

Transitional Justice in Afghanistan

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As I look around the room today, I see many faces that are both familiar and unfamiliar. Familiar, because, for most of those I know here, our common engagement with the agonies and hopes of the people of Afghanistan first brought us together, and, through long periods of separation and even at times, disengagement, has repeatedly thrown us back together. Unfamiliar, because the faces I first met, if I may put it tactfully, are not precisely those I see today. Nearly half my life has passed since the Saur Revolution of April 1978, and it has been twenty years since I first interviewed an Afghan refugee, a defecting police colonel, about violations of human rights in that country, and sent the transcript to the research department of Amnesty International.

As time passes, so do all living beings, men and women among them, some by age, some by the gun or the bomb, as in the case of Sayd Bahauddin Majrooh, assassinated in Peshawar fifteen years ago this month, and some, like our friend Anthony Hyman, by premature illness that robs us of the time whose passing so many of us see in each other here this evening. It honors me, and I am grateful, that those who knew him best, most of all Hillary, his wife, Elizabeth Winter, his friend, whom I first met at his house, and David Page of SOAS, his long-time friend, whom I met at Lyse Doucet's home, have asked me to deliver this lecture in his honor, at this institution, where Anthony and I met for the first time, and where I attended his memorial service in February 2000. Meeting in such a place and on such an occasion we miss his insight, his hesitant eloquence, his irony, and his friendship. We wish we could know what Anthony might contribute to our thoughts on the subjects we are to address tonight. But we may also speculate that if Anthony or some transformation of him knew of our assembly, he might take some comfort from the fact that, without his memory and what it has inspired in us, there would be no such occasion to consider these matters.

When I began to consider what subject to address in Anthony's honor, I thought back to how we first came in contact. It must have been about 1983-84 or so, when Anthony came to Amnesty as a researcher on South Asia. He had already published

Afghanistan under Soviet Domination, one of the first books I read as I started to make a transition from working on India to working on Afghanistan.

At the time, together with Patti Gossman, I was the chair of the South Asia Coordination Group of Amnesty's US section, and, as we began collecting material on violations of human rights and humanitarian law during the period of Soviet occupation and Islamic resistance, I often exchanged information with Anthony. I first met him in person at a conference at SOAS, organized by Shirin Akiner in December 1988, to consider the future of Afghanistan as the Soviets completed their withdrawal. Soon after, in January 1989, I led a mission to Afghanistan and Pakistan for what was then Asia Watch (now the Asia section of Human Rights Watch). Anthony joined me as a consultant during the Pakistan phase of the research, and we spent a couple of weeks together conducting interviews. It was during this visit that we first discovered the growing unease of the Afghans with the presence of Arab Islamist extremists in the jihad, and our report was one of the first to warn of that danger. Later Anthony and I shared a growing interest in post-Soviet Central Asia as well. But when I thought how best to commemorate Anthony, I returned to the questions that had first brought us together: how to protect the most basic rights of the people of Afghanistan, particularly in this time of transition.

During such a phase, nations and international actors confront the challenge of "transitional justice," measures by which a society accounts for past abuses as it moves from dictatorship or conflict, where the perpetrators of violence enjoy impunity, to a state of civil peace, where the state seeks to provide justice and security to its citizens.

But if post-transition justice is routine, transitional justice cannot be; it is exceptional. It cannot punish or even record all abuses according to the ordinary law of peacetime. This can be mathematically proven in Rwanda, where the number of accused participants in genocide, the most serious crime known to humanity, exceeds the capacity of any known court system to try them. In Afghanistan too, the violations that Anthony and I worked to document were only instants in a decades-long succession of crimes that constitute a virtual catalogue of all that is supposedly forbidden, but remains prevalent, in human affairs.

We should not romanticize Afghanistan before 1978. Afghan prisons were punishing, and the interrogators might have been surprised to learn that all Afghan constitutions since 1923 had prohibited the use of torture. The police could be corrupt and brutal. But the revolution of 1978 brought about an intensity and scope of violence that had not been seen at least since the formation of the modern Afghan state in the closing years of the nineteenth century.

From April 1978 to December 1979, the Khalqi faction's communist regime attempted to eradicate its enemies through mass arrests and executions. The Parchami regime installed by the Soviets at the end of that time published a list of about 12,000 people said to have disappeared in Pul-i Charkhi prison at that time. Others put the actual figure higher. Throughout the country, the Khalqi regime, at times under the apparent supervision of Soviet advisors, executed an unknown number – probably in the tens of

thousands – of religious, tribal, and clan leaders. In a few cases, people were buried or burned alive. After a military mutiny led by Captains Ismail Khan and Alauddin Khan, the city of Herat was bombed indiscriminately, with an unknown number of casualties.

During the Soviet occupation, hundreds of thousands of civilians, to choose a modest estimate, lost their lives in the indiscriminate bombing and shelling of villages thought to shelter the resistance. Populated areas by roadsides were razed. Millions became refugees. Irrigation systems, orchards, and grain and seed storage were destroyed. Torture became part of an intelligence effort and hence more systematic, with the aid of Soviet and East German advisors. A diplomat of the regime once estimated to me that 150,000 people had been arrested in Kabul by his government, and virtually all prisoners were tortured. Gradually, especially after 1986, torture decreased, to be replaced by skilled interrogation. Indiscriminate bombing decreased, to be replaced by indiscriminate bribing. But debasement of the currency is not yet classified as a war crime.

As the mujahidin and tribal militias of the regime gained in strength, their abuses also increased. Since fleeing to Pakistan in the 1970s, some, notably Gulbuddin Hikmatyar, had assassinated others. Their turf wars in Afghanistan also proved brutal for civilians. The treatment of prisoners by guerrilla irregulars has never been one of the bright spots in the history of warfare, and this conflict was no different: one even heard of captured Soviet soldiers being skinned alive, though some were allowed visits by the ICRC, after the regime also agreed to ICRC access in 1986. With US and Pakistani supplies and direction, mujahidin in the late 1980s began to rocket the city of Kabul indiscriminately, killing and mutilating many civilians. The Arab extreme Islamists brought their own brutal doctrines of warfare, advocating the execution of “Communist” civilian men and the capture or trafficking of their women.

When Najibullah fell, the country entered a period of virtual statelessness, in which ethnic antagonisms increased. While the Soviet war destroyed the countryside, the war among the mujahidin and militias destroyed the capital, killing tens of thousands of people. The destruction of entire neighborhoods and historic features of this great and ancient city constitutes a crime in itself, as does the looting and destruction of the precious relics of the Kabul Museum.

For the first time in the history of Afghanistan, as far as I know, rape became a regular feature of war. Captured enemies were killed with a spike through the head or held in the summer in sealed shipping containers where they suffocated in the heat. Civilians were robbed and subject to extortion. Outside Kabul, the former mujahidin commanders often became lawless warlords, preying upon travelers and traders, abducting and raping young boys and girls, and profiting from smuggling and drug trafficking. Assassination became a regular means of settling disputes. Though the USSR had dissolved and the US disengaged, virtually every faction found a regional foreign backer that kept the weapons and money coming. Arab fighters from what we now know as al-Qaida became increasingly prominent.

This was the context in which the Taliban emerged, as both an indigenous southern Pashtun response to warlordism and an instrument of Pakistani policy. The abuses of the previous period provided the justification for the Taliban's own harsh rule. They imposed the hudud punishments of amputation and stoning in the areas under their rule, and suspected opponents were dealt with harshly. The damage they wrought to the already fragile and debased education and health of Afghans through their obscurantist restrictions on women may not constitute crimes against humanity, but they deserve their own mention in this chronicle. The destruction of the Bamiyan Buddhas and as yet uncounted other treasures by the most extremist wing allied with al-Qaida helped obscure the vast cultural destruction presided over by their predecessors.

For all this, the principal war crimes and crimes against humanity during this period occurred during the battle between the Taliban and various components of the Northern Alliance for control of northern and central Afghanistan. The Taliban and al-Qaida turned the plain north of Kabul into a ruined wasteland, executing some of the inhabitants, destroying the orchards and vineyards, and expelling the people. In the battle for Mazar-i Sharif, Uzbek and Hazara commanders of various Northern Alliance factions murdered hundreds, maybe thousands, of Taliban prisoners in June 1997. The Taliban returned to kill many more thousands of civilians in August 1998, including Iranian diplomats. Pakistan groups were implicated in these killings. Similar killings, if on a smaller scale, occurred as Bamiyan and Yakaolang in Hazarajat changed hands several times.

Taliban rule ended with the military campaign of the US and its allies after the attack of September 11, 2001, itself a crime against humanity, the only one of these that I witnessed personally, but one in which no Afghans were directly involved. After the fall of Kunduz to several factions of the US-aided Northern Alliance, including those recruited from the groups massacred by the Taliban in 1998, thousands of Afghan and Pakistani Taliban and al-Qaida prisoners, who were told they would be released, were transported toward Mazar-i Sharif. Some apparently suffocated in containers or were shot, to be buried in mass graves in the same area as the victims of 1997 and 1998. Others arrived at Qala-yi Jangi only to die in the suppression of an insurrection under disputed circumstances, including bombing of the prison by the US and Britain. Some witnesses place US Special Forces or CIA officers on the scene of the killings.

Since that time hundreds, at least, of civilians have died in US bombing raids, without public investigations or payment of compensation. The only trial has been of pilots who accidentally killed Canadian soldiers, not Afghan civilians. Underground groups opposing the US presence have killed civilians in bombings in Kabul and elsewhere. The commanders of the Northern Alliance and others who returned with US and coalition assistance have established themselves in their areas again and are engaging in the same brutality in some areas as in the early 1990s. Hazara and Uzbek militias have expelled Pashtun communities in northern Afghanistan, killing and raping the inhabitants. At least one prisoner has died under torture in government custody, and two members of the cabinet have been assassinated, in one case by members of the dominant faction, with no one charged or held accountable. Islamist extremists have asserted the right to

execute Muslims for “blasphemy” or “apostasy” and have started to use of such charges against their opponents.

Despite this history, or perhaps, because of it, the voices calling for accountability for past abuses have been relatively weak and few. No one, to my knowledge, has proposed the establishment of a special court to try those responsible, though at least one commander, Abdullah Shah, has been tried in Afghanistan for his egregious abuses. This commander, formerly known as the dog of Zardad, the Hizb-i Islami commander now in the process of being expelled from Britain, was caught chasing one of his wives down the street, trying to kill her. After he was jailed other victims came forward.

In some post-conflict situations, of course, the peace agreement itself includes an agreement on transitional justice. In the case of Afghanistan, however, there is no peace agreement, as usually understood. The Bonn Agreement of December 5, 2001, was not an agreement among the warring groups to lay down their arms and build a new society. One side of the armed conflict, the Taliban and al-Qaida, was still in the process of being pulverized by US bombs, when representatives of four anti-Taliban groups convened in Bonn. Only one of those four groups, the United Front (Northern Alliance) had armed forces on the ground and could therefore be considered a potential object of transitional justice. Hence the political dynamic in some negotiations, where one party presses for measures of transitional justice as part of an agreement to end the armed conflict, as did the ANC in South Africa or the FMLN in El Salvador, was absent in this case.

Nonetheless, the prospect of some reckoning with the past was on the mind of at least some delegates at Bonn, as well as the UN team. One challenge that the UN team faced was: who would be appointed to various offices? Some of us discussed, and at one time put in a pre-Bonn draft, that no one guilty of war crimes, crimes against humanity, or gross violations of human rights should serve as a minister in what came to be called the Interim Administration of Afghanistan. In discussions of the need to form new security forces, we noted the desirability of screening recruits, especially to the officer corps, to prevent the appointment of those who had committed serious abuses. These discussions came to naught, first, because no judicial or similar process was in place to determine who was ineligible, and it would be impossible to obtain agreement on its mandate and establish a process with sufficient legitimacy in time; and, second, because the US-led coalition policy of arming the Northern Alliance and other commanders as allies on the ground gave Afghanistan a de facto new set of armed forces without any such process. This decision still shadows all such efforts today.

During the talks, the issue emerged again. The final text of the Bonn Agreement contains no reference to transitional justice, except for the establishment of the Human Rights Commission, whose mandate was understood, though not stated, to include coping with past as well as current abuses. Nonetheless, the issue did figure in the debates, as the UN drafters had included a paragraph stating that the Interim Administration should decree no amnesty for war crimes or crimes against humanity.

This measure forbidding an amnesty did not figure in the final agreement. It caused a furor within the meeting and even more outside. The two members of the UF

delegation from the party of Abd al-Rabb al-Rasul Sayyaf claimed that this measure was aimed at delegitimizing the struggle of the mujahidin. We heard that the leaders of the UF were insisting to Muhammad Yunus Qanuni, the head of the delegation, that the paragraph be removed. In the drafting session, Mr. Brahimi recalled to the delegates the danger of an amnesty. As he did several times during the negotiations, he referred to his own background the Algerian struggle for independence. He recalled to the delegates that a retired French military officer had recently published a memoir in which he had confessed, or, more precisely, boasted of, his role in the torture and killing of Algerian prisoners during the war there. Yet, because the French government had declared a blanket amnesty, it was impossible to take any action against him.

The resistance to the paragraph forbidding an amnesty for war crimes formed part of a broader political struggle that creates part of the political context for today's decisions about transitional justice. Other items that caused conflict were:

- A paragraph drafted by the UN consisting of what we thought of as standard boilerplate for peace agreements, namely a call for demobilization, disarmament, and reintegration of unofficial armed groups; when some argued that it was dishonorable to call on mujahidin to abandon their arms, Brahimi once again referred to his past as a mujahid, noting that his decision to lay down arms and enter diplomacy was a good thing;
- Annex I on security, which called on the UN Security Council to authorize an international security assistance force for Kabul and, eventually, other areas;
- The role of Zahir Shah in the Loya Jirga and, potentially, the government, and the lack of any mention of or role for President Burhanuddin Rabbani.

Rabbani and Sayyaf used these issues to try to mobilize support against the agreement. They were telling their followers that the purpose of the agreement was to (1) bring Western troops to Afghanistan through the invitation of ISAF; (2) disarm and demobilize the mujahidin; and then (3) try the mujahidin for "war crimes." Note that international legal standards are not well known or understood in Afghanistan. The phrase "war crime," janayat-i jangi, might be interpreted there to mean the crime of waging war, implying that all those who had taken up arms in the jihad would be tried.

The background to this was the anxiety that the victory over the Taliban and a kind of peace agreement were causing among the fighters. Most international concern has rightly gone to the women of Afghanistan and the civilian victims of the conflict, but the fighters, too, are victims. The young men fighting in Afghanistan in 2001, 23 years after the Sawr Revolution, had known nothing but war and conflict their whole lives. They had been raised on and lived an ideology of jihad; they had never known a united Afghanistan where competing groups did not resort to arms; they had little education and few skills, and in the economy they had known, bearing arms, growing opium, and

smuggling seemed the only relatively lucrative professions. They might long for peace, but they also feared it. Peace might seem, if anything, less secure than war.

This point was brought home to me during the hours I spent negotiating the draft of a paragraph that now appears in the preamble of the Bonn Agreement, praising the “mujahidin” for their sacrifices, and heralding their (as yet untested) determination to become heroes of peace and reconstruction. I remember the anxious face of my counterpart as he waited for us to finish the translation of the paragraph so he could fax it to Kabul. A top official of Afghanistan’s National Security Directorate recently told me that this paragraph was essential to winning the support of major armed groups to the agreement. Other concessions included the omission from the agreement of any explicit mention of disarmament or demobilization. Instead the agreement called for all armed groups to come under the command of the new administration and be integrated into national armed forces, which would be reorganized according to need.

Still, over a year after its installation, neither the interim administration nor its successor, the Islamic Transitional State of Afghanistan, has declared any amnesty for human rights violations, nor does there appear to be any political pressure to do so. The goal was achieved without explicitly proclaiming such a demand, something to bear in mind when making future policy recommendations about sensitive issues.

Similar political tensions were on display at the Loya Jirga last June, when the jihadi political forces pushed through a resolution changing the name of the new government from the Transitional Administration of Afghanistan, as in the Bonn Agreement, to the Transitional Islamic State of Afghanistan. Denunciations of warlords and warlordism, especially by women delegates, led Sayyaf to declare that criticizing mujahidin was equivalent to blasphemy, and hence deserving of death. President Karzai, despite his declared goal of eliminating warlordism, did not feel strong enough to abandon the policy of accommodation, and he included major regional commanders in his government.

During this same period, the discussion on transitional justice began, very slowly and tentatively. No major human rights organization, as far as I know, has called for the establishment of any special tribunal, international or mixed, to try war criminals in Afghanistan. All appear to accept that the situation is too complex and the current situation too fragile for such measures. The judicial system in Afghanistan is clearly incapable of managing even the basic tasks of legal order, let alone taking on a major task of historical accountability. The one trial of a commander that has taken place, that of Abdullah Shah, whom I mentioned earlier, was based on ordinary criminal law. While the victims and their relatives welcomed the condemnation of the accused, the trial clearly failed to meet not just international but historic Afghan standards of fairness. In fact there hardly was any trial. Asma Jahangir, the UN Human Rights Commission’s Special Rapporteur on Extra-Judicial Killings, while welcoming the conviction, called for the revocation of the death penalty imposed on grounds that the trial was unfair.

The Bonn Agreement placed the responsibility for transitional justice implicitly on the Human Rights Commission, and during the preparatory process for its

establishment, it convened a working group on accountability for past crimes. At the public meeting establishing the commission, President Karzai surprised those assembled by announcing that, while he did not know if it was within the powers of the Interim Administration to do so, perhaps the Transitional Administration that would follow it would establish a truth commission to investigate the past. He intended that the issue not be manipulated politically: at dinner at the palace on Nawruz, when a minister suggested establishing a museum of the atrocities of the Taliban, he rejected the idea, saying that the problem was not only the Taliban, but all the crimes of these past twenty-three years of war. At times he has indicated to visitors that he wants to deal with this issue more quickly; at other times he has said, as he told Lyse Doucet of the BBC, that peace is a necessity and justice a luxury that Afghanistan might not be able to afford right now. He now indicates that his administration has taken a firm decision to draw a line between the present and the past.

The Loya Jirga Commission decided to require each delegate to sign a statement swearing that the candidate had not killed innocent people or engaged in drug trafficking or terrorism, but it proved a hollow gesture with no enforcement mechanism, as many known to have violated those conditions served without obstacle. The cabinet ratified Afghanistan's membership in the International Criminal Court, which spokesmen such as Foreign Minister Abdullah, in another interview with Lyse Doucet, have pointed to as a sign of Afghanistan's intention to fulfill its responsibilities under international humanitarian and human rights law. One Afghanistan's accession takes place, on May 1, 2003, the ICC will have jurisdiction over war crimes and crimes against humanity committed in Afghanistan from that date onward.

A number of international human rights organizations have sent missions to sound out Afghans on the right approach to the past. Most have concluded that what Afghans need right now is the opportunity to reflect and debate on the issue in order to understand the variety of options that have been tried under different circumstances. The International Center for Transitional Justice, headed by Alexander Boraine, former vice-chairman of South Africa's Truth and Reconciliation Commission, and whose vice president is Anthony's long-time friend and associate, Ian Martin, has sent a small mission to work with the HRC to help it think through alternatives and learn from international experience.

The main issue that has attracted attention to transitional justice in Afghanistan in the last year has been the discovery, or at least publicity, of mass graves in Dasht-i Leili district in northern Afghanistan, apparently containing the remains of Afghan and Pakistani Taliban prisoners, as well as perhaps some al-Qaida prisoners, captured by NA forces in Kunduz in November 2001. These prisoners were transported in shipping containers, the ubiquitous sheet metal boxes used for smuggling goods from Dubai, housing and shops in Kabul, and makeshift jails throughout the country. At least some prisoners suffocated to death, and others may have been shot. The NA forces were then receiving assistance from US Special Forces and CIA operatives. Some witnesses place these Americans at the scene as well. Probably because of the charges of US involvement, these graves have received far more attention than others in the same district containing the remains of people killed in previous rounds of massacres, in 1997

and 1998. The local authorities, including General Abdul Rashid Dostum, had promised to cooperate with investigations at that time, but the Office of the UN High Commissioner for Human Rights, despite repeated requests from Lakhdar Brahimi, then Special Envoy of the Secretary-General, failed to carry through on its promises, leaving a heritage of suspicion.

Physicians for Human Rights, which participated in the preliminary forensic examination of those older graves, has also visited these sites. Last April, in confidential letters to President Karzai and key members of the Security Council, it called for preservation of the sites. Despite the fact that many observers consider him a chief suspect, Dostum claims he is guarding the sites, and UN political officers visit them regularly. PHR, which has a track record of work on graves in this region, has undertaken a mission to the region on behalf of the UN High Commissioner for Human Rights and appears to have recommended caution, in view of the unsettled conditions and continuing conflict in the area. No major human rights organization has advocated making investigation into these sites the centerpiece of accountability in Afghanistan. Focusing solely on the recent past, and on particular cases with a political angle that contemporary politics makes attractive, risks defeating the purpose of transitional justice. It must not only be just; it must be fair. Justly calling perpetrators to account for certain crimes while ignoring others undermines the process, by making it seem captive to a political agenda. It may then reinforce factionalism and polarization, rather than reconciliation and peace. Above all, it may discredit the idea of transitional justice, making it seem a political tool.

The most recent proposal has come from Asma Jahangir. In her forthcoming report on Afghanistan, the UN HRC's special rapporteur on extra-judicial executions has called for an international commission of inquiry, which could "undertake ... a stocktaking of grave human rights violations in the past that could constitute a catalogue of crimes against humanity." The commission would undertake a comprehensive catalogue of abuses since 1978, not seeking to list every event or to attribute legal responsibility, but to establish a public, official record to be used as a benchmark in any effort that Afghans and the international community may undertake in the future.

Why is there so much consensus on caution? Sometimes people explain this by saying that one should not "destabilize" the new order. Others respond that one should not stabilize an unjust order. The difficulty lies in the outcome of the activity: one wants a more just order, but destabilizing the current order risks the more likely outcome of return to the unjust disorder from which Afghanistan has barely emerged.

The injustices of the current order are clear, as is its fragility. Asma Jahangir reports what others have also observed, that "there is a climate of fear, and those who leak information on violations of human rights are threatened." This climate of fear effectively prevents Afghans themselves, including the Human Rights Commission, from pursuing redress for current violations or pursuing transitional justice.

This problem of intimidation is merely one result of a more pervasive problem, the one that nearly all Afghans identify now as their primary challenge: security.

Security and human rights are often considered as separate problems, security as a problem for army and police, the “security forces,” human rights as a problem for the judiciary and non-governmental NGOs. In fact they are the same problem. The main obstacle, or at least the immediate obstacle, to both in Afghanistan, as in other collapsed or failed states, is what Afghans call “tufangsalari,” rule by gunmen. In most of the country, regardless of the legal and constitutional structures established by the Bonn Agreement, effective power is in the hands of commanders who were armed by the coalition in 2001, most of whom were also commanders in the jihad and the mujahidin government. Some, like Dostum, were former militia leaders of the communist regime; some changed sides and also worked for the Taliban. Given the factional character of most of the forces under the command of the ministry of defense, these too merit this characterization. Some of these commanders, and their followers, including both the major regional commanders often described as warlords, were those whose opposition threatened to derail the Bonn Agreement.

It would be wrong simply to blame these individuals and think that order and security would return to Afghanistan if the so-called “warlords” and past abusers were removed from power. Key to this sentence, which I have heard so often, is the passive voice, indicating a lack of uncertainty as to who would carry out the task. More fundamentally, however, what will bring more peace and more justice to Afghanistan is not the removal of offending individuals, but the creation of a system of institutions to control them and make government effective and law-bound. Ending impunity by punishing offenders is part of that process, but it is neither the sole part, nor necessarily the first part.

The issue that will make or break virtually all others in Afghanistan – security, reconstruction, human rights – is the disarmament, demobilization, and reintegration of these former combatants and the creation of a civilian administration and a system of law and justice. Some former fighters will be integrated into the new Afghan National Army or the police. The rest will need alternative employment and probably training, loans or grants, and other forms of assistance. The war-disabled are already mobilizing in protest against the government, which has failed to carry out its most modest promises of assistance. This is a mere foretaste of the problems that the demobilized could cause if they are disappointed.

The government has assigned responsibility for both demobilization and the creation of the new security forces to a National Defense Commission, including major political and military leaders, including the major “warlords.” The US as the primary sponsor of the ANA and the UN as overseer of the entire process also play major roles.

Arriving at a common plan has sparked bitter debates. The major issue was the same one as at Bonn: how to reassure the hundreds of thousands of barely controlled, largely unpaid armed men that they will still have a future. The Ministry of Defense, controlled by Shura-yi Nazar, proposed a plan under which the base of the future army would be the “mujahidin,” mostly NA fighters, who would be gradually winnowed down. Those closer to the former king or who were independent argued for demobilization and disarmament of nearly all existing forces in favor of creating new ones from those

untainted by past battles and the unprofessional habits of guerrilla war. Though the debate was not conducted in the language of human rights, among the concerns raised by the latter group was the fear that the new forces would turn into a more efficient but still predatory group, which would abuse rather than protect the population. Minister of Finance Ashraf Ghani is now using the power of the purse to try to force reduction in these forces, setting off severe tensions in the government.

As one would expect, the process, which has barely started, is marked by vast mistrust, delays, trickery, maneuvering for position, and insecurity on the part of those called upon to disarm. No one wants to give up his only source of livelihood or to disarm before his rivals or enemies do. But if this process fails, there will be no justice, transitional or otherwise, and no peace either. Afghanistan will remain a chaotic, misruled, or unruled state, living, to the extent that it does, from narcotics and smuggling, and offering a free recruiting ground to all sorts of armed groups. But there is little intellectual challenge in spinning disaster scenarios for Afghanistan.

To argue that the success of DDR is essential and, to the extent that there is a contradiction, should take priority over immediate measures to bring past abusers to account, is not to argue that “peace” should take priority over “justice.” Without successful DDR, Afghanistan will have neither peace nor justice. A state at peace is one where people have a reasonable expectation that justice may be done. Justice cannot be done in a state of war and collapse of institutions. Peace and justice are interdependent, not contradictory.

But in conducting peace operations – which should perhaps be renamed peace and justice operations -- it is important to carry out efforts in the right sequence. Elections before disarmament sparked renewed conflict in Angola and Cambodia. Of course, a political and social process is not like a machine that one operates by pressing the right buttons in the right order. People’s need for justice and recognition of their suffering, their pain and fear at being ruled by those who harmed them in the past, may erupt, as they did at the trial of Abdullah Shah. Most Afghans, however, hope above all for the maintenance of today’s fragile peace and stability, and the government’s caution reflects their concern.

What I fear is a repetition of what happened during the Bonn negotiations: that poorly timed external pressure for measure of transitional justice may lead the fighters or their leaders to draw a connection between disarmament and transitional justice, conclude that the foreigners – the coalition and the UN – have come to Afghanistan to disarm the mujahidin and try them for war crimes, and that they need to keep their weapons for self defense. Such fears did not ultimately manage to derail Bonn, thanks in part to intervention from the coalition, and similar intervention might keep them in check in the future. But it could be all too easy for those who oppose the process to play upon such fears, especially in the charged political atmosphere of the next year, with the upcoming debate over the constitution and the preparation for elections in June 2004.

Yet one cannot simply postpone work on justice. The risks I have outlined are not certainties. They show how to be careful; they do not argue for paralysis. Those keeping

records of who has done what in the past should watch over the process of creating the new security forces and assure that they, at the very least, eliminate the Abdullah Shahs. The Human Rights Commission, with the help of others, should prepare within the next six months, a set of proposals for public discussion, bearing in mind that this will coincide with another potentially divisive and difficult discussion, over the constitution. The panel of experts suggested by Asma Jahangir can be constituted and carry out its work in a low-key way. It need not conduct original research by interviewing victims in Afghanistan in a way that would draw public attention to its work. Enough has been documented, or alleged, in public documents over the past 23 years, that it would perform a service merely by collecting those together into a coherent account that could constitute a public reference point once it is completed.

The president should clarify his own position and at least give a consistent message to his various interlocutors. He could ease some fears by issuing a decree declaring amnesty for all who have taken up arms for or against any Afghan government or political group since 1978, with the exception of war crimes, crimes against humanity, and genocide. He could take the opportunity to explain to the cabinet and public what those exceptions mean, while leaving it to the Human Rights Commission to propose how to deal with them.

I cannot say exactly what Afghans should or can do. If today's fragile peace holds and is further consolidated, the best alternative, in my view, would be a national documentation process that includes measures to clarify the fate of the disappeared and establish the truth about numerous massacres. The numerous foreign actors responsible for crimes of war will most likely never be made answerable, and this in turn will make it difficult if not impossible to pursue those Afghans responsible. Some, especially minor figures guilty of horrendous crimes, like Abdullah Shah, may eventually stand before the bar of common justice. If the process is comprehensive and fair enough, it may be possible to structure a process of recognition that allows those in positions of authority to admit their implication in serious crimes during the long decades of violence, in return for further participation and international legitimacy. If the coalition moves against some such figures, more will be possible, but at the risk of politicizing the process. It will never be possible to offer compensation to all the victims, or to punish those responsible.

It may be unfortunate if abusers retain their positions, but a process of accountability that is not focused primarily on retribution may have positive effects. Actions are not the result solely of people's characters, but also of their circumstances. Some past abusers may change. Najibullah, though certainly a notorious abuser of human rights, presided over major reforms in his later period in power and is remembered by many in Afghanistan, at least in confidence, as better than any of the rulers who succeeded him. Removing this abuser from power did little or nothing to protect the human rights or security of Afghans.

Such a stance lacks the moral clarity that I had, and that Anthony had, in the days we were working together. But the longer I have studied and lived with those crimes, the less I have been able to perceive them with the simple moral clarity with which I began. The discourse of transitional justice often sorts people into categories such as perpetrators

and victims, but many in Afghanistan are both. I know men presiding over an intelligence service that arrests and intimidates people who lost many of their own families to torture and assassination. Foreign intervention confronted the commanders of poorly equipped and undisciplined militias with the alternatives of capitulation or brutal, indiscriminate resistance. The collapse of institutions that provide security sometimes made violence seem the only alternative to victimization. Competition for desperately scarce resources led communities to wage war against one another. Najibullah, who presided over the largest torture machine Afghanistan has known, was himself tortured, mutilated, murdered, and exposed.

Nor should we forget the tragic circumstance that twenty-five years of violence have left many brutalized and disturbed. I remember sitting outside in the clear winter sun of Peshawar with Anthony and Dr. Muhammad Azam Dadfar in January 1989. Dr. Dadfar, an Afghan psychiatrist who later participated in the UN Talks on Afghanistan in Bonn and was elected a deputy chairman of the Emergency Loya Jirga last June, had set up the only psychiatric clinic for the three to four million Afghan refugees in Pakistan, a clinic he later had to close when it was attacked by extremists. I had helped Dr. Dadfar obtain initial funding for that clinic from Amnesty International, in order to provide some treatment to victims of torture suffering from post-traumatic stress syndrome.

On every visit I saw the lines of those applying for treatment winding through the lanes of the Nasir Bagh refugee camp. In our conversation almost exactly fourteen years ago, Dr. Dadfar told Anthony and me of the vast range of psychological disturbance he had found among the Afghan population: in addition to the numerous torture victims, not only did a population of several million people have a proportionate number of schizophrenics and other “normally” mentally ill people, but many refugees had persistent fantasies that their lost relatives would be found somewhere, in Russia, in prison, somewhere. Many suffered from intense suspicion, bordering on paranoia and sometimes crossing that line. Depression and sleeplessness were rampant, and increasingly angry and hostile fantasies prevailed, often acted out in violence against women, neighbors, or in war. Tensions between the sexes and generations over honor, pride, and marriage that contributed to the Taliban phenomenon were already evident. The cycles of violence in places like Mazar-i Sharif, Bamiyan, and Kabul were not merely political or ethnic in any simple sense. A part of the population is enraged and disturbed by suffering, indifference, loss of honor, a feeling of woundedness and loss, which provides a pool of potential recruits for violent movements. I remember one of the wisest remarks I ever saw quoted from an official of the Taliban, Deputy Minister of Health Stanikzai. Protesting against the international isolation of his government, he asked, if a member of your family goes insane, do you punish him? Or do you try to heal him?

Afghanistan is a wounded society, and its people need healing, as both individuals and as a nation. We know that individuals cannot heal the wounds of the past by denying or suppressing them. One way or another, they need to confront them, in their own way, in their own time, when they are strong enough to do so, and with the help of skilled and empathetic outsiders, and, in some cases, institutions of justice. If we are lucky, in Afghanistan the basic foundations that will make this process possible are just being laid;

if we are unlucky – well, if we are that unlucky, I don't know how the Afghans will survive. As the late Dr. Muhammad Yousef, the first prime minister of Afghanistan's New Democracy in the 1960s, once said to me in support of a negotiated withdrawal of Soviet troops, the people of Afghanistan are not made of iron and steel. They are made of flesh and blood.

To those Afghans who are seeking that difficult way of reconciling their society with its past, we, the so-called international community, owe our support, and to the extent possible, our protection. We should provide that support in a way that advances the entire process of rebuilding order and justice in Afghanistan. It is too easy to make defiant statements from a distance and leave others to face the consequences.

It is also too easy to forgive offenses committed against others. As we say in America, "It ain't hard to get along with somebody else's troubles." Islam, like Judaism before it, teaches that there are two types of sin: against God and against one's fellow human being. For the former, repentance before God suffices, but God will not forgive a sin against another till we seek that person's forgiveness ourselves. Afghans will have to decide how to conduct the lengthy and difficult process. Their culture and religion are replete with customs and traditions for reconciling disputes and wrongs, including murder, though the tribal rites of reconciliation between feuding clans were never meant to atone for the massacres and tortures of thousands, of hundreds of thousands.

The opening sura of the Holy Quran begins: "Bismillah al-rahman, al-rahim; al-hamdu lillah, rabb al-'alamin, al-rahman, al-rahim; malik al-yawm al-din. Iyaka na'budu wa iyaka nasta'in. Ihdina al-sirat al-mustaqim." "In the name of the Merciful, the Compassionate: praise be to God, the Ruler of the universe, the Merciful, the Compassionate, Master of the Day of Judgment. You do we worship, and on You do we rely; show us the right path." One can interpret these words in several ways. The attribute of God's rulership is preceded and followed by two attributes of mercy, and the attribute of judgment comes only after those four attributes of mercy. On the other hand, even after four attributes of compassion, judgment still follows. And the invocation ends, as it must, with a humble prayer for guidance in the right way.

Caught up in the clash and fall of contending ideologies and empires, showered with weapons and money, prodded into and subjected to violence by vast forces beyond their control, and now, at least provisionally sheltered by forces over which they have just as little control, Afghans have had few moments to consider how to live out these words of faith in their shattered and brutalized society. Let us help them without pushing them, knowing that international support and protection is fickle and unreliable, and that Afghans will have to live with each other when the recent arrivals have gone home. Despite what we all wish, Afghanistan will not heal quickly from decades of violence. There is no single set of individuals who are responsible, and no one set of actors who can help that society on the long path to greater peace, and greater justice.

I do not claim to know what Anthony would have said today. We largely agreed in the past, but things seemed a lot clearer then. It might have been easier if either of us had really had faith in the God of our ancestors, Who releases the captives, lifts up the

fallen, opens the eyes of the blind, revives the dead, and keeps His faith with those who sleep in the dust, who now, these last three years, include our friend, Anthony Hyman. Nonetheless, even if we do not believe, perhaps because we do not believe, we still try to do God's work, as Anthony did. If not us, who?