

# JUSTICE TO THE EXTENT POSSIBLE: THE PROSPECTS FOR ACCOUNTABILITY IN AFGHANISTAN

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## I. INTRODUCTION

Justice in Afghanistan, in the wake of nearly three decades of war, is a complicated endeavor – further complicated by the Afghan government’s recent grant of amnesty to perpetrators of past crimes. This paper will attempt to establish the prospects for accountability in Afghanistan, in light of the country’s historical cycles of war and violence and the recent attempts to trade justice for peace. The historical foundation will first be laid to demonstrate the complexities of the Afghan conflict and the fragility of the current regime. The steps that have been taken towards establishing a transitional justice framework are then set out to illustrate the theoretical objectives that stand in sharp contrast to the government’s actual intransigence to justice and accountability. The latter being demonstrated most significantly in the amnesty law signed into effect on February 20, 2007, that may ultimately be considered illegal at international law.

However, the illegality of amnesty does not answer the question of accountability for Afghans, since current circumstances and the government’s self-interest suggest that it will continue in effect. Thus, alternatives are considered, both domestically and internationally – with only one avenue producing the most realistic prospect for justice and accountability. It suggests that justice in Afghanistan is not entirely impossible, in spite of the increasing instability and in spite of the amnesty. Although the culture of impunity in Afghanistan has been perpetuated on the pretext of peace – it has become all too clear that true peace will require justice. Thus, the limited options that remain ought still to be pursued vigorously so as to ensure that impunity is reversed and some semblance of justice is had for Afghans to move forward.

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## II. HISTORICAL BACKGROUND

### A. *From Antiquity to Bonn*

Afghanistan is a country that has experienced a nightmare for the past quarter century, within which the Afghan people have suffered in immeasurable ways. They have been forced out of their country in the hopes of seeking safe refuge from repeated governmental regimes of violence.<sup>1</sup> Before the Soviet invasion in 1979 Afghanistan's population was slightly above 13 million, but was reduced significantly by early 1990 when about 6.2 million Afghan refugees fled to Pakistan or Iran.<sup>2</sup> "They have been the victims of wide scale and horrendous crimes perpetrated by all sides to the various conflicts."<sup>3</sup> More than a million Afghans lost their lives and roughly the same number became disabled in the twenty-three years of war.<sup>4</sup> Throughout, the Afghani people have been sadly manipulated with repeated promises of renewal and the consistent reality of ruin.

In the early 1920s, Afghanistan optimistically stood as a progressive and newly-independent Muslim country.<sup>5</sup> But the optimism proved to be short-lived with the overthrow of the monarch, King Amanullah, by a tribal insurrection in 1928.<sup>6</sup> The subsequent monarchy led by King Nadir Shah (the cousin of King Amanullah) and later, his son – King Zahir Shah, endured in a fragile balance for forty years despite territorial, tribal and religious tensions throughout the country.<sup>7</sup> In 1973, the entire monarchy succumbed to these tensions and was displaced in a coup led by Mohammad Daoud whose reign was cut short by the Saur Revolution

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1. See William Maley, *Rescuing Afghanistan*, 8-9 (Peter Browne & Julian Thomas eds., UNSW Press 2006); Deniz Kandiyoti, United Nations Research Inst. for Social Dev., *The Politics of Gender and Reconstruction in Afghanistan* § II.A (2005), available at <http://www.unrisd.org/unrisd/website/document.nsf/0/3050BE40DA5B871CC125704400534A7A?OpenDocument>.

2. Maley, *supra* note 1, at 9.

3. See Human Rights Watch, *Survivors Describe Taliban: Human Rights Watch urges U.N. Investigation of Massacre*, Oct. 31, 1998, <http://www.hrw.org/en/news/1998/10/31/survivors-describe-taliban> [hereinafter *Survivors Describe Taliban*]; see Human Rights Watch, *Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan* Vol. 14, No. 2 (C) (2002) [hereinafter *Paying for the Taliban's Crimes*], available at <http://www.hrw.org/en/reports/2002/04/09/paying-talibans-crimes>; see generally Human Rights Watch, *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity* (2005) [hereinafter *Blood-Stained Hands*], available at <http://www.hrw.org/en/reports/2005/07/06/blood-stained-hands>.

4. Afghan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan* 4 (2005) [hereinafter *AIHRC*], available at <http://www.ictj.org/static/Asia/Afghanistan/aihrc.callforjustice.eng.pdf>.

5. See Maley, *supra* note 1, at 7.

6. Kandiyoti, *supra* note 1, at § II.A.

7. *Id.*

in 1978.<sup>8</sup> It was against a backdrop of ideological fervor and ethnic tension that the Soviets invaded in 1979 in an effort to preserve the Communist regime.<sup>9</sup>

In the years that followed, Afghanistan became a site of continuous warfare and self-interested intervention, driven by the ideological forces of the Cold War and fuelled by the conflicting interests of the Soviet Union and Iran on the one hand, and the United States and Pakistan on the other.<sup>10</sup> It was during the authoritarian and pro-communist rule of the People's Democratic Party of Afghanistan (PDPA) that a pattern of mass atrocity began.<sup>11</sup> The Soviets withdrew their troops in 1989 but continued to support the regime of Mohammad Najib Ullah until 1992.<sup>12</sup> During this time, Najibullah held only nominal control over the country as factionalism continued to spread and intensify.<sup>13</sup> As a result of these persisting tribal and territorial tensions, various factions captured large portions of the country, government troops defected and the country descended into the further chaos of civil war.<sup>14</sup> In the subsequent period between 1992 and 1996, the Mujahideen resistance movement, composed of different resistance parties and supported by the United States, acquired precarious governmental control as factions continued to fight vociferously over Kabul.<sup>15</sup> The Mujahideen government was nominally run by the Jami'at-i-Islami party (what became known as the Northern Alliance), spearheaded by Burhanuddin Rabbani as President and Ahmad Shah Masoud as defense minister.<sup>16</sup> While the Mujahideen tried to retain Kabul, the ongoing battles between 1992 and 1995, destroyed at least a third of the city, killed thousands of civilians and drove half a million refugees to Pakistan.<sup>17</sup> It was also during this time that the Taliban, a movement of religious students of Sunni Muslim faith, from the Pashtun areas of eastern and southern Afghanistan and supported by Pakistan, began to rise in power and influence.<sup>18</sup> The Taliban eventually succeeded in displacing the Mujahideen government in 1996, when they came to power on the pretext of restoring law and order and establishing a government that could ensure

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8. *Id.*

9. *Id.*

10. See Maley, *supra* note 1, at 8-10.

11. Ahmad Nader Nadery, *Peace or Justice? Transitional Justice in Afghanistan*, 1 INT'L J. OF TRANSITIONAL JUSTICE 173-74 (2007).

12. WILLIAM MALEY, FUNDAMENTALISM REBORN: AFGHANISTAN AND THE TALIBAN 104 (Hurst & Co., 1998).

13. Maley, *supra* note 1, at 17.

14. See Kandiyoti, *supra* note 1, at § II.A.

15. See Nabi Misdaq, *Afghanistan: Political Frailty and Foreign Interference* 172-97 (Routledge Taylor & Francis Group, 2006); Maley, *supra* note 12, at 29.

16. See Misdaq, *supra* note 15, at 172-73.

17. Human Rights Watch, *The Massacre in Mazar-i Sharif* § 2 (1998) [hereinafter *The Massacre in Mazar-i Sharif*], available at <http://www.hrw.org/legacy/reports98/afghan/>.

18. *Id.*

peace and stability in the country.<sup>19</sup> The Northern Alliance in turn, became the opposition both in government and on the ground.<sup>20</sup>

Contrary to promise, from 1996 to 2001, Afghanistan fell into an even darker period of totalitarian repression and misery as the Taliban mechanistically created a regime of absolute terror.<sup>21</sup> The regime virtually sealed Afghanistan off from the rest of the world, while the rest of the world observed in ambivalent silence.<sup>22</sup> During this time, the Taliban “managed to prevail not because they enjoyed substantial popular support throughout Afghanistan, but on account of their trusty lifeline from Pakistan and the sheer exhaustion of the war-weary Afghans whom they were seeking to dominate.”<sup>23</sup> In spite of this, the Taliban were still no more able to control the extensive factionalism throughout the country than preceding governments.<sup>24</sup> The north remained a network of fiefdoms under the authority of various warlords, which combined with the Taliban, left Afghans with little protection from murder, rape or extortion.<sup>25</sup> The lack of uniform control by the Taliban also led to various military campaigns against insurgent factions, tribes and non-Pashtun or Shi'a Muslim ethnic groups – many of which now represent some of the worst massacres in Afghan history.<sup>26</sup> Ultimately, the Taliban's conquest succeeded at bringing about 90% of Afghan territory under its control; political support remained much more elusive, however.<sup>27</sup>

Against this backdrop of political instability, September 11, 2001, unexpectedly launched Afghan and the Taliban onto the global stage. The events that unfolded thereafter once again placed Kabul, the capitol, in the crosshairs of a conquering force. As a part of Operation Enduring Freedom, the United States carpet-bombed Kabul for more than a month, until the Taliban were driven into the mountains.<sup>28</sup>

The overthrow of the Taliban necessitated, amongst other things, a new political arrangement, thus prompting the intervention of the United Nations to broker a solution.<sup>29</sup> In an unexpectedly cooperative manner, key Afghan actors came together at the direction of the special representative of the Secretary-General, Lakhdar Brahimi, who convened a meeting in Bonn, Germany in late November 2001 that successfully resulted in the adoption of an “Agreement on Provisional Arrangements in Afghanistan Pending Re-establishment of Permanent Govern-

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19. *Id.*

20. See Misdaq, *supra* note 15, at 185.

21. *Id.* at 195-196; Maley, *supra* note 12, at 90.

22. Maley, *supra* note 12, at 90.

23. Maley, *supra* note 1, at 9-10.

24. See The Massacre in Mazar-i Sharif, *supra* note 17, at § 2.

25. See *Id.*

26. See Misdaq, *supra* note 15 at 195-196.

27. See *id.*

28. See *id.* at 246.

29. See Maley, *supra* note 1, at 30.

ment Institutions” (the “Bonn Agreement”).<sup>30</sup> The Bonn Agreement quite meticulously set out a path for political transition that was, for the most part, carried out in succession.<sup>31</sup> First, it established an Interim Authority and mapped out the creation of a Transitional Authority through an Emergency Loyal Jirga (Grand Assembly), that was held in June 2002.<sup>32</sup> Next, following a path of constitutional development, a Constitutional Commission was established and a Constitution ratified in January 2004.<sup>33</sup> Furthermore, in October 2004, Afghans elected Hamid Karzai in a remarkably peaceful presidential election, followed by a less participatory but relatively peaceful parliamentary election in October 2005.<sup>34</sup>

### ***B. The Legacy of War and Persistent Instability***

Unfortunately, it cannot be said that the “rest is history.” Although Operation Enduring Freedom succeeded in eliminating the Taliban government in response to the events of September 11<sup>th</sup>, 2001, and although the Bonn Agreement initiated a path for positive development, the country continues to cling to existence in a state of near ruin.<sup>35</sup> The removal of the Taliban was only the beginning. The preceding twenty-three years of war had devastated Afghanistan’s infrastructure and battered its territory.<sup>36</sup> Since there had been no effective central government for nearly three decades, the most basic necessities including paved roads, electricity and clean water were absent.<sup>37</sup> Worse still, the many remnants of war included not only collapsed state institutions, but mass graves, a country replete with land mines, an effectively disabled population, a burgeoning illegal poppy trade and the continuing expanse of warlordism.<sup>38</sup> In addition, the country also suffered severe drought

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30. *Id.*; Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Dec. 5, 2001 [hereinafter the “Bonn Agreement”].

31. SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE BUILDING* 88-92 (Oxford University Press, 2004).

32. Chesterman, *supra* note 31, at 92; See Kandiyoti, *supra* note 1, at 18.

33. International Center for Transitional Justice, Afghanistan: ICTJ Activity, at <http://ictj.org/en/where/region3/507.html> (last visited Mar. 31, 2009) [hereinafter ICTJ].

34. *See id.*; Press Release, United Nations, Secretary-General Congratulates Hamid Karzai on Election to Afghan Presidency, U.N. Doc. SG/SM/9575 (Nov. 4, 2004) [hereinafter Press Release].

35. *See* CYRUS HODES & MARK SEDRA, *THE SEARCH FOR SECURITY IN POST-TALIBAN AFGHANISTAN* 7 (Routledge: International Institute for Strategic Studies, 2007) [hereinafter HODES & SEDRA]; *see generally* United Nations Security Council, *The situation in Afghanistan and Its Implications for International Peace and Security*, UN Doc. S/2008/617 (Sept. 23, 2008) [hereinafter UN, *Afghanistan and its Implications*].

36. MALEY, *supra* note 1, at 78.

37. Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 NEW ENG. L. REV. 709, 710 (2001).

38. HODES & SEDRA, *supra* note 36, at 11; HUMAN RIGHTS WATCH, AFGHANISTAN’S BONN

and famine throughout the years, eliminating any hope for self-sufficiency in the foreseeable future.<sup>39</sup>

Even more disconcerting is the recent lapse into instability that is spreading once again throughout the country – reminiscent of the tribal and territorial factionalism that marked the previous decades and suggestive of the current regime's inability to reverse those historical trends.<sup>40</sup> The Taliban-led insurgent activity has intensified every year since 2001, with indicators of insecurity more than quadrupling between 2005 and 2006.<sup>41</sup> Moreover, according to the UN Assistance Mission in Afghanistan (UNAMA), “[t]he number of violent insurgent and terrorist attacks in 2007 was at least 20 percent higher than in 2006” and is steadily increasing.<sup>42</sup>

Despite the initial achievements in reconstruction, the post-Taliban era has therefore been defined by a deterioration of security.<sup>43</sup> Afghanistan is at great risk of spiraling back down to a highly factionalized environment that could paralyze any hope for a centralized and effective government.<sup>44</sup> The revival of Taliban attacks is most telling of this threat.<sup>45</sup> In the immediate aftermath of the Coalition operation, the Taliban scattered to remote areas of Afghanistan and northern Pakistan.<sup>46</sup> Rumors that the Taliban were regrouping emerged in March 2002 after the Coalition's inconclusive Operation Anaconda in eastern Afghanistan<sup>47</sup> and it has now become clear that the Taliban are particularly responsible for much of the insecurity, in addition to other anti-government forces, warlords, drug lords, and others allied to the Afghan government.<sup>48</sup>

The violence cannot, however, only be attributed to Taliban or anti-government insurgencies. As a result of the many ethnically-inspired crimes committed during and prior to the Taliban regime, there has been a considerable backlash against ethnic Pashtuns in northern Afghanistan.<sup>49</sup> This backlash in-

AGREEMENT ONE YEAR LATER: A CATALOGUE OF MISSED OPPORTUNITIES, Dec. 4, 2002, <http://www.hrw.org/en/news/2002/12/04/afghanistans-bonn-agreement-one-year-later> [hereinafter AFGHANISTAN'S BONN AGREEMENT ONE YEAR LATER].

39. UN, *Afghanistan and its Implications*, *supra* note 36, at 13.

40. See HODES & SEDRA, *supra* note 36, at 11-15.

41. *Id.* at 7-8.

42. ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: AFGHANISTAN 10 (2008).

43. HODES & SEDRA, *supra* note 36, at 8.

44. UN, *Afghanistan and its Implications*, *supra* note 36, at 5-6; see also Jane Armstrong, *The Return of the Taliban*, THE GLOBAL AND MAIL (Canada), Jan. 27, 2009, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20090127.wafghan27/BNStory/Afghanistan/home>; see generally FRONTLINE: THE RETURN OF THE TALIBAN (PBS television broadcast Oct. 3, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/taliban/>.

45. See MALEY, *supra* note 1, at 60.

46. *Id.*

47. *Id.*

48. Human Rights Watch, *Open Letter from Human Rights Watch to the International Afghanistan Support Conference*, June 9, 2008, <http://www.hrw.org/en/news/2008/06/09/open-letter-human-rights-watch-international-afghanistan-support-conference-june-12->

49. See PAYING FOR THE TALIBAN'S CRIMES, *supra* note 3, at 5-42 (chronicling the Taliban's

cluded killings, sexual violence, beatings, extortion, and looting against the ethnic Pashtuns.<sup>50</sup> These abuses are a direct result of the failure to address the crimes of the previous regime. In this regard, a 2002 Human Rights Watch Report states the following:

Any understanding of the current abuses committed against Pashtuns in northern Afghanistan must take account of the severe abuses that the Taliban regime committed against non-Pashtun ethnic groups in northern Afghanistan, even though many ethnic Pashtuns living in northern Afghanistan did not participate in abuses against their neighbors. The brutality of Taliban rule in northern Afghanistan has left many communities targeted by them with grievances that, in the absence of judicial mechanisms for accountability and redress, are being addressed in a vigilante fashion.<sup>51</sup>

It is arguable whether the war in Afghanistan is over, or whether it has merely been subdued. As long as the country remains insecure, factionalism will continue to intensify unabatedly, in fashion with the previous three decades of conflict. The tension between peace and justice is therefore very real to Afghans – presenting one of the most enormous challenges to a successful transition.

### *C. Worthy Intentions and Promises*

The attempt to ensure justice was never wholly absent from the reconciliation agenda. The Bonn Agreement was premised on the need to establish a functioning legal system with respect for human rights.<sup>52</sup> Such principles were then firmly committed to in the Constitution.<sup>53</sup> In particular, Article 58 mandates the state to establish an Independent Human Rights Commission of Afghanistan to assist individuals whose rights have been violated.<sup>54</sup> The Afghanistan Independent Human Rights Commission (AIHRC) was created in 2002 and has since carried the broad mandate of human rights protection and transitional justice.<sup>55</sup> To this end, in 2003 the AIHRC conducted a broad national consultation to determine the appropriate

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atrocities by region).

50. *Id.* at 1.

51. *Id.* at 10.

52. See AFGHANISTAN'S BONN AGREEMENT ONE YEAR LATER, *supra* note 39.

53. See The Constitution of Afghanistan, pmbl., arts. 6, 7, 24 (Afg.), available at [http://www.supremecourt.gov.af/PDFfiles/constitution2004\\_english.pdf](http://www.supremecourt.gov.af/PDFfiles/constitution2004_english.pdf).

54. *Id.* art. 58.

55. See ICTJ, *supra* note 34; AIHRC, *supra* note 4, at 5; see generally AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION, at <http://www.aihrc.org.af/> (last visited Apr. 19, 2009) [hereinafter Official AIHRC Website].

method of dealing with past human rights violations.<sup>56</sup> The results of the consultation were included in a report in 2005 by the AIHRC that set out a series of recommendations to the government of Afghanistan, the UN, the international community and to civil society, related to criminal justice and other forward-looking measures including reform, reconciliation and prevention.<sup>57</sup> The report led to the government's adoption of an Action Plan<sup>58</sup> in December 2006, which addresses some, but not all of the recommendations in the AIHRC report. The most notable absence from the Action Plan's structural framework is the criminal justice element, despite the AIHRC report indicating that almost 40 percent of all respondents understood "justice" to mean criminal justice before the courts and in spite of the report's conclusion that the desire for criminal justice was so strong as to possibly outweigh the other transitional justice options.<sup>59</sup> Instead, the Action Plan emphasizes a holistic approach to transitional justice by focusing on four key areas of reform: (1) symbolic measures, (2) institutional reform, (3) truth-seeking and (4) documentation and reconciliation.<sup>60</sup> In each of these areas, it proposes specific activities to be carried out by expressly stipulated bodies and each pursuant to a particular timeline.<sup>61</sup> The specificity of its approach reflects a sincere commitment to four important areas of reform and should be commended in that regard. However, the conspicuous absence of a criminal justice mechanism is a fundamental weakness of the government's strategy for transitional justice and reflective of its lack of commitment to the area.

### III. ACCOUNTABILITY DENIED

#### A. *Amnesty Declared*

The government's lack of commitment to criminal justice was expressly confirmed on February 20, 2007, when President Karzai signed into law an amended version of the controversial *National Stability and Reconciliation Bill*, passed by a sweeping majority (50 votes to 16) of the Meshrano Jirga,<sup>62</sup> three weeks after it was approved by the Wolesi Jirga.<sup>63</sup> The law grants amnesty and legal protection from prosecution to Afghan commanders accused of committing war atrocities in the last two-and-a-half decades.<sup>64</sup> Karzai has stressed that the legislation contains a

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56. See AIHRC, *supra* note 4, at 5.

57. *Id.* at 18.

58. AIHRC, Peace, Reconciliation, and Justice in Afghanistan, Action Plan of the Government of the Islamic Republic of Afghanistan, [http://www.aihrc.org.af/actionplan\\_af.htm](http://www.aihrc.org.af/actionplan_af.htm) (last visited Mar. 31, 2009) [hereinafter Action Plan].

59. See AIHRC, *supra* note 4, at 26-27.

60. *Id.* at 44-54.

61. *Id.*

62. Council of Elders, referring to the upper house of the legislature.

63. People's Council, referring to the lower house of the legislature.

64. Dad Noorani, *Amnesty Law Condones Warlords' Past Abuse*, INTER PRESS SERVICE, Mar. 23, 2007, <http://ipsnews.net/news.asp?idnews=37056>.



reprieve from blanket amnesty in that it is intended to preclude only future prosecutions because it does not apply to persons who are currently under investigation for crimes “committed against the security of Afghanistan,” (though it offers such persons a reduced punishment if they accept the proposed national reconciliation program) and, it claims to recognize victims’ rights in providing an allowance for lawsuits against the perpetrators.<sup>65</sup> However, such reprieve has been interpreted as a token inclusion that is meant to give the appearance that the government is meeting its international obligations when in fact, there is little likelihood of a victim bringing a claim when many of those responsible for past crimes continue to retain weapons and power.<sup>66</sup>

The issue of amnesty has been a continual point of controversy in Afghan history. In 1992, the Mujahideen declared a blanket self-amnesty after the fall of Najibullah’s government.<sup>67</sup> After the collapse of the Taliban and during the Bonn negotiations, attempts at amnesty were introduced by the Northern Alliance but rejected in the final agreement.<sup>68</sup> The data collected by the 2005 AIHRC report indicated that most respondents were not asked about whether they would accept unconditional amnesties or pardons of war criminals as these were common features of previous regimes.<sup>69</sup> Instead, they were asked if they would support amnesties or pardons for anyone who confessed their crimes before an institution for transitional justice.<sup>70</sup> A majority (60.5 percent) rejected an approach to transitional justice based on amnesties and pardons, though a still significant portion (38.1 percent) said they would accept such an approach.<sup>71</sup> The report reasoned this response on Islamic notions of forgiveness that are strong in Afghan culture and the fact that Afghans generally differentiate between their own right to seek justice and God’s justice, which is considered unavoidable.<sup>72</sup> Notwithstanding, any support was contingent on a conditional scheme and a strong majority still opposed all amnesties. In the wake of the amnesty law, human rights and civil society organizations have challenged its constitutionality and viewed the law as an obstacle to reconciliation,<sup>73</sup> illustrative that the public continues to oppose the concept of amnesty.

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65. *Id.*

66. J. Alexander Thier & Scott Worden, *Path to Peace, Justice in Afghanistan*, CHRISTIAN SCI. MONITOR, Mar. 13, 2007, at 1-2, available at <http://www.csmonitor.com/2007/0313/p09s02-coop.html?page=1> [hereinafter Thier & Worden].

67. See AIHRC, *supra* note 4, at 21 n.16.

68. See ICTJ, *supra* note 34.

69. See AIHRC, *supra* note 4, at 21.

70. *Id.*

71. *Id.*

72. *Id.*

73. See Declan Walsh, *Afghanistan Approves Amnesty for Warlords*, THE GUARDIAN (London), Feb. 1, 2007, <http://www.guardian.co.uk/world/2007/feb/01/afghanistan.warcrimes/print>;

Such opposition is in large part due to the expectations set by the Afghan government itself. Following the AIHRC report, the government's Action Plan contained several reassurances that perpetrators would be held accountable. Specifically, it stated:

This peace and justice perspective can not mean to excuse genocide, war crimes, crimes against humanity and other gross violations of human rights. On the contrary, bold action against these crimes is itself a universally accepted moral principle.

Further, the Government of Afghanistan, with reference to the constitutional organs of Afghanistan such as the Parliament of the country, is committed to establish accountability institutions and to take the necessary accountability measures in accordance with the nationally and internationally accepted norms on war crimes, crimes against humanity and obvious violation of human rights. The commission of such crimes does not fall into the scope of amnesty on the basis of the principles of the sacred religion of Islam and internationally accepted standards . . . .

The Government of Afghanistan acknowledges that many cases of human rights violation have been committed during the previous four years in Afghanistan. Relying on the principles enshrined in the Constitution and the commitments of the Government towards the people of Afghanistan, it should be reminded that human rights violations during these four years will be seriously dealt with. Violations in these four years should be evaluated in the framework of international human rights standards and the law of the country.<sup>74</sup>

The amnesty law was passed in spite of these promises and in response to pressure on the Karzai government from warlords and factional leaders – who have long been pressuring the government to pass the amnesty law.<sup>75</sup>

### ***B. Peace versus Justice***

Given the increased insecurity in the country and the evident pressure from factional groups who have proved the historical ability to ignite civil war – it is clear that the amnesty was granted as an attempt to secure peace in Afghanistan. In fact, the government justified the bill as a “comprehensive solution” for “consolidating peace and stability,” though it has been received by most as “a self-serving attempt by many of the country's top warlords-cum-politicians to escape prosecution for the horrific catalogue of crimes . . . that they perpetrated against other Af-

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Thier & Worden, *supra* note 67.

74. Action Plan, *supra* note 59.

75. See Noorani, *supra* note 65.

ghans for nearly three decades.”<sup>76</sup> According to the AIHRC Commissioner, Nader Nadery, “peace at the cost of justice remains the core policy of the UN mission in Afghanistan and of the Afghan government,” who maintain that, “if Afghanistan moves forward on accountability and justice for past human rights abuses, the country’s fragile peace will be challenged and the peace processes will be disrupted.”<sup>77</sup>

Nowhere is the polarization between peace and justice more pronounced than in the context of the amnesty debate.<sup>78</sup> The issue usually arises in the course of negotiations in the immediate aftermath of a conflict whereby the position taken is “that it is better to negotiate a peace deal with those responsible for atrocities than to insist on the inclusion of norms of justice which may derail the peace process, prolong the conflict, and limit foreign policy options to the use of force and economic sanctions.”<sup>79</sup> This kind of transitional amnesty offers to the previous regime the repudiation of justice and accountability in exchange for a lasting peace. Such was the case in several Latin American peace deals in the 1980s and in the South African negotiations to end Apartheid.<sup>80</sup>

The Latin American model of amnesty drew upon the origins of the word “amnesty,” meaning oblivion, in the sense that it sought to completely forget the crimes of prior regimes.<sup>81</sup> Although the South African model of conditional amnesty differed from the earlier era of blanket amnesties in Latin America, it served a similar function – to grant amnesty relating to prior repressive rule as a precursor to political change, peace, and reconciliation.<sup>82</sup> Whereas the peace negotiations in Afghanistan that culminated in the Bonn Agreement rejected calls for amnesty and were followed by an ostensibly peaceful regime<sup>83</sup> – the underlying rationale for the Afghan grant of amnesty parallels these historical instances that used amnesty as a vehicle for obtaining stability.

However, the recent pattern of reversing the effect of amnesties in Latin America,<sup>84</sup> combined with the integration of criminal justice mechanisms in

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76. Thier & Worden, *supra* note 67.

77. Nadery, *supra* note 11, at 175.

78. See Paul R. Williams, *The Role of Justice in Peace Negotiations* in POST-CONFLICT JUSTICE 115, 133 (M. Cherif Bassiouni ed., 2002).

79. *Id.*

80. See Ruti G. Teitel, *Transitional Justice* 53-54 (Oxford University Press, 2000); BEN CHIGARA, *AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS* 11 (Pearson Education Ltd. 2002); ANDREAS O’SHEA, *AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE* 24 (Kluwer Law International, 2002).

81. See O’Shea, *supra* note 81, at 56.

82. See Chigara, *supra* note 81, at 11-12.

83. See Hodes & Sedra, *supra* note 36, at 7.

84. See Paul van Zyl, *Justice without Punishment: Guaranteeing Human Rights in Transitional Societies* in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation*

emerging transitional arrangements such as in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and East Timor,<sup>85</sup> reflects an increasing recognition of the false dichotomy between peace and justice. That is, a recognition that amnesties and by inference, the absence of justice and accountability, do not create a lasting peace. As put by Richard Goldstone, “peace without justice is an illusion.”<sup>86</sup> In turn, the idea that individual accountability for massive crimes as an essential part of a preventative strategy becomes intertwined with notions of justice when laying the foundation for what will result in a lasting peace. The Lomé Accord signed in the aftermath of the Sierra Leone conflict is a prime example.<sup>87</sup> The Accord provided a blanket amnesty for crimes committed during the war, and within one year, the Revolutionary United Front was committing new atrocities.<sup>88</sup> Similarly, in Afghanistan, it has become readily apparent that the ongoing tensions have arisen out of the failure to properly address the crimes and underlying tensions from the past.<sup>89</sup> According to Nadery, the policy of ‘peace first, justice later’ “encouraged more violence by the local warlords and promoted a state of impunity.”<sup>90</sup> The amnesty, as an extension of such policy, serves as a further denial of the inextricable correlation between peace and justice – leaving Afghans with little hope for either.

### C. *Amnesty and International Law*

The legal status of amnesty in international law is less than clear. In recent years, courts and commentators have observed that amnesties for genocide, crimes against humanity and war crimes, have been considered illegal at international law.<sup>91</sup> However, there are several qualifications to this principle. First, the type of crimes for which amnesty may be granted is disputed.<sup>92</sup> It has been suggested that

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Commission of South Africa 42, 57 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000); *see also* Inter-American Commission on Human Rights, Report No. 28/92 (Oct. 2, 1992); Inter-American Commission on Human Rights, Report No. 29/92 (Oct. 2, 1992); *Los Hoja Massacre Case*, No. 10.287, Annual Report of the Inter-American Commission on Human Rights (1993).

85. *See* G.A. Res. 1993/827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the former Yugoslavia (ICTY)); G.A. Res. 1994/955, U.N. Doc. S/RES/955 (Nov. 4, 1994) (establishing the International Criminal Tribunal for Rwanda (ICTR)); the Special Court for Sierra Leone (SCSL) set up jointly by the government of Sierra Leone and the United Nations; the Extraordinary Chambers in the Courts of Cambodia (ECCC) set up jointly by the government of Cambodia and the United Nations; and the Ad-Hoc Court for East Timor, set up jointly by the governments of East Timor, Indonesia and the United Nations).

86. MADOKA FUTAMURA, *WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY* 23 (Routledge, 2007).

87. *See* Neil J. Kritz, *Progress and Humanity: The Ongoing Search for Post-Conflict Justice* in *POST-CONFLICT JUSTICE* 55, 67 (M. Cherif Bassiouni ed., 2002).

88. *Id.*

89. Nadery, *supra* note 11, at 175-76

90. *Id.* at 175.

91. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2604-06 (1990-91).

92. Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 *LAW & CONTEMP. PROBS.* 41, 60 (1996).

amnesties for crimes against humanity, torture and war crimes in an internal conflict are not *prima facie* illegal.<sup>93</sup> Although recent developments demonstrate otherwise, it is difficult to point to an uncontested principle in international law that completely eclipses this contention.<sup>94</sup> Second, the type of amnesty granted will impact its legality.<sup>95</sup> Only blanket or unconditional amnesties and self-amnesties, that is, amnesties granted by governments unto themselves, have been considered illegal.<sup>96</sup> Other amnesties, in particular, those passed by democratically elected governments to amnesty the crimes of a former regime, occupy a less certain space in international law and may find justification in the circumstances of their enactment or what has been referred to as the “Needs of State” theory.<sup>97</sup>

Given the uncertain status of amnesties in international law, a doctrinal framework then becomes useful in assessing legality in the Afghan context, which, at first glance, would appear to fall within the possible exceptions to illegality, justifying the position of the Afghan government. However, the possible exceptions are increasingly being challenged by international law.<sup>98</sup> This trend, combined with those principles which *are* certain in international law and the application of a doctrinal framework – support the position that the act of amnestying past crimes in Afghanistan is in fact, illegal at international law.

### 1. Illegality for Certain Crimes

The necessity of criminal accountability in certain circumstances is supported by international legal principles.<sup>99</sup> In the 2001 case of *Barrios Altos*, the Inter-American Court of Human Rights was one of the first to pronounce that self-amnesty laws promulgated by the Peruvian government in the 1990s had no legal effect.<sup>100</sup> Although the Court’s decision was premised on the incompatibility of the amnesty laws with the Inter-American Convention on Human Rights, it also considered that the amnesty provisions were inadmissible, “because they intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and

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93. *Id.*; Chigara, *supra* note 81, at 57, 123; O’Shea, *supra* note 81, at 320.

94. Chigara, *supra* note 81, at 90.

95. van Zyl, *supra* note 85, at 68.

96. *Id.* at 83.

97. *Id.* at 41.

98. *Id.* at 47-50; *see also* The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 40-48, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

99. Orentlicher, *supra* note 92, at 2551; Antonio Cassese, *International Criminal Law* 301 (1st ed. 2003).

100. *Barrios Altos v. Peru*, 2001 Inter-Amer. Ct. H.R. (ser. C) No. 75, ¶ 44 (Mar. 14, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf).

forced disappearance,” all of which the court recognized as violations of “non-derogable rights recognized by international human rights law.”<sup>101</sup>

The illegality of amnesty is ultimately grounded in the controversial but frequently cited principle, *aut dedere aut judicare*, the duty to extradite or prosecute.<sup>102</sup> In other words, the decision to grant amnesty must first take into account whether there exists in international law an obligation to prosecute the particular offense.<sup>103</sup> In this regard, numerous scholars support the contention that amnesty cannot be granted for grave breaches of the Geneva Conventions (war crimes) in the context of international armed conflict and acts of genocide as defined under the Genocide Convention – both of which impose a duty to prosecute or extradite under customary international law.<sup>104</sup>

However, according to Michael Scharf, the extension of the duty to prosecute and the inferred illegality of amnesty is less clear in the context of torture, crimes against humanity, war crimes in an internal conflict, and other human rights principles arising from treaties such as the International Covenant on Civil and Political Rights or the regional conventions in Europe or Latin America.<sup>105</sup> Specifically, Scharf suggests that the Torture Convention only imposes a duty on parties to the Convention;<sup>106</sup> that state practice in the area of crimes against humanity reflects a trend of granting amnesties or *de facto* immunity rather than prosecution;<sup>107</sup> that the duty to prosecute war crimes under the *Geneva Conventions* does not apply to internal armed conflicts;<sup>108</sup> and, that the various human rights treaties only require parties to ‘ensure’ the rights enumerated therein without mandating prosecution.<sup>109</sup> Accordingly, Scharf suggests that in some circumstances, an amnesty for peace would not violate international law.<sup>110</sup>

That being said, Scharf’s contention has been recently and significantly challenged by international developments. In a 2004 Report, then-UN Secretary General Kofi Annan recommended that peace agreements, Security Council resolutions and mandates “reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity” with no distinction made as between international or internal armed conflict.<sup>111</sup> Furthermore, in the 2006 decision, *Almonacid-Arellano v. Chile*, the Inter-American Court of Human Rights persuasively reasoned its conclusion that crimes against humanity imply a duty to prosecute and are not suscep-

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101. *Id.* ¶¶ 41-44.

102. Orentlicher, *supra* note 92, at 2604-05.

103. Scharf, *supra* note 93, at 42.

104. *Id.* at 60; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L. J. 507, 515-17 (1998-99).

105. Scharf, *supra* note 105, at 517-18.

106. Scharf, *supra* note 93, at 60.

107. *Id.* at 57.

108. Scharf, *supra* note 105, at 516.

109. *Id.* at 517-18.

110. *Id.* at 514-15.

111. The Secretary-General, *supra* note 99, ¶ 64(c).

tible of amnesty pursuant to the basic rules of international law, relying on case law from the International Criminal Tribunal for the Former Yugoslavia (ICTY), various General Assembly Resolutions since 1946, Security Council Resolutions 827 and 955 and the constating documents for the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the Special Tribunal for Sierra Leone.<sup>112</sup> Finally, Scharf's contention is challenged by the increasing influence of the Rome Statute establishing the International Criminal Court (ICC), to which there are 108 state parties as of June 1, 2008.<sup>113</sup> The Rome Statute imposes a duty on parties to respond to genocide, crimes against humanity, war crimes and the crime of aggression – by way of investigation or prosecution and subject to the complementary jurisdiction of the ICC in the event of inability or unwillingness by the affected state party.<sup>114</sup> Although it has not yet been made expressly clear as to whether the Rome Statute permits amnesties,<sup>115</sup> the listing of crimes against humanity and war crimes in an internal conflict as crimes which mandate governmental response, in category with those which already impose a duty to prosecute, supports the view that amnesties for such crimes will at the very least, be considered suspect at international law.

## 2. A Permissible Range

A further qualification to the illegality of amnesty lies in the type of amnesty granted. The amnesties in both *Barrios Altos* and *Almonacid* were self-amnesties issued by a military regime to avoid judicial prosecution of its own crimes.<sup>116</sup> Self-amnesty is distinguishable from circumstances where a democratically elected legislature votes to pass an amnesty law to cover crimes committed during a previous administration's internal armed conflict, effectively providing amnesty to the crimes of an old regime.<sup>117</sup> It is this latter category which occupies a less certain space in international law arising out of a pragmatic concern that legitimate governments should be empowered to take whatever steps necessary to ensure a sustainable peace.<sup>118</sup> In confronting the dilemma of new democracies dealing with past human rights violations, José Zalaquett argues “[p]olitical leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints, lest in

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112. *Almonacid-Arellano et. al. v. Chile*, 2006 Inter-Am. Ct. H.R. (sec. C) No. 154, ¶¶ 105-109, 114, 129 (Sept. 26, 2006).

113. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90.

114. *Id.* arts. 86-111.

115. Scharf, *supra* note 104, at 521-22.

116. *Barrios-Altos v. Peru*, *supra* note 101, ¶ 2(i); *Almonacid-Arellano et. al. v. Chile*, *supra* note 113, ¶¶ 3, 72(b).

117. This is has been alleged in Afghanistan; see also O'Shea, *supra* note 81 (similar amnesties were granted in Croatia, France, Uganda, Romania, and post-Apartheid South Africa).

118. Scharf, *supra* note 93, at 60; van Zyl, *supra* note 85, at 34-47.

the end the very ethical principles they wish to uphold suffer because of a political or military backlash.”<sup>119</sup> In other words, the political and practical realities of a post-conflict regime may require amnesty to create peace. This has also been referred to as the “Needs of State” doctrine, premised on allowing the state to give priority to reconstruction rather than insisting on a form of retribution through prosecution.<sup>120</sup>

However, even where state priorities are asserted, there continues to be an international legal barrier against providing amnesty for international crimes such as genocide, war crimes and crimes against humanity.<sup>121</sup> When dealing with such crimes, Zalaquett emphasizes that efforts should be made “not to set the nefarious precedent that would be established if these crimes were formally amnestied by a democratic government.”<sup>122</sup> Furthermore, those who consider the needs of a state as a potential justification, tend to acknowledge that the “[g]ranting of national amnesty to perpetrators of any of these crimes appears to be inconsistent with international law.”<sup>123</sup>

Finally, the needs of a state would not justify a blanket, rather than conditional amnesty. For instance, in response to the blanket amnesty in Sierra Leone, the UN insisted it would not be bound insofar as the amnesty applied to crimes under international law.<sup>124</sup> According to Neil Kritz, this is good law and good policy as “[i]nternational law is increasingly clear that a blanket amnesty for these types of crimes is impermissible.”<sup>125</sup> Thus, the scope of discretion for the amnesty of international crimes, remains contestable.

### 3. A Doctrinal Framework

Due to the lack of a clear understanding of when amnesty is legal, it comes as no surprise that the conduct of states in their recognition of amnesties has been called “schizophrenic.”<sup>126</sup> Accordingly, a doctrinal framework to assess the propriety of an amnesty law is useful to support any legal conclusions made.

According to Paul van Zyl, a state may be unable to prosecute the crimes of a former regime because the security of the nation hangs in the balance, or the practical obstacles are such that it is virtually impossible to engage in criminal prosecution. Such obstacles include but are not limited to, an inoperative criminal justice system, social upheaval and lawlessness or insufficient skills and resources.<sup>127</sup>

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119. José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1429 (1992).

120. Chigara, *supra* note 81, at 48-56.

121. *Id.* at 75-90; van Zyl, *supra* note 85, at 68.

122. Zalaquett, *supra* note 120, at 1436.

123. Chigara, *supra* note 81, at 48.

124. Kritz, *supra* note 88, at 67.

125. *Id.*

126. Chigara, *supra* note 81, at 57-91.

127. van Zyl, *supra* note 85, at 57-59.



Van Zyl argues that in these or comparable circumstances, a state may be permitted to derogate from the international obligation to prosecute (where such obligation applies) provided it is able to establish: first, that prosecution is impossible either because a transition from repressive rule would not have occurred without some form of amnesty or because the state is objectively unable to prosecute; second, that a majority of citizens freely endorse the policy; third, that the state has made a good faith effort to comply with all other obligations under international law; and fourth, that the state structures the amnesty law so as to ensure the fulfillment of its remaining international obligations including the obligation to make reparation to victims.<sup>128</sup> Finally, in spite of these parameters, van Zyl supports the view that no court should be required to uphold amnesties for crimes against humanity, genocide, or war crimes.<sup>129</sup>

#### 4. The Afghan Amnesty

Applying the legal principles and doctrinal framework to the situation in Afghanistan ultimately supports the conclusion that this amnesty is illegal under international law. First, the scope of crimes committed over the course of nearly three decades of conflict will most certainly include crimes that do not fall under the rubric of international crimes subject to the duty to prosecute. However, there is equally persuasive evidence that establishes egregious violations of human rights and the commission of international crimes, including war crimes, crimes against humanity and crimes of genocide.

In May 1997, the Taliban attempted to take over the city of Mazar-i Sharif in northwest Afghanistan, one of the last remaining opposition strongholds controlled by the United Front.<sup>130</sup> They failed in their attempt and in the process thousands of Taliban soldiers were killed.<sup>131</sup> In reprisal, Taliban militia forces took over the city one year later, on August 8, 1998, in what witnesses referred to as a “killing frenzy.”<sup>132</sup> In the first few hours of the offensive, Taliban troops killed innumerable civilians in indiscriminate attacks – shooting non-combatants and suspected combatants alike.<sup>133</sup>

Retreating opposition forces are rumored to have also engaged in indiscriminate shooting as they fled the city.<sup>134</sup> In the days that followed, Taliban forces carried out a systematic search for male members of the ethnic Hazara, Tajik and Uzbek communities – during which thousands of men are said to have been de-

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128. *Id.* at 51-54.

129. *Id.* at 54.

130. Human Rights Watch, *supra* note 17, § I.

131. *Id.*

132. *Id.* § III; A Wordsmiths Compilation, *Afghanistan: Things Fall Apart* 168 (2002).

133. Human Rights Watch, *supra* note 17, § III.

134. *Id.* § I.

tained and subsequently summarily executed.<sup>135</sup> Reports vary as to the number of deaths, though estimates range between 2,000 and 6,000 killed.<sup>136</sup> During this time, the Taliban governor, Mulla Manon Niazi, delivered many speeches inciting violence against Hazaras and ordering them to either become Sunni Muslims, leave Afghanistan, or risk being killed.<sup>137</sup> Human Rights Watch also received reports that many women and girls were raped and abducted during the takeover.<sup>138</sup>

Two years later, in May 2000, the Taliban perpetrated another massacre upon a civilian population.<sup>139</sup> Reports by Human Rights Watch confirm that thirty-one bodies were found at the site, of which twenty-six were positively identified as civilians from Baghlan province.<sup>140</sup> All of those killed had been detained for four months prior and many of them had been tortured before they were killed.<sup>141</sup>

Less than one year later, on January 8, 2001, Taliban forces retook the town of Yakaolang nine days after being driven out by two Shi'a-based parties in the United Front.<sup>142</sup> Similar to the massacre in Mazar-i Sharif, the Taliban conducted searches throughout the city and nearby villages, rounding up all adult males, including staff members of humanitarian organizations.<sup>143</sup> Human Rights Watch reported that somewhere between 170 to 300 civilian adult males were then herded to the center of the district and shot by firing squad in public view.<sup>144</sup>

These massacres represent some of the worst in Afghan history, with the Mazar-i Sharif massacre considered the single worst attack on civilians in the entire conflict.<sup>145</sup> The sheer gravity of the crimes goes to explain the Afghan desire for justice. The facts moreover, constitute proof that war crimes, crimes against humanity and arguably, crimes of genocide are at issue. It is therefore of little practical significance that amnesties for certain crimes may be permitted in international law as it is clear that the kinds of crimes committed in the Afghan conflict include those which unequivocally impose a duty to prosecute. Furthermore, the Afghan amnesty bears the hallmarks of a blanket amnesty that also forcefully questions its legality at international law.<sup>146</sup>

The type of amnesty in the Afghan context appears on the surface to fall in the category of a democratically-elected government amnestying the crimes of a former regime. However, beneath the surface there are elements of self-amnesty in

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135. *Id.* § III.

136. *Id.* § I.

137. Survivors Describe Taliban, *supra* note 3.

138. *Id.*

139. Human Rights Watch, Massacres of Hazaras in Afghanistan § V (2001), available at <http://www.hrw.org/legacy/reports/2001/afghanistan/index.htm>.

140. *Id.*

141. Human Rights Watch, Afghanistan: Taliban Massacres Detailed (Feb. 18, 2001), available at <http://www.hrw.org/en/news/2001/02/18/afghanistan-taliban-massacres-detailed?print>.

142. Human Rights Watch, *supra* note 140, §§ I, IV.

143. *Id.*

144. *Id.*

145. Human Rights Watch, *supra* note 17, § I.

146. Noorani, *supra* note 65.

that many alleged perpetrators now occupy various parliamentary and executive positions in the Afghan government. The AIHRC report reflects a perception amongst Afghans that most violations were committed by those in power,<sup>147</sup> with the perpetrators including those in the People's Democratic Party of Afghanistan (PDPA); Khad security agency and Soviet army during the Soviet occupation; many faction leaders from the Mujahideen era; and the Taliban.<sup>148</sup> The participants also stressed that the same leaders are widely and publicly known to be human rights violators and continue in power today.<sup>149</sup> Human Rights Watch has specifically alleged that several highly placed members of the current Afghan government and legislature were implicated in the commission of war crimes including the former Defence Minister, Mohammed Qasim Fahim; Barhanuddin Rabbani; the current Energy Minister, Ismail Khan; the Army Chief of Staff, Abdul Rashid Dostam; and the current Vice-President, Karim Khalili.<sup>150</sup> Non-governmental figures who have been implicated include Gulbuddin Hekmatyar, a major warlord in southeastern Afghanistan, and Taliban leaders such as Mullah Omar who is still at large, and Jalaluddin Haqqani, who is wanted by the Americans but is also rumored to have been offered the role of Prime Minister in the Karzai government.<sup>151</sup> Due to the continuing existence of war criminals in their leadership, it would be very difficult for the Afghan government to argue that the amnesty should be upheld as a law passed by a democratic government, when the evidence suggests that the government stands to benefit from amnesty.

The third part of the doctrinal framework must still be applied as the pressing security concerns in Afghanistan blur the lines of legality by suggesting practical and political realities that may nevertheless justify the amnesty in legal terms. In fact, both of the legitimate reasons for failure to prosecute argued by van Zyl<sup>152</sup> could arguably be invoked by the Afghan government to say that the security of the nation hangs in the balance and practical obstacles, the absence of infrastructure, make it impossible to engage in criminal prosecution.

Regardless of the overarching rationale asserted, the four requirements advanced by van Zyl must be met in order for the state to avoid its international obligations, and in this respect, the Afghan amnesty still fails. First, the fact that the amnesty was passed six years following the transition<sup>153</sup> precludes the government

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147. AIHRC, *supra* note 4 at 11-13.

148. *Id.*

149. *Id.*

150. BLOOD-STAINED HANDS, *supra* note 3, § IV (B.); ECONOMIC INTELLIGENCE UNIT, *supra* note 43, at 4.

151. Part 3: Through the Eyes of the Taliban, ASIA TIMES, May 5, 2004, [http://www.atimes.com/atimes/Central\\_Asia/FE05Ag02.html](http://www.atimes.com/atimes/Central_Asia/FE05Ag02.html).

152. van Zyl, *supra* note 85, at 43-44.

153. Noorani, *supra* note 65.

from arguing that it is necessary for a peaceful transition.<sup>154</sup> Ongoing insecurity is indeed a threat to the sustenance of the country, but there is no evidence to suggest that amnesty is the missing ingredient for peace, particularly given the country's history of amnesties and repeated relapses of instability. Furthermore, this first requirement requires circumstances where an amnesty is the "make-or-break" component of a peace negotiation rather than an ex-post law colored by suspicion of self-amnesty.

The second requirement that a majority of citizens support or endorse the policy<sup>155</sup> is arguably met as a result of the amnesty being passed by the democratically-elected Karzai government,<sup>156</sup> however this fact is only persuasive in the absence of popular dislike for the amnesty. In this case, the AIHRC report<sup>157</sup> as well as the public outcry<sup>158</sup> following the enactment of the law, suggests that a majority of the citizens do not support the law.

The third and fourth requirements<sup>159</sup> pertaining to good faith by the government in fulfilling all other legal obligations as an assessment of good faith is an inherently political inquiry. On the one hand, the government has demonstrated good faith by adopting the Action Plan and the comprehensive mechanisms contained therein.<sup>160</sup> Additionally, the amnesty law attempts to address the needs of victims by allowing applications to be brought in furtherance of civil actions.<sup>161</sup> On the other hand, human rights organizations have been repeatedly calling upon the government to actually implement the Action Plan,<sup>162</sup> which it has failed to do thus far. As well, the duty to make reparation to victims is amongst the international obligations it must comply with and it may be said that the mere allowance for civil actions does not suffice to meet this obligation.<sup>163</sup> Finally, irrespective of inability or circumstance, the doctrinal framework supports the contention that amnesties may not apply to crimes against humanity, genocide or war crimes – which, as demonstrated, appear to come within the purview of the amnestied crimes in Afghanistan.<sup>164</sup>

The legality of amnesty in Afghanistan does not afford a simple answer. It is complicated by the nature of the Afghan conflict – which one might argue has straddled the boundary between intra- and inter-state war – involving the commission of numerous kinds of atrocities by various actors, over the course of almost a

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154. van Zyl, *supra* note 85, at 67.

155. *Id.* at 52.

156. ICTJ, *supra* note 34; Press Release, *supra* note 34.

157. AIHRC, *supra* note 4, at 12.

158. Noorani, *supra* note 65; Thier & Worden, *supra* note 67.

159. van Zyl, *supra* note 85, at 52-54.

160. Int'l Center for Transitional Just., Submission to the Universal Periodic Review of the UN Human Rights Council Fifth Session: May 4-15, 2009, Nov. 3, 2008, ¶ 11 [hereinafter ICTJ].

161. *Id.*; Noorani, *supra* note 65.

162. ICTJ, *supra* note 161; *see also* Afghanistan Justice Project, <http://www.afghanistanjusticeproject.org> (last visited Mar. 31, 2009).

163. van Zyl, *supra* note 85, at 53.

164. *Id.* at 54.

quarter century. Also, despite there being some agreement in international law when it comes to the proscribed limits of amnesty, the present circumstances of the country suggest some allowance. Nevertheless, taking into account the developments in international law and those principles which are certain, combined with the application of a doctrinal framework in the Afghan context – it becomes evident that an amnesty exceeds the permissible limits of international law.

#### IV. REALISTIC PROSPECTS FOR ACCOUNTABILITY

The illegality of amnesty does not resolve the problem of transitional justice or accountability in Afghanistan. As is well known amongst international legal theorists and practitioners alike, the status of international law may not automatically impact a domestic regime, instead state sovereignty and the ability of the state to dictate its own laws reigns supreme in a national setting.<sup>165</sup> Accordingly, even if consensus emerged in the international community as to the illegality of the amnesty in Afghanistan, the Afghan government may quite feasibly uphold its domestic application. Thus, it becomes necessary to examine what realistic prospects for accountability are available to the Afghan people, who have confirmed through history and experience that criminal justice will be necessary for a successful transition.

##### A. Domestic Prospects

In a domestic setting, the prospects for accountability are unfortunately quite grim. The amnesty barrier is but one element in an exceedingly complex domestic environment that is at present, completely unreceptive to national mechanisms of accountability. Under current circumstances, the first practical step towards bringing perpetrators accountable would involve removing the amnesty barrier through a constitutional challenge. "Independent voices" in Afghanistan have already questioned Parliament's authority to pass legislation that undermines the constitutional rights of citizens to receive legal redress.<sup>166</sup> Complainants could rely on the constitutional provisions which seek to uphold human rights and individual liberty<sup>167</sup> as well as those dealing with accusations against ministers or members of the

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165. CASSESE, *supra* note 100, at 64-65.

166. Noorani, *supra* note 65.

167. THE CONSTITUTION OF AFGHANISTAN, pmbl., arts. 6, 7, 24 (Afg.). The Constitution of Afghanistan contains several articles requiring the protection of human rights. The preamble establishes Afghanistan as an Islamic state and specifically refers to "the previous injustices, miseries and innumerable disasters," which befell the country. *Id.* pmbl. It attests to the observance of the UN Charter and the Universal Declaration of Human Rights and the need to "[f]orm a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples' freedoms and fundamental rights. . . ." *Id.* Articles 6 and 7 elaborate on these principles and article 24 outlines the state's obligation to respect the liberty and human dignity of the Afghan people. *Id.* arts. 6, 7, 24.

National Assembly in instances where government officials stand accused.<sup>168</sup> Realistically however, the feasibility of a constitutional challenge hinges on the legal system being transparent, independent, fair and impartial – criteria that have not yet proven themselves in the Afghan system.<sup>169</sup> For example, the judiciary has been accused of being staffed with “a large number of corrupt and known human rights violators.”<sup>170</sup>

Therein lies the second challenge to domestic accountability – that is, the lack of an operative judicial system that ensures, or at least appears to ensure, that justice is being done.<sup>171</sup> Prior to the passage of the amnesty law, the few attempts to hold war criminals accountable have involved what can only be referred to as show trials.

The first trial of Abdullah Shah, a former Mujahideen commander, took place in October 2002. Shah was accused of grave human right violations, including twenty counts of murder.<sup>172</sup> He was a figure renowned in Afghanistan for the brutality of his crimes and his links to warlord Gulbuddin Hekmatyar.<sup>173</sup> Shah was ultimately convicted and sentenced to death in a retrial after the first judge was allegedly dismissed for accepting a bribe.<sup>174</sup> During the retrial, no defense lawyer was present, twenty-three written complaints formed the bulk of the evidence and there was no opportunity for cross-examination.<sup>175</sup> Furthermore, reports provided to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions indicated Shah was wearing leg irons throughout his trial, was forced to sign a con-

168. *See id.* art 78 (providing that accusations against a Minister for crimes against humanity or other crimes must be submitted to a special court). Article 102 provides that a member of the National Assembly that is accused of a crime shall be prosecuted in the ordinary course. *Id.* art. 102.

169. *See Nadery, supra* note 11, at 175-76.

170. *Id.*

171. Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, Official Gazette No. 851 (May 21, 2005) (Afg.), available at [http://afghanistantranslation.com/Laws/Law\\_on\\_Organization\\_and\\_Jurisdiction\\_of\\_Courts\\_of\\_Afghanistan\\_English\\_rev-MGH\\_ET.doc](http://afghanistantranslation.com/Laws/Law_on_Organization_and_Jurisdiction_of_Courts_of_Afghanistan_English_rev-MGH_ET.doc) The Afghani judicial system is regulated according to a statute created May 21, 2005 as an amendment to the Constitution. *Id.* art. 1. This document provides for the establishment of a “Public Security Dewan.” *Id.* art. 18. It is not clear whether the trials for war criminal have taken place in this forum as the reports variously refer to as a “Public Security Court,” “National Security Tribunal,” and “Kabul National Security Primary Court.” It may also be that the two trials were held in a separate special court under the “National Directorate of Security,” the intelligence service established during the Soviet regime.

172. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2003: AFGHANISTAN, AI Index POL 10/003/2003, available at <http://asiapacific.amnesty.org/report2003/afg-summary-eng>.

173. Carlotta Gall, *With Killer's Execution, Karzai Signals Move on Warlords*, N.Y. TIMES, May 3, 2004, at A14.

174. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF DISAPPEARANCES AND SUMMARY EXECUTIONS, ADDENDUM: MISSION TO AFGHANISTAN, U.N. Doc. E/CN.4/2003/3/Add.4, ¶¶ 50-54 (2003).

175. *Id.*

fession and was tortured in detention.<sup>176</sup> The Afghan government's response did not include any investigation into these alleged improprieties.<sup>177</sup>

At the time of Shah's conviction, the country still had in place a death penalty moratorium that had commenced with the fall of the Taliban.<sup>178</sup> The moratorium came to an end however, on April 20, 2004, when Shah was taken from his cell in Kabul to a prison on the outskirts of the city and shot in the back of the head.<sup>179</sup> His family only learned of his death three days later and according to his cousin, Shah's nose appeared to have been broken "by something like a rifle butt," suggesting he was beaten before being killed.<sup>180</sup>

The second trial of Assadullah Sarwari, the head of the Afghanistan intelligence service during the Communist regime in the late 1970s, took place between December 2005 and February 2006 in the course of three hearings.<sup>181</sup> Sarwari did not have legal counsel at his trial because he could not afford a lawyer and had been detained without trial since 1992 when he was arrested by the Mujahideen.<sup>182</sup> Most of the evidence presented concerned Sarwari's involvement in the arrest and subsequent disappearance of up to seventy members of the Mujeddadi family in June 1979.<sup>183</sup> In addition, sixteen witnesses gave testimony while others spontaneously gave evidence from the public gallery, including members of the victims' families.<sup>184</sup> As he was representing himself, Sarwari was not given the opportunity to cross examine any of the witnesses. He did however, have the opportunity to read out a defense statement denying all allegations against him.<sup>185</sup> The judicial panel took fifteen minutes to deliberate after which it pronounced Sarwari's guilt and sentenced him to death, which penalty he now awaits.<sup>186</sup>

The immediate response of the Afghan public to both convictions reflected happiness and relief that the government was finally making efforts to hold criminals accountable. The decree ordering the execution of Shah stated that "it should

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176. Press, Release Amnesty International, Afghanistan: First execution since fall of Taliban, (Apr. 26, 2004), available at <http://www.amnesty.org/en/library/asset/ASA11/007/2004/en/e1e6302b-d5e1-11dd-bb24-1fb85fe8fa05/asa110072004en.pdf>.

177. *Id.*

178. *Id.*

179. Gall, *supra* note 174, at 1.

180. *Id.*

181. Center for Human Rights and Global Justice, New York University School of Law, Observations of the Special Rapporteur, Afghanistan: Death Sentence of Asadullah Sarwari, available at <http://www.extrajudicialexecutions.org/communications/afghanistan.html>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

be a lesson to other people that a person who commits a crime will be brought to justice."<sup>187</sup> When Sarwari's judgment was read out, the packed courtroom broke out into applause with victims' families proclaiming, "Allahu Akbar!" ["God is great!"].<sup>188</sup>

The public reaction is indicative of the strong desire for criminal accountability in Afghanistan. However, in the wake of Shah's secretive and sudden execution, reports began to surface suggesting that it had been orchestrated by "powerful political players to eliminate a key witness to human rights abuses."<sup>189</sup> In particular, a report by Amnesty International stated the following:

During his detention, Abdullah Shah reportedly revealed first hand evidence against several regional commanders currently in positions of power against whom no charges have been brought. They are among the scores of other Afghans implicated in serious crimes, including war crimes and crimes against humanity. The lack of a fair and independent mechanism to deal with such crimes means that most of the accused have not been brought to justice and remain in positions of power from which they continue to threaten the Afghan population. This is of particular concern in the context of upcoming elections due to be held in September 2004 when it is believed that several of these individuals will be standing for political office.<sup>190</sup>

Such allegations of government connivance have become common parlance in the Afghan perception of justice, as illustrated in the AIHRC report.<sup>191</sup> Thus, any benefit or relief that may have been felt as a result of these show trials is effectively reversed upon the realization that the government has merely been creating a façade of justice to conceal its own complicity. This perception is worsened by the government's reticence to deal with additional perpetrators and confirmed with the passage of the amnesty bill – both of which indirectly point to a governmental interest in preventing accountability. According to Madeline Morris, "it is unlikely that a government that is responsible for the crimes would be efficacious in their prosecution."<sup>192</sup>

Furthermore, although there may be a value of symbolism in the conduct of show trials that might result in a perception of justice for the local population,

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187. Gall, *supra* note 174, at 1.

188. Griff Witte and Javed Hamdard, Afghan Convicted of War Crimes, WASHINGTON POST, Feb. 26, 2006, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/25/AR2006022501447.html>.

189. Amnesty International, *supra* note 177, at 1.

190. *Id.*

191. AIHRC, *supra* note 4, at 12.

192. Madeline Morris, *Lacking a Leviathan: The Quandaries of Peace and Accountability*, POST CONFLICT JUST., 2002, at 135 (M. Cherif Bassiouni ed. 2002).



show trials are inevitably weakened by a paradox of illegitimacy, explained by Martii Koskiniemi as follows:

This is the paradox: to convey an unambiguous historical “truth” to its audience, the trial will have to silence the accused. But in such case, it ends up as a *show trial*. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the versions of the truth represented by the prosecutor and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands.<sup>193</sup>

The conduct of sham or show trials devoid of due process, combined with the government’s selective and self-interested approach, therefore operate to cause more damage than could have been undone by the conviction of two war criminals.

An additional complicating factor in the domestic context is the unique status of Afghan law that is based on various Islamic, tribal and customary legal principles<sup>194</sup> – the combination of which leads to a highly idiosyncratic and complicated set of legal norms that are not easily receptive to what might otherwise be considered ‘universal’ conceptions of justice. For instance, the imposition of the death penalty in Afghanistan has already given rise to immense concern based on the mostly global consensus that it violates international law.<sup>195</sup> Normative concerns aside, the death penalty has enormous practical consequences for a transitional justice regime in Afghanistan as most international donors may refuse support on this basis.<sup>196</sup> This was one of the factors that severely weakened the Supreme Iraqi Criminal Tribunal (formerly the Iraqi Special Tribunal), as the United States was the only government willing to fund a penal system that imposed the death penalty.<sup>197</sup>

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193. Martii Koskiniemi, *Between Impunity and Show Trials*, MAX PLANCK UNYB 6, 2002, at 35 (Max Planck Yearbook of United Nations Law).

194. See Christina Jones-Pauly and Neamat Nojumi, *Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 825 (Fall 2004); Ali Wardak, *Building a Post-War Justice System in Afghanistan*, 41 CRIME, L., & SOC. CHANGE, 319–41 (2004).

195. See U.N., The Universal Declaration of Human Rights, Art. 5, <http://www.un.org/Overview/rights.html#a5> (last visited Mar. 27, 2009); U.N., International Covenant on Civil and Political Rights, Art. 6, U.N. Doc. CCPR/C/USA/Q/3, at 4, (Apr. 26, 2006), *available at* [http://www.unhcr.ch/tbs/doc.nsf/0/d1495dfbb5493eacc12571980051d2d6/\\$FILE/G0642626.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/d1495dfbb5493eacc12571980051d2d6/$FILE/G0642626.pdf); Amnesty International, *International Standards on the Death Penalty*, (January 2006), *available at* <http://www.amnesty.org/en/library/info/ACT50/001/2006>.

196. See Vanessa Blum, *A Slow Search for Justice in Iraq*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, Jan. 24, 2005, <http://www.ictj.org/en/news/coverage/article/360.html>.

197. *Id.*

Furthermore, the application of Afghan law in the prosecution of war criminals has shown itself to be extremely variable, depending on the relevance of certain cultural values and needs.<sup>198</sup> During the Taliban era, the government relied on Pashtun tradition and Islamic law to refuse to hand over Osama bin Laden to the United States, claiming that *Pashtunwali* prohibited the handing over of one's guests to his enemy.<sup>199</sup> The variability of the Afghan approach is also reflected in the prosecution of Shah and Sarwari, which was based on general principles of Hanafi jurisprudence rather than express criminal provisions because Afghan law does not expressly criminalize war crimes, crimes against humanity or genocide.<sup>200</sup>

This is not to say that an Islamic legal system is incapable of implementing judicial mechanisms of transitional justice. Transitional justice is meant to be highly contextualized to the cultural and societal needs of the population.<sup>201</sup> The problem however, is that the few examples of Islamic-based legal systems attempting transitional justice tend to reflect dismal failures. The Supreme Iraqi Criminal Tribunal, established to try international crimes committed between July 1968 and May 2003 under Iraqi national law,<sup>202</sup> has been viewed by some as a symbol of victor's justice<sup>203</sup> – especially evidenced by the swift and highly publicized trial and execution of Saddam Hussein.<sup>204</sup> Similarly, the aftermath of the East Timorese conflict, domestic trials held in Indonesia in have been criticized as sham trials, mainly due to the the number of acquittals, light sentences, and incompetence of the prosecution.<sup>205</sup>

In spite of this, most recommendations for transitional justice in Afghanistan have focused on establishing a domestic mechanism that would produce results more likely to be felt by Afghans than international mechanisms. To this end, international human rights groups have repeatedly called for the establishment of a special tribunal to try the perpetrators of international crimes.<sup>206</sup> Similarly, the

198. Wardak, *supra* note 195.

199. Misdaq, *supra* note 15, at 243.

200. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/4/20/Add.1 (Mar. 12, 2007) (prepared by Philip Alston).

201. van Zyl, *supra* note 85, at 42-57.

202. Law of the Supreme Iraqi Criminal Tribunal, AL-WAQA'II AL- IRAQIYA, (Oct. 18, 2005), No. 4006, 14 Ramadan 1426 Hijri, 47th Year.

203. Ellen Knickmeyer, *Hussein Verdict Near After Trial With 'Serious Shortcomings,'* WASHINGTON POST, Nov. 4, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301779.html>; See also Julia Preston, *Hussein Trial Was Flawed but Reasonably Fair, and Verdict Was Justified, Legal Experts Say*, N.Y. TIMES, Nov. 6, 2006, available at <http://www.nytimes.com/2006/11/06/world/middleeast/06trial.html>; see also M. Cherif Bassiouni, *Prosecuting Saddam Hussein*, FOREIGN POLICY, July 2005, available at [http://www.foreignpolicy.com/story/cms.php?story\\_id=3120](http://www.foreignpolicy.com/story/cms.php?story_id=3120).

204. Knickmeyer, *supra* at note 204, at A01.

205. U.C. BERKELEY WAR CRIMES STUDIES CENTER, THE INDONESIAN AD HOC TRIBUNAL FOR EAST TIMOR, [http://socrates.berkeley.edu/~warcrime/East\\_Timor\\_and\\_Indonesia/Judges\\_Training\\_Seminar/Judges\\_Training\\_seminar.htm](http://socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Judges_Training_Seminar/Judges_Training_seminar.htm), (last visited Mar. 27, 2009).

206. HUMAN RIGHTS WATCH, SPECIAL COURT NEEDED FOR PAST ATROCITIES, (July 6,

AIHRC calls upon the Afghan government to establish a Special Prosecutor's Office to investigate and prosecute current and past atrocities and human rights violations, in addition to a specialized Chamber to hear cases of war crimes and crimes against humanity committed during the conflict.<sup>207</sup>

What these recommendations fail to recognize is that the realistic prospects for accountability through domestic mechanisms are independently very weak if not non-existent, as a result of numerous inescapable factors including: the poor institutional capacity of the current judicial system, the experience of show trials, the complicity of the Afghan government, the complexity of the Islamic legal system, the increased instability in the country, and now, the passage of the amnesty law. It is in light of these factors that international mechanisms must be considered and pursued in order to offer Afghans and the international community, what little justice may be had.

### ***B. International Prospects***

According to Bassiouni, "[a]ccountability must be recognized as an indispensable component of peace and eventual reconciliation" and it "is the antithesis of impunity, which occurs either *de jure* through the granting of amnesties or *de facto* through the failure of a state to enforce legal norms either willingly or as a result of insufficient legal infrastructure."<sup>208</sup> Both these elements of impunity are present in the Afghan context and yet the need for criminal accountability through prosecutions is undeniable, as illustrated by the Afghan perception of justice, the ongoing insecurity in the absence of prosecution and the widespread opposition to the amnesty law.

As domestic mechanisms that normally ought to constitute the primary means of achieving accountability are not realistically available, there are several models for accountability which may be employed in the alternative.<sup>209</sup> According to Morris, "[b]y vesting prosecutorial power in an external authority, perpetrator regimes are impeded in their ability to shield perpetrators from justice."<sup>210</sup> The exercise of an external authority can occur via three avenues: the first, is internationally and

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2005), available at <http://www.hrw.org/en/news/2005/07/06/afghanistan-bring-war-criminals-justice?print>; HUMAN RIGHTS WATCH, OPEN LETTER FROM HUMAN RIGHTS WATCH TO THE INTERNATIONAL AFGHANISTAN SUPPORT CONFERENCE ON JUNE 12, 2008, IMPUNITY, TRANSITIONAL JUSTICE, AND NEEDED JUDICIAL REFORM, (June 9, 2008), available at <http://www.hrw.org/en/news/2008/06/09/open-letter-human-rights-watch-international-afghanistan-support-conference-june-12->.

207. IHRC, *supra* note 4 at 50-51.

208. M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, POST CONFLICT JUST., 2002, at 26 (M. Cherif Bassiouni ed. 2002).

209. *Id.* at 27.

210. Morris, *supra* note 193, at 135.

predominantly UN-sponsored prosecution through the establishment of ad-hoc tribunals<sup>211</sup> such as was done for the former Yugoslavia,<sup>212</sup> Rwanda,<sup>213</sup> Sierra Leone<sup>214</sup> and Cambodia.<sup>215</sup> The second, is the assertion of universal jurisdiction by states over *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture.<sup>216</sup> The third, is the exercise of jurisdiction by the International Criminal Court.<sup>217</sup>

The first and third avenues cannot apply to ensure accountability for crimes committed during the Afghan conflict. With respect to the International Criminal Court, although Afghanistan is now party to the Rome Statute,<sup>218</sup> the Court's jurisdiction is only prospective and therefore would not be exercised to investigate or prosecute past crimes. The rationale for not establishing an ad-hoc tribunal is less straightforward. In fact, a 2001 report of experts on Afghanistan provided that "[s]erious consideration should also be given to an international sponsored regime for the judicial prosecution of those responsible for war crimes and human rights violations."<sup>219</sup> Nearly eight years after this suggestion however, support for such a regime has been virtually non-existent, in large part due to the acknowledgment that establishing basic infrastructure and ensuring security take priority in the distribution of nation-building resources for Afghanistan. But there are also the unique circumstances of the Afghan conflict and Afghan law, that questions whether the model of ad-hoc tribunals can simply be transplanted to affect justice on the ground.

In her advocacy for a "mixed domestic-international tribunal" (also referred to as a "hybrid tribunal"),<sup>220</sup> Laura Dickinson appeals to the approach taken in Kosovo and East Timor to suggest that the model may "hold promise in a place such as Afghanistan where external solutions are often greeted with suspicion, but internal solutions are not workable."<sup>221</sup> The model is based on a hybrid structure wherein the institution and the applicable law consist of a blend of the international and

211. Bassiouni, *supra* note 209, at 429-658 (discussion of the "International Judicial Model" and "Mixed Judicial Model").

212. UN Resolution 827, *supra* note 86.

213. UN Resolution 955, *supra* note 86.

214. See S.C. RES. 1315, U.N. Doc, S/RES/1315 (Aug. 14, 2000) (calling for the establishment The Special Court for Sierra Leone (SCSL) to be set up jointly by the government of Sierra Leone and the United Nations)

215. See G.A. Res 52/135, U.N. Doc A/RES/52/135 (Feb. 27, 2998) (calling for the establishment of The Extraordinary Chambers in the Courts of Cambodia (ECCC) set up jointly by the government of Cambodia and the United Nations).

216. Bassiouni, *supra* note 209, at 27.

217. Morris, *supra* note 193, at 135.

218. Press Release, Coalition for the International Criminal Court, Afghanistan Signs Up for the International Criminal Court (Feb. 10, 2003) available at, <http://www.iccnw.org/documents/02.10.2003-Afghanistan.pdf>

219. Scharf & Williams, *supra* note 38, at 717.

220. Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y 23, 26 (2003).

221. *Id.* at 40.

domestic, to be applied by foreign judges and lawyers and their domestic counterparts, working together in a team.<sup>222</sup> It is noteworthy that her proposal was made prior to the establishment of the Iraqi Special Tribunal, which now stands as an illustration of the significant shortcomings of such a model, particularly in the area of legitimacy and impartiality.<sup>223</sup>

A more fundamental problem in Dickinson's analysis however, is her focus on the hybrid model as providing a solution to the wider problem of terrorism, with accountability in Afghanistan as a convenient byproduct. In pointing out that, "[t]he Bush administration has not pursued a consistent course," in its treatment of suspected terrorists both with regard to Guantanamo and the treatment of US nationals or legal aliens on American soil, Dickinson's aim is to illustrate the utility of transitional justice and particularly, the hybrid tribunal, in "the fight against terrorism."<sup>224</sup> The proposal is therefore completely misdirected when it comes to assessing the suitability of accountability structures because it does not seek to respond to the crimes committed against Afghans; rather it proposes what is now clearly been proven as an unfeasible option of prosecuting "terrorists" in Afghanistan.

This leaves only one avenue for accountability, the exercise of universal jurisdiction, that not only represents a theoretically feasible alternative, but has actually been successfully exercised to prosecute crimes committed during the Afghan conflict. Universal jurisdiction allows the courts of any state to exercise jurisdiction without regard to the territory where the crime occurred or the nationality of the perpetrators or victims.<sup>225</sup> It is particularly useful in the face of governments who are unwilling or unable to prosecute because it vests jurisdiction in all states.<sup>226</sup> Moreover, universal jurisdiction over genocide, war crimes and crimes against humanity has "come to be widely treated as an accepted feature of customary international law."<sup>227</sup>

The exercise of universal jurisdiction goes as far back as 1962 when the Israeli Supreme Court applied it to prosecute Nazi war criminal, Adolf Eichmann.<sup>228</sup> Later, when Spain sought to have extradited from the United Kingdom, former Chilean President Augusto Pinochet, the House of Lords confirmed the existence of universal jurisdiction and found that Pinochet's immunity as former head of

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222. *Id.* at 27.

223. See Knickmeyer, *supra* note 204; Preston, *supra* note 204; Bassiouni, *supra* note 204.

224. Dickinson, *supra* note 221, at 24-26.

225. Morris, *supra* note 193, at 141.

226. *Id.*

227. Morris, *supra* note 193, at 148.

228. Attorney-General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 277 (IsrSC 1962).

state could not protect him from prosecution for *jus cogens* crimes.<sup>229</sup> A more recent example involved the conviction of four Rwandans in Belgium for genocide and other crimes related to their involvement in the 1994 Rwandan genocide.<sup>230</sup>

Most persuasive in this context however, are four recent cases involving the prosecution of Afghans for their complicity in the commission of international crimes during the Afghan conflict. These cases illustrate a remarkable application of universal jurisdiction that ensures the due process rights of the accused, while preventing a global culture of impunity in the wake of mass atrocity.

On July 19, 2005 in the United Kingdom, a jury convicted Faryadi Zardad of conspiracy to torture and conspiracy to take hostages.<sup>231</sup> He was sentenced to twenty years' imprisonment.<sup>232</sup> On February 7, 2007, the Court of Appeal dismissed Zardad's appeal and upheld the conviction.<sup>233</sup> Zardad, from the nearly lawless period between 1992 to 1995, was a military commander (warlord) of a faction known as Hezb-e Islami that controlled Sarobi, a town south of Kabul.<sup>234</sup> His faction had set up checkpoints on the road to Sarobi and was known to engage in interrogation, detention and torture of Afghans who traveled there.<sup>235</sup> The evidence put forward by the prosecution included numerous witnesses comprised of aid workers, a UN official, two journalists and a number of Afghans.<sup>236</sup> During the trial, evidence from Afghan witnesses - many in fear of their lives - was beamed into the British court via a video link from the UK embassy in Kabul.<sup>237</sup>

Zardad had come to the UK in 1998 on a false passport, after which the police mounted an extensive investigation involving officers making several trips to Afghanistan under armed escort to track down Zardad's victims.<sup>238</sup> A significant challenge for the prosecution was to establish Zardad's command responsibility as he did not personally carry out torture. In the original sentencing hearing, Mr. Justice Treacy said to the accused, "It is clear to me from the evidence that for a period of over three years you, as a powerful warlord, presided over a brutal regime of terror in areas under your control."<sup>239</sup> He went on to say, "You represented the only real form of authority, law and government in the areas under your control and you grossly abused your power."<sup>240</sup> The Court of Appeal, in upholding the

229. R. v. Ex Parte Pinochet [1999] 1 All ER 577 (H.L.)(U.K.).

230. Peter Ford, *Belgium Pursues Justice Without Borders*, CHRISTIAN SCIENCE MONITOR, June 11, 2001, at 1.

231. . v. Zardad, [2007] EWCA (Crim) 279, ¶¶ 1-56.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Afghan Zardad Jailed for 20 Years, BRITISH BROADCASTING CORPORATION NEWS, July 19, 2005, [http://news.bbc.co.uk/go/pr/ft/-/2/hi/uk\\_news/4695353.stm](http://news.bbc.co.uk/go/pr/ft/-/2/hi/uk_news/4695353.stm).

238. *Id.*

239. *Id.*

240. *Id.*

conviction, also confirmed that the strength of the evidence was sufficient to prove the charges.<sup>241</sup>

On October 14, 2005, in the Netherlands, The Hague District Court convicted Hesamuddin Hesam and Habibullah Jalalzoy for war crimes and acts of torture committed during the Afghan civil war in the 1980s.<sup>242</sup> They were sentenced to twelve and nine years' imprisonment respectively.<sup>243</sup> Both accused had come to the Netherlands in the early 1990s, seeking asylum, and were eventually charged under the Dutch *International Crimes Act* that came into force in October 2003.<sup>244</sup> Their convictions were subsequently upheld by the Court of Appeal in The Hague on January 29, 2007.<sup>245</sup> Both Hesam and Jalalzoy were high-ranking soldiers in Kabul.<sup>246</sup> Hesam was in charge of the Khad military intelligence service, while Jalalzoy was head of the interrogations department.<sup>247</sup> The evidence in both cases consisted of several witness statements from Afghan victims which were made both over the telephone to the investigative team and in front of an examining magistrate in Kabul.<sup>248</sup> The investigation and eventual prosecution was prompted in 1998 with the establishment of the Netherlands National Investigation Team for War Crimes ("NOVO"), which works with a variety of experts to carry out investigations of war criminals in the Netherlands.<sup>249</sup>

Although both the trial and appeal decisions pertaining to Hesam and Jalalzoy concluded with lengthy, reasoned judgments indicating that the evidence was sufficient for conviction and the procedural fairness rights of the accused were not infringed by the inability to cross-examine witnesses – the cases still raised questions as to the assurance of due process in the exercise of universal jurisdiction, particularly where the investigation is remotely conducted and evidence remotely gathered. The suspects in these cases, unlike Zardad, did not have the benefit of all the procedural safeguards including live witness testimony and the right to cross-

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241. Zardad, *supra* note 232, at ¶¶ 1-56.

242. Cedric Ryngaert, *Another Afghan Case in the Hague District Court: Universal Jurisdiction over Violations of Common Article 3*, THE HAGUE JUSTICE PORTAL, Sept. 13, 2007, <http://www.haguejusticeportal.net/eCache/DEF/8/213.html>.

243. Appeal Judgement in the case of Hesamuddin Hesam, THE HAGUE JUSTICE PORTAL, Jan. 29, 2007, translated at, <http://www.haguejusticeportal.net/eCache/DEF/7/502.html>; Appeal Judgement in the case of Habibullah Jalalzoy, THE HAGUE JUSTICE PORTAL, Jan. 29, 2007, translated at <http://www.haguejusticeportal.net/eCache/DEF/7/501.html>.

244. Hesam, *supra* at note 244; Jalalzoy, *supra* at note 244.

245. Hesam, *supra* at note 244; Jalalzoy, *supra* at note 244.

246. Hesam, *supra* at note 244; Jalalzoy, *supra* at note 244.

247. Hesam, *supra* at note 244; Jalalzoy, *supra* at note 244.

248. Hesam, *supra* at note 244; Jalalzoy, *supra* at note 244.

249. Heshamuddin Hesam, TRIAL WATCH, [http://www.trial-ch.org/en/trial-watch/profile/db/facts/heshamuddin\\_hesam\\_391.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/heshamuddin_hesam_391.html) (last visited March 31, 2009).

examine, to which the accused is customarily entitled in criminal proceedings.<sup>250</sup> Furthermore, concern for due process standards is considered one of the most serious shortcomings in the exercise of universal jurisdiction.<sup>251</sup>

However, a recent decision of The Hague District Court on June 25, 2007, acquitting Abdullah F.,<sup>252</sup> another Afghan military official and one of the deputies to the Director of the Khad,<sup>253</sup> is an illustration of the Dutch Court's very careful and reasoned approach to the evidence in these cases, contrary to what might have been the impression following the convictions of Hesam and Jalalzoy. The Court concluded that the evidence supported the finding that the Khad did submit persons to physical violence, cruel and inhumane treatment and torture during interrogations and that the Head of the Interrogation Department was in control of the employees of that department.<sup>254</sup> However those conclusions were not sufficient to link the accused to the commission of such acts.<sup>255</sup> More importantly, the Court recognized the inherent limitations in the prosecution of crimes committed in a foreign conflict in the following statement:

The criminal proceedings against the defendant refer to offences allegedly committed more than twenty years ago in a country torn apart by political, religious and ethnic disputes and by acts of violence. Many of those disputes still exist today. This fact, but especially the lapse of time, calls for prudence when studying the witness statements. This is even more important because it concerns events in a society, which in all areas - cultural, technical, economical and political - is so totally different from the Dutch society, that the Court can hardly relate anything to facts and circumstances 'that are generally known' and to understanding of common organization structures and relations, so therefore the Court is obstructed in their assessment of the witness testimonies.<sup>256</sup>

This recognition of its own limitations by the Court actually operates to support the exercise of universal jurisdiction because it directly responds to the criticism that such jurisdiction raises evidentiary and due process concerns, by implicitly requiring a higher threshold of proof before conviction.

That being said, the Court in no way questioned its ability to hear the case on the basis of universal jurisdiction. In fact, it maintained this ability even in the face of the recent Afghan amnesty law which the accused attempted to raise as a

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250. Ryngaert, *supra* note 243; Kriangsak Kittichaisaree, *INTERNATIONAL CRIMINAL LAW* 288-99 (2001).

251. Morris, *supra* note 193, at 141.

252. 09/750001-06 Case against Abdullah F., DISTRICT COURT THE HAGUE, June 25, 2007, [http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol\\_2\(2\)/Article%20Ryngaert-EN.pdf](http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2(2)/Article%20Ryngaert-EN.pdf).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*



defense.<sup>257</sup> To this, the Court concluded that the entry into force of such a law in Afghanistan does not automatically imply that the Dutch Public Prosecution service is no longer entitled to start criminal proceedings against suspects residing in the Netherlands.<sup>258</sup> The Court then added the following proviso to its conclusion:

[T]he Court is aware of the fact that an amnesty regulation can have great importance within the framework of the attempts to reach reconciliation and recovery of stability. This does not affect the unbearable thought that war criminals would be able to travel freely abroad and could end up standing there face to face with their victims who meanwhile have fled to other countries. This does not only involve the Afghan, but also the Dutch legal order. In this respect the District Court considers that the fact that an amnesty regulation has been adopted should not be overlooked, but at the same time this does not imply that the right to prosecute should become ineffective.<sup>259</sup>

Thus, both British and Dutch case law illustrate remarkable support for the recent application of universal jurisdiction to crimes committed during the Afghan conflict, in a manner that attempts to respond to the inherent weaknesses in the exercise of such jurisdiction. Moreover, the active involvement of Afghans in the process and particularly the ability of victims to convey their statements and testimony from a safe distance, speaks to the ability of this approach to have an impact on the ground, in addition to the general deterrent impact on perpetrators seeking refuge in other countries.

Still, an unavoidable weakness in this approach, that is present in any of the international avenues for accountability, is the perception that the justice being imposed is a western or foreign brand of justice, alien to the needs of local Afghans. In other words, international prosecutions wrongly assume that international truth and domestic truth are one in the same.<sup>260</sup> This critique implicitly suggests that the truth revealed through an international prosecution does not have the same impact as would occur with domestic trials. Finally, an additional complicating layer in this context is the critique that universal jurisdiction can perpetuate conflict where it is deployed for political reasons.<sup>261</sup>

With respect to Afghanistan, it is certainly true that the impact of an international prosecution will not be felt in the same way that a fairly-run domestic trial would. But as was the case with the former Yugoslavia and Rwanda, there is little

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257. *Id.*

258. *Id.*

259. *Id.*

260. Koskiniemi, *supra* note 193, at 19.

261. Morris, *supra* note 192, at 151.

institutional capacity to carry on local trials, and even less political capacity to do so in a manner that would allow for a domestic truth to emerge. Furthermore, given the overarching context of the American-led “War on Terror,” the prosecution of Afghans will undoubtedly be seen as an imposition of western conceptions of justice. This is a reality and reflection of the current global state of affairs, but it calls into question whether it is acceptable to allow for a system that permits Afghans (and others) to be tried or detained in Guantanamo Bay for their alleged crimes against America and the rest of the world, whilst ignoring any attempt to hold accountable those perpetrators who engaged in atrocious crimes against the Afghan people for nearly a quarter century.

## V. CONCLUSION

Transitional justice mechanisms are necessarily idealistic, but they also aim to be pragmatic. In Afghanistan, a model for transitional justice has been set out in the Action Plan adopted by the government that incorporates indispensable elements of a comprehensive approach including vetting processes, institutional reform, truth telling and reconciliation.<sup>262</sup> But a conspicuous gap is the element of justice, which has been misperceived as contrary to the objective of peace in Afghanistan. The decision to grant amnesty to perpetrators of war crimes is a further consolidation of this misperception. Still, the specter of increased instability and a return to the violent cycles of the past, becomes a more real threat every day and in the meantime, accountability continues to be denied to ordinary Afghans. A pragmatic and realistic approach to transitional justice can therefore only be premised on national courts exercising universal jurisdiction as a means of affecting criminal accountability. This requires vigilance on the part of the international community to ensure that a culture of impunity is not perpetuated and that perpetrators are brought to justice in a manner that is fair, transparent and inclusive of the needs and voices of the victims. It is not a perfect solution, but under the circumstances, there is no such thing. Afghans can only hope for justice to the extent possible.

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262. AIHRC, *supra* note 4, at 44-54.