announcement may also have caused the publication of the Amnesty law to ensure protection of the local and international violators of grave human rights during the armed conflict.

What role could the ICC play in Afghanistan? The ICC only has prospective jurisdiction starting on the date in which the treaty enters into effect.¹³⁴ This means that crimes committed before 2003, when Afghanistan ratified the Court, are not within its jurisdiction. At a conference on the ICC held in October 2009, it was highlighted that during the past six years aerial bombardments by international forces, armed attacks, roadside explosions and suicide attacks had caused heavy civilian casualties.¹³⁵ However, the involvement of ICC for the last seven years will not be sufficient because the people of Afghanistan will ask about violations that took place in the last three decades. Any attempt to make any temporal “distinction” will jeopardize the legitimacy of the process in the eyes of the victims. Moreover, this will also bail out the worst perpetrators of mass crimes committed since 1978 for which the Afghan community is deeply concerned.

¹³⁰ Like Darfur and Democratic Republic of Congo.

¹³¹ Rome Statute.

¹³² Louis Charbonneau, “ICC Prosecutor Eyes Possible Afghanistan War Crimes.”

¹³³ James Reiml, “ICC Investigates War Crimes in Afghanistan,” *United Nations Press*, New York, September 10, 2009.

¹³⁴ “Consultative Meeting on the Obligations of Afghanistan under the ICC,” Emily Winterbotham, “The State of Transitional Justice in Afghanistan,” 20.

¹³⁵ *Ibid.*

The present preliminary examinations by the ICC's Chief Prosecutor, before any formal investigations by the ICC could act as a threat to many abusers of human rights, past and present. Future investigations by the ICC could help create an environment in which impunity is harder to defend and domestic interest in pursuing accountability is revived.¹³⁶ Non-governmental Organizations (NGOs) have played an important role in the creation and working of ICC in other conflicts, particularly Darfur. In Afghanistan, till 2005, local and International NGOs were playing a very active role for transitional Justice. Nonetheless, one should be very candid in expectations about the capacity of human rights NGOs.

NGOs

Getting justice for victims has never been easy anywhere. However, the case of Afghanistan is particularly difficult. Some people argue that NGOs cannot do much in this highly politicized environment where violence has been the only means of communication among the powerful and the weak.¹³⁷ Despite all these limitations, there are some avenues open for the NGOs to play an effective role to advance the aims of the ICC in Afghanistan.¹³⁸

Making Coalition of Local and International Civil Society

The international community has an important role to play in Afghanistan, because it can either promote or undermine the accountability agenda. The Washington-based "International Center for Transitional Justice considers it important to reach US and European audiences with the clear messages that they receive from our Afghan partners about the importance of justice for sustainable peace."¹³⁹ Afghan NGOs have this dual role to play: stressing upon justice-based policies and taking this agenda forward with international NGOs so the public opinion in other countries can be developed to promote justice in Afghanistan. In this way, Afghan civil society can play a role in building support for the justice process by putting pressure on other governments to cooperate with the ICC as well as by assisting the Court with information collection on the ground. As a member of the Coalition for the ICC, Afghanistan Watch on October 24, 2009 organized a consultative conference on the ICC, bringing together senior Afghan state officials, international diplomats and experts, and members of Afghan civil society and academia.¹⁴⁰

¹³⁶ ICTJ Briefing, "Beyond Peace Versus Justice: Fighting Impunity in Peace Building Contexts."

¹³⁷ Interview with Afghan Student in Harvard University, April 12, 2010.

¹³⁸ Aziz Rafiee, see note 137.

¹³⁹ "ICTJ Briefing."

¹⁴⁰ "ICC Consultative Meeting."

The Afghan Independent Human Rights Commission is an active and outspoken governmental human rights organization. It has recently published a discussion paper along with International center for Transitional Justice about legal position on amnesty laws.¹⁴¹ It calls upon the state and international community to end the culture of impunity in Afghanistan.

Invoking Universal Jurisdiction

War crimes are not investigated in Afghanistan.¹⁴² But another accountability mechanism available against most serious crimes is the application of universal jurisdiction by third countries. NGOs can educate people about action taken by other countries against Afghan war criminals abroad. The year 2005 was important due to some positive developments for trial of some Afghan war criminals. In that year, UK and Netherland exercised universal jurisdiction against criminals present in their countries accused of torture and genocide. The first trial for the crime of torture was held in July 2005, against Zardad Faryadi Sarwar, a former Hezb-i-Islami commander, who was sentenced to 20 years in prison in the United Kingdom for conducting a campaign of torture and hostage-taking in Afghanistan between 1992 and 1996.¹⁴³ On October 14, 2005, a Netherland court sentenced “Hesamuddin Hesam and Habibullah Jalalzoy, both high level members of KHAD, Afghanistan’s infamous communist-era intelligence service, for engaging in torture and sentenced them to 12 years and nine years in prison respectively.”¹⁴⁴ NGOs can publicize these trials positively and this is another deterrent for those who are bent upon violating all laws and rules of a civil society. It is also important because domestic political immunity granted to war criminals does not prevent the universal jurisdiction invoked by third countries.¹⁴⁵

Strengthening Local Criminal Justice System

Neither all cases can be prosecuted by invoking the universal jurisdiction nor will the ICC have jurisdiction on crimes committed before 2003. Investigations of the ICC will be a major step to end impunity but most of the crimes of the Taliban and the Communist era can be tried only in the domestic

¹⁴¹ “ICTJ Briefing” and “AIHRC.”

¹⁴² Electronic Communication with Office of the Commissioner of AIHRC, Nadir Nadrey, April, 2010.

¹⁴³ Sandra Lavielle, “UK Court Convicts Afghan Warlord,” *The Guardian*, July 19, 2005, <http://www.guardian.co.uk/uk/2005/jul/19/afghanistan.world>.

¹⁴⁴ HRW, “Afghanistan: Justice for War Criminals Essential to Peace,” December 12, 2006, <http://www.hrw.org/en/news/2006/12/12/afghanistan-justice-war-criminals-essential-peace>.

¹⁴⁵ “ICTJ Briefing” and AIHRC, “Discussion Paper on the Legality of Amnesties,” February 23, 2010.

courts. There is a need to have an independent domestic mechanism able to prosecute the crimes committed from 1978 to 2003 according to international standards. In the absence of a local capable system the very critical issue of sexual violence will be swept away from the pages of history and gender-based violence will go unpunished to the sheer disadvantage of women victims of this conflict. It is critical for Afghanistan to have a criminal justice system, which represents all the ethnicities of the country.¹⁴⁶ From recruitment of officers to administration of justice, people from all ethnicities should be part of the system and accountable to public and official mechanisms. Therefore, to call for the reformation of a fair, transparent and professional criminal justice system becomes a primary responsibility of the NGOs. This is an urgent need and NGOs will find the international community supportive in achieving this target. They can ask for implementation of anti-corruption measures available in the present set up and stress upon the international donor community not to waste taxpayers' money on corrupt officials without establishing functional oversight mechanisms.

Providing Legal Aid and Education

Many NGOs are working in the legal aid provision area to build the capacity of existing domestic criminal justice system.¹⁴⁷ There are at least eight NGOs, which are helping people in day-to-day judicial work.¹⁴⁸ Although the NGOs cannot take out warlords out of the government but they can educate people about their rights and judicial mechanisms available to redress their grievances. Informing people about the law of armed conflict will help them in raising their concerns against violations of laws by warring parties at the appropriate level. Some NGOs are already doing it. Awareness and exposure to other efforts to deal with past crimes can be another area where NGOs can be helpful. Local NGOs can be trained in other projects of international NGOs in other settings. For example, in 2008, United States Institute for Peace (USIP) hosted a training to learn from a documentation center in Cambodia to use some tools, methods and experiences in Afghanistan.¹⁴⁹ Similarly, other South Asian countries can provide training in different skills for these NGOs.

¹⁴⁶ Philip Alston, "Report of the Special Rapporteur on Extrajudicial."

¹⁴⁷ Ele Pawelski, "Defining Justice in Afghanistan."

¹⁴⁸ Ibid.

¹⁴⁹ Scott Worden and Rachel Ray Steele, "Peace Brief Telling Story: Documentation Lessons for Afghanistan from Cambodian Experience," December 2008, <http://www.usip.org/resources/telling-story-documentation-lessons-afghanistan-cambodian-experience>.

Preserving the Evidence

There are no forensic facilities available and the chances of destruction of evidence¹⁵⁰ are very many. A report by UN and another by PHR has confirmed that the massacre site of Dasht-i-Leili was tampered in 2008.¹⁵¹ However, it is important to preserve the evidence. Who can do this preservation of evidence and under what law? It is an important unresolved question. Members of the Ministry of Interior and some investigative workers of civil society organizations can be trained in evidence collection particularly in preserving the mass graves sites. This training can be arranged by NGOs like Physicians for Human Rights.¹⁵² The cultural and religious sensitivities of these procedures should be carefully managed in the given circumstances.

Documentation of War Crimes

Documentation of the past crimes is another important chapter in this struggle. There have been commendable efforts by various organizations to build the archives of past crimes. Documentation of the most heinous crimes will make it difficult for perpetrators to deny their acts for all times to come. This can be made successful by active victim participation. Stories and events described by victims and witnesses will help in generating a debate and will prevent a repetition by the same perpetrators who are in the echelons of power today. AIHRC is one option for the purposes of documentation because it is constitutionally mandated to investigate and document human rights violations.¹⁵³ Its most recent documentation project has mapped human rights violations in Afghanistan during 1978- 2001, in each province.¹⁵⁴ Some other important documents about war crimes are compiled by Afghanistan Justice Project (AJP),¹⁵⁵ Human Rights Watch,¹⁵⁶ Killid¹⁵⁷ and UNIFEM. USIP

¹⁵⁰ Physicians for Human Rights, "PHR Calls for Probe into Removal of Mass Grave in Afghanistan," December 12, 2008, <http://physiciansforhumanrights.org/library/news-2008-12-12.html>.

¹⁵¹ Ibid.

¹⁵² Emily Winterbothom, "The State of Transitional Justice in Afghanistan."

¹⁵³ The Law on the Structure, Duties, and Mandate of the Afghanistan Independent Human Rights Commission, Article 5, http://www.aihrc.org.af/law_of_aihrc.pdf; also see "AIHRC Mission," also suggested by International Crisis Group, "Afghanistan Judicial Reform and Transitional Justice," 13.

¹⁵⁴ Electronic communication with office of the Commissioner Mr. Nadir Nadery, also see "AIHRC Call for Justice, 2004," http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf.

¹⁵⁵ AJP, "Casting Shadows: War Crimes and Crimes Against Humanity, 1978-2001," 2005.

¹⁵⁶ HRW, "Blood Stained Hands," 2005, <http://www.hrw.org/en/node/11668>.

¹⁵⁷ Killid, "Crimes of War,"

<http://www.crimesofwar.org/education/Afgh-reports.html>.

is also working with Afghan experts and NGOs for documentation of past crimes.¹⁵⁸ International NGOs can help local NGOs in digitally documenting the crimes taking place around them.¹⁵⁹

Media

This commendable work needs to be exposed and debated in the wider public. Afghanistan media has not played any significant role on these issues so far.¹⁶⁰ For international observers, it is hard to get into the details and understand the public support of this issue through the media. Though a Transitional Justice press release¹⁶¹ mentioned that past crimes were an issue during presidential elections but it is hard for the outside world to get this feeling by merely looking into Afghan media. One possible issue can be media accessibility. It is really difficult to unearth war crime stories in the expansive rocky hinterlands of Afghanistan.¹⁶² Comparing the media coverage of Gaza and Afghanistan, Rafael Broch quotes Colonel Richard Kemp, a former British Army commander in Afghanistan: “When we go into battle, we do not get the same knee-jerk, almost Pavlovian response from many, many elements of the international media and international groups, humanitarian groups and other international groups such as the United Nations which should know better of utter automatic condemnation.”¹⁶³ This would not be the response of Colonel Kemp if the incidents are reported in time by leading newspapers and news channels because media is a very powerful tool to end impunity. Proper international media coverage of civilian killings by German air strikes and hiding the facts from parliament resulted in the resignation of the German defence minister.¹⁶⁴ Slow progress of justice system was criticized in Netherlands and they withdrew their 10 million euro funding for the justice project in Afghanistan.¹⁶⁵ All this is possible by presenting the true picture of the present and paving the way for a safer future. NGOs can exploit the media to expose the information they gather from victims and witnesses, without compromising their security, about present and past crimes.

¹⁵⁸ Scott Worden and Rachel Ray Steele, “Peace Brief Telling Story.”

¹⁵⁹ Ibid.

¹⁶⁰ Emily Winterbothom, “The State of Transitional Justice in Afghanistan,” 17.

¹⁶¹ “ICTJ Briefing.”

¹⁶² Rafael Broch, “Hearts, Minds and War Crimes,” March 19, 2010, <http://www.isrelate.com/pages/content/2/723/Hearts,-Minds-and-War-Crimes>.

¹⁶³ Ibid.

¹⁶⁴ “Nicholas Kulish, German Defense Minister Resigns Over Afghan Air Strikes,” *New York Times*, November 26, 2009,

<http://www.nytimes.com/2009/11/28/world/europe/28germany.html>.

¹⁶⁵ EU-Transitional Justice Meeting, Kabul, August 2009 quoted by Emily Winterbothom, “The State of Transitional Justice in Afghanistan,” 15.

Challenges for NGOs

Though these are some conceivable tasks, which NGOs can perform in Afghanistan in the present scenario but very high hopes should not be pinned with available NGOs in the given circumstances in Afghanistan. Advocacy NGOs operate in very different circumstances than the development sector NGOs because of the nature of work and cultural beliefs of local population. Expectations from NGOs to achieve all the above mentioned targets may be misleading due to the following challenges faced by NGOs in Afghanistan:

1. NGOs in Afghanistan are in very different security environment than their western counterparts in any other developing country. According to the Afghan NGOs Safety Office (ANSO), which maintains comprehensive records of NGO activity in Afghanistan, in 2008, 31 staff members of non-governmental organizations were killed in Afghanistan, while 78 were abducted by armed opposition and criminal groups. ANSO recorded 176 attacks against NGO staff and facilities.¹⁶⁶ Violence has steadily risen in Afghanistan during 2009, and the weeks before and after the presidential elections saw the worst levels of violence since the invasion in 2001. Majority of population is struggling with security matters. The UN Security Council in November 2008 reported 6,792 security incidents through the first ten months last year, compared to 508 in 2003. The UN also reported last September that some 12 districts were under the control of the Taliban and 90 at extreme risk - meaning that neither the government, the UN and the international donor community nor NGOs - have access for humanitarian or development projects.¹⁶⁷ When the governmental control over the country is not fully established, it will be easy to understand operational capability of NGO workers to reach out to the public.
2. The relationship between NGOs and government is not very congenial because of divergent policies on human rights.¹⁶⁸ It is evident from the fact that the government has not implemented the “Action Plan for Peace, Reconciliation and Justice” of 2005 presented by AIHRC, but backed by all NGOs working for transitional justice in Afghanistan. The President refused to renew

¹⁶⁶ International Crisis Group, “Afghanistan: Tens of Thousands of People Displaced Fighting Death and Hunger,” February 19, 2009.

¹⁶⁷ “Testimony by Mark L. Schneider.”

¹⁶⁸ Electronic communication with Mr. Aziz Rafiee, Head of Afghan Civil Society Forum, April 27, 2010, and Interviews with Afghan Students in Washington D.C.

it in 2009.¹⁶⁹ Even the UN Security Council has deliberately ignored the issue of implementation of this plan in its statement of March 23, 2009.¹⁷⁰ Given the open opposition to prosecute war criminals by the government with support of international powers present in Afghanistan, there is little space available for NGOs to maneuver.

3. Most of the funding from international community “enters Afghanistan from military and political window” so it is harder for the NGOs to control the agenda.¹⁷¹ In Darfur, it was possible for Western countries because they were not participating in the conflict and their neutral role was morally defensible. Public opinion was also in favor of prosecuting the war criminals including Umar Al Bashir, President of Sudan. Now it will be hard to get funding for projects, which may end up in indicting the western soldiers and commanders. It is not an easy task. Excluding NATO and the US soldiers from any accountability mechanism will lose legitimacy in the eyes of local Afghans and independent observers.
4. Involvement of NATO and US forces in the reconstruction affairs in Afghanistan in order to win the hearts and minds of people is portrayed as a success story. One major reason is insecurity for field staff of NGO community, which is a prime mandate of the occupation forces. NGOs are also apprehensive about militarization of aid because it compromises their neutrality and “acceptance in the communities”¹⁷² in an ongoing conflict. CARE International and Oxfam have clearly expressed their concerns about humanitarian staff working with Provincial Reconstruction Teams (PRTs) of NATO and the US.¹⁷³

The real challenge for the NGOs is to find some space in the informal justice system, which is mostly based on tribal lines, and where the majority of the cases are still decided through *Jirga*. Crossing the ethnic lines and emerging as neutral players being acceptable both to the international community and local population is not an easy task. In an egalitarian society where such arrangements have never been tried, it is very hard to predict the future of

¹⁶⁹ “Afghanistan: Justice Plan Heading for Oblivion,” *IRIN News*.

¹⁷⁰ Statement of UNSC, March 23, 2009.

¹⁷¹ Aziz Rafiee, see note 137.

¹⁷² Lex Kassenberg, Director CARE International quoted, “USAID: Rejects NGOs Concerns Over Aid Militarization,” *Spero News*, December 3, 2009, <http://www.speroforum.com/a/23613/AFGHANISTAN-USAID-rejects-NGO-concerns-over-aid-militarization>.

¹⁷³ *Ibid*.

activities sponsored by the NGOs unless these NGOs are designed on local patterns. It will be a very important step to acknowledge and record war crimes and the trial of the criminals in courts to end impunity when circumstances are favorable in Afghanistan, like Argentina which is prosecuting the people involved in gross human rights violations after 23 years. Recently a court in Argentina convicted the former General Ronaldo¹⁷⁴ and General Santiago Omar Riveros¹⁷⁵ for 25 years for his crimes of torture, kidnapping and killing innocent civilians during the “Dirty War” of 1970. In 2005, an Argentinian Court ruled that political amnesty to protect former military officials was illegal.

Conclusion

As tempting as it may be for policymakers to sweep the past under the rug after so many decades of war, the failure to address the legacy of impunity in Afghanistan is contributing to ongoing insecurity. Transitional justice is not only about addressing past crimes but about dealing with continuing impunity, which delegitimizes and hinders governance and counterinsurgency efforts.¹⁷⁶ Just a statement of ICC’s Prosecutor about possible investigations has rekindled the issue of justice in Afghanistan. There are no positive signs that the government of Afghanistan is willing or capable of taking any action against those responsible for the gravest crimes. Domestically, the scope of work is seriously hampered by widespread corruption and political interference by power holders. NGOs can be one option for raising awareness and calling upon the international community to keep this issue alive.¹⁷⁷ The solution may be like the South African truth and reconciliation process and open trials or community dialogues to reach at some other settlement. Ignoring the demands of justice and suppressing the voices of victims will not lead to sustainable peace in Afghanistan.

This situation raises many questions about the role of UN, which supports the ICC and other accountability mechanisms for war crimes. The supremacy of political objectives of western powers in Afghanistan over the right of people to get justice exposes the double standards of these countries. European countries are responding to these questions in a different way than

¹⁷⁴ “Ex-President General Sentenced for 25 Years,” *BBC News*, Urdu Service, April 21, 2010, http://www.bbc.co.uk/urdu/world/2010/04/100420_argentina_dictator_bignone_jailed.shtml.

¹⁷⁵ “Dirty War General Found Guilty,” *BBC News*, August 13, 2009, <http://news.bbc.co.uk/2/hi/americas/8198702.stm>.

¹⁷⁶ *Ibid.*, 31.

¹⁷⁷ Firouz Rahimi, “The Forgotten,” (A Movie about War Crimes in Last Three Decades), January 28, 2012, <http://www.bbc.co.uk/news/world-asia-16768093>

the US and in the coming days it will be interesting to watch how the differences between these countries and the US can help in ending the culture of impunity in countries like Afghanistan. The present dialogue between the Taliban and the US in Qatar and release of some Taliban prisoners from Guantanamo Bay as precondition to initiate the talks has pushed the issue of war crimes on the back burner. The dialogue may help in speedy withdrawal of US forces from Afghanistan but bleeding wounds of victims of war crimes will never heal without addressing these issues along with other political priorities. ■