

No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

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ARIANE LUESSEN, FEB 7 2022

After the withdrawal of international forces in August 2021, Afghanistan is yet again at the edge of transition, giving rise to the question on how to realise transitional justice and sustainable peace. What lessons can be learned from the past? While the Afghan history is marked by constantly shifting alliances, this paper focusses specifically on the transition after the fall of the Taliban in 2001. In 2002, both influential international actors and the Afghan government argued that pursuing justice could disturb the fragile peace (Saeed, 2021; Winterbotham, 2009: 4). Recapitulating the post-2001 transition, this essay puts forward the argument that the alleged trade-off of peace and justice and the denial of transitional justice has hindered the achievement of sustainable peace in post-2001 Afghanistan. While focusing on this particular case, this essay adds to the broader debate on whether justice represents an obstacle or a facilitator of peace (see Krzan, 2017).

The Taliban regime fell in 2001 when the US and its coalition allies invaded Afghanistan in the aftermath of 9/11 (Barfield, 2013: 171). The UN-led *Bonn Agreement*, which brought together representatives of different political factions and the international community, established an interim administration led by Hamid Karzai (HRW, 2009; Ruttig, 2017; Barfield, 2013). Literature argues that the 2001 Bonn conference paved the way for nation-building and represented a window of opportunity for transitional justice and to address the grave human rights abuses—including forced disappearances, massacres, and torture—during the time period of 1978-2001 (Gossman, 2012: 3; Ruttig, 2007: 16; Barfield, 2013: 165). The UN understands transitional justice as the range of instruments to “address large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation” (UNSC, 2004). However, the international community—led by the United States—subordinated transitional justice to the so-called “War on Terror” (Ruttig, 2007; Nadery, 2007; Saeed, 2020). In this paper, I argue that the denial of transitional justice has hindered sustainable peace in Afghanistan. Firstly, I briefly outline the process of transitional justice (or rather the lack thereof). Thereafter, I discuss various arguments advanced for and against delaying justice and critically assess the dichotomous understanding of peace and justice which the debate is built on. Finally, I conclude that the failure to address the legacy of large-scale abuses has eroded the foundation for sustainable peace by infringing the credibility and legitimacy of public authorities, denying the will of the people and weakening the fragile rule of law.

Why the denial of transitional justice hindered sustainable peace and stability

Although the newly appointed president had vowed to initiate a truth commission in 2002, this pledge was never fulfilled (FDHR, 2011: 36). While a few less controversial measures, such as the creation of a memorial site in Badakhshan and the declaration of the National Remembrance Day on December 10, were implemented, substantial measures, including the publication of the 1978-2001 conflict mapping report or vetting of perpetrators from public offices, were not (Saeed, 2021). In 2006, the Afghan Independent Human Rights Commission (AIHRC) had sought to launch a conflict mapping project to uncover all human rights violations during the wars from 1978 to 2001 (ICTJ, 2012). Underlining its necessity for meaningful reconciliation, the report ought to establish a shared narrative of the past conflicts to strengthen national unity (Gossman, 2013: 7). However, anyone attempting to document past crimes is confronted with the imminent threat of being killed, tortured or kidnapped. Eventually, the project was entirely silenced (Gossman, 2013; Breslin & Würth, 2017).

No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

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Based on the results of the AIHRC report, *A Call for Justice*, the AIHRC, the President's Office and the UN Assistance Mission to Afghanistan (UNAMA) drafted the *Action Plan for Peace, Reconciliation and Justice*. This plan laid out concrete steps of action for five central fields: the acknowledgement of the suffering of the Afghan people, credible and accountable state institutions, truth-seeking, reconciliation and the establishment of accountability mechanisms. In 2007, however, the "National Reconciliation, General Amnesty and National Stability Law" was adopted. Unlike the previously drafted plan, this envisaged a blanket amnesty—an unconditional amnesty encompassing all crimes committed during a conflict (Hadden, 2017:371)—for perpetrators of massive human rights violations and crimes of past regimes (FDHR, 2011: 36; Saeed, 2021). Impunity thus turned into law.

The false dichotomy of peace and justice

Special Reporter to the Secretary General (SRSG) for Afghanistan Lakhdar Brahimi argued that justice would have to be postponed in order to move the peace process forward (UNAMA, 2002). Essentially, this prioritisation of peace over justice, which allowed for both the circumvention of transitional justice during the Bonn agreement and the later adoption of the amnesty law, had been built on a false dichotomy of the aims of peace and justice. Instead of prioritising peace over justice, various scholars in the 2000s actually argued that justice is a prerequisite for peace (Hansen, 2019: 951). Johan Galtung's conceptualisation of peace helps to shed light on the peace versus justice debate and the very narrow, negative definition of peace it entails.

According to Galtung (1969: 183ff), positive peace requires more than just the absence of violence, such as the restoring of relationships and the constructive resolution of conflicts. Peace and justice are inextricably linked, wherefore the underlying logic of "peace first, then justice" denies the fact that the two aims are not isolated from one another. Hence, there cannot be positive peace without justice. As the Secretary General (2004: 8) argued, justice and peace are not opposing forces. Rather, they may even promote and sustain one another. In order to emerge from the conflict, Afghanistan would have been required to confront its history (Gossman, 2012: 3). Otherwise, peace could only be a temporary state. Discontent would be bound to re-emerge at a later stage (Hansen, 2019: 951). In order to move towards sustainable, stable peace after transition, a more interconnected understanding of peace and justice is needed. Peace cannot be achieved at the cost of justice or vice versa.

The denial of justice threatened the credibility and legitimacy of democratic institutions

The amnesty law stated that those engaged in hostilities would be granted immunity if they would agree to reconcile with the Afghan government (HRW, 2005). According to the law's introduction, it was adopted in order to end the war, bolster national unity and build trust among the Afghan society (Kouvo, 2010). Literature suggests that amnesties can represent an important instrument for minimising human suffering and restoring peace after severe internal conflicts and transitions, wherefore the "benefit" of punishing the guilty shall be sacrificed (Goldsmith & Krasner, 2003: 51; Hadden, 2017: 358). The underlying goal is to bring together previously hostile factions in order to accept a new regime, as the continuation of conflict, which would cause the most severe human rights violations, should be prevented at all costs (Hadden, 2017: 362). However, at the same time, scholars argue that any progress demands reckoning with the past and amnesties simply delay the manifestation of grievances to the future (Fijalkowski, 2017: 119). Moreover, research shows that the dismissal of justice for the sake of securing peace frequently turns out to be shortsighted (HRW, 2009).

According to the AIHRC commissioner, Nader Nadery, the law incentivised people to act with impunity and thus made the government of Afghanistan appear weak (Boone, 2010). As research shows, confronting accountability in post-conflict societies may help to strengthen the rule of law which is important to build a new order on a solid foundation (see Stromseth, 2007). Criminal justice is central for the reaffirmation of relevant norms and the promotion of civic trust, whereas the failure to address such crimes threatens the legitimacy and the democracy of institutions (Nadery, 2007). Since almost every Afghan is affected by the consequences of war, an environment must be created in which the war traumas can be dealt with in order to reduce the risk of violence (Maass, 2006: 3). Moreover, in order to (re)establish trust between different factions in society, there needs to be a clear break from past abuses. The dominant narrative of "peace first, justice later" and the enactment of the amnesty law gravely affected the credibility of Afghanistan's new democratically elected government and the peace process at large (Nadery, 2007:

No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

Written by Ariane Luessen

175).

According to the International Federation for Human Rights (2011: 35), the systemic impunity of high-level perpetrators of war crimes and human rights violations has led to a continuous cycle of violence that has destroyed both the legitimacy and credibility of the Afghan justice system. Pursuing transitional justice in turn could have contributed to rebuilding trust in state institutions and the rule of law (Kent, 2017: 205) and thus leading to more sustainable peace. Hence, adopting a blanket amnesty law for the sake of building trust and strengthening national unity has proven to be counterproductive. As highlighted by the Secretary General (2011: 4), the lack of a government's responsiveness to accountability for serious crimes draws the population to belligerents for their security needs, which makes the recurrence of violence more likely. Hence, the circumvention of justice has not increased trust and national unity, but rather, destroyed the legitimacy and credibility of the Afghan government.

The denial of transitional justice ignored Afghan demands for justice, truth and reconciliation

In 2005, the AIHRC conducted a national consultation with 6,000 Afghans to develop a national strategy for dealing with past abuses (see AIHRC, 2005). As the International Centre for Transitional Justice (ICTJ) (2011) highlights, the roots of transitional justice are in the goals of accountability and restitution for victims. The result was a report *A Call for Justice*, which drew a clear picture of what respondents wished for in regard to criminal justice, truth and reconciliation. There was a strong desire for criminal justice and 76.4 % of respondents believed that Afghanistan would be more secure if criminal justice would take place in the near future (AIHRC, 2005: 17). The findings showed that most respondents rejected amnesties for perpetrators confessing their crimes (60.5%) (AIHRC, 2005: 21). Moreover, 95% of respondents believed that establishing the truth of war-time violations was important (AIHRC, 2005: 29). However, due to the Amnesty Law and resistance by members of the Afghan parliament, the AIHRC was hindered from releasing its conflict mapping report which ought to map all war crimes committed in the 1978-2001 period (Tourangbam and Neha Dwivedi, 2010). According to Mendez (2006: 142). Truth-telling mechanisms can only be effective in contributing to peace if there is general acceptance for the necessity of investigating past crimes (see Mendez, 2006: 142 in Gossman, 2013: 6).

Gossman (2013: 6) argues that this is not the case for Afghanistan, where the AIHRC, UNAMA and international donors promoted the action plan for transitional justice, whereas the parliament passed an amnesty law. Especially given the fact that political factions sought to deny past human rights violations, the report would have been a significant contribution and could have helped to break the continuum of war in Afghanistan (Breslin & Würth, 2017). Given the lack of justice and security, the majority of Afghan people mistrust public authorities (AIHRC, 2005: 5). Without the Afghan people trusting the public authorities to protect their fundamental rights and ensure rule of law, the fundamental structures for building peace are arguably absent.

The denial of transitional justice weakened with the rule of law

Some scholars argue that pushing accountability—especially in contexts where peace depends specifically on those who would be held accountable—can destabilise peace processes and thus extend conflicts (see Kerr, 2017). In the case of Afghanistan, critics may argue that pursuing justice would have risked destabilizing the new order and would thus have perpetrated even more violence (AIHRC, 2005: 50). The UN Special Adviser, Lakhdar Brahimi, deemed the warlords' cooperation as central for the success and argued that peace and stability had a higher priority than justice (Secor, 2004). The fact that all parties of the peace agreement were to a certain extent involved in serious human rights violations was decisive for not including transitional justice in the agreement (Nadery, 2007: 174). However, an important reason for pursuing justice is that ensuring and enforcing accountability for severe violence may serve as an effective deterrence for future abuses and could thus contribute to sustainable peace (see Hadden, 2017). For example, research has shown that human rights prosecutions have a deterrent impact and thus serve to prevent violations of physical integrity rights (e.g. Kim & Sikkink, 2010; Dancy et al, 2019). Moreover, prosecutions signal a non-tolerance for impunity and a rigorous commitment to rule of law (Kent, 2017: 204). Not pushing criminal accountability in Afghanistan has in turn signaled a culture of impunity. The filling of important official posts with well-known human rights abusers and the blank absence of transitional justice measures opposed the clear demands by the public for vetting government officials and raised doubts among Afghans to what extent the government was

No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

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capable of protecting their rights (Nadery, 2007: 175; Zeerak, 2020: 32). Moreover, the amnesty law hindered the AIHRC from realizing the planned Presidential Special Advisory Board for Senior Appointments as a vetting instrument (Breslin & Würth, 2017).

The bypassing of justice—and the accompanying loss of trust and confidence in the government—plays directly into the hands of opposers of democratic change. In the context of Afghanistan, it has paved the way for the return of warlords and other perpetrators of war crimes (Saeed, 2020). The majority of the worst perpetrators were brought together in the new government, which led to a continuum of violence and abuse of power (HRW, 2009; HRW, 2015). Hence, the concentration of peace over justice has strengthened anti-democratic forces and allowed them to enter state institutions (Ruttig, 2008: 7). According to Rettig (2008: 5), the militant insurgencies which evolved after the 2001 transition are partially a result of the failed transitional process. A significant part of the insurgents were thus fighting against the Karzai-administration due to its institutional weakness, bad governance, corruption and the lack of rule of law. The failure of the international community and the Afghan government to bring into effect transitional justice has promoted more violence and instability, as past offences have remained unanswered (Zeerak, 2020: 32). The lack of justice and accountability has not increased stability, but threatened the goal of sustainable peace.

Conclusion

Afghanistan has a complex history of enduring violence inflicted by forces fighting for its control. It became the center for a sequence of proxy wars for the sake of ideologies which only few Afghans shared (Barfield, 2013: 165). Whilst the arguments advanced in this essay clearly endorse the proposition that the denial of transitional justice has hindered the achievement of sustainable peace in Afghanistan in the time span of post-2001, it is nevertheless important to acknowledge the limitations of this paper. Given the convoluted history of conflict in Afghanistan and the complex composition of rival and allied factions, this paper cannot (and does not claim to) provide a full account of Afghanistan's conflict history and all its entanglements. Instead, it delves deeper into the post-2001 transition after Afghanistan made the horrific experience of suffering from both a reactionary Islamist regime and a socialist one from 1978-2001. Thereafter, Afghanistan prioritised short-term security over justice while the international community sacrificed justice to secure alliances with forces accused of grave human rights violations for the sake of the "War on Terror" (Ruttig, 2007; Nadery, 2007; Saeed, 2021).

As a consequence, both the national authority and the international community have failed Afghan demands for criminal justice, truth and reconciliation. While the demands of justice can be dismissed, the discontent will not vanish and peace can only be a temporary state (Hansen, 2019: 951). The alleged trade-off of transitional justice and peace is proof of the vigorous, dichotomous understanding of peace and justice as separate goals. On the contrary, lasting, positive peace (see Galtung, 1969) and justice are inextricably linked. Sustainable peace is not a self-evident consequence of laying down arms and transitioning to a new government. Instead, in order to build solid foundations to make progress, the redress of victims, the reestablishment of confidence in the authorities and the pursuit of justice is imperative. This essay takes the conclusion that the absence of transitional justice measures in the post-2001 transition has hindered the achievement of sustainable peace. In summary, this essay has shown that the lack of transitional justice has weakened the rule of law, strengthened a culture of impunity and eroded the legitimacy and credibility of the Afghan government. In order to escape the spiral of violence, a confrontation with its history of decades of war and violence is inevitable for Afghanistan. The failure to realise transitional justice does not lead to stability and the resolution of conflicts, but rather, bears as a consequence the persistent recurrence of a vicious cycle of violence.

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No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

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No Peace Without Justice: The Denial of Transitional Justice in Post-2001 Afghanistan

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