The UN Security Council and Transitional Justice: Afghanistan

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he UN Security Council’s approach to transitional justice in Afghanistan in the post-2001 era has generally reflected the international community’s, and most notably the United States’, prioritization of short-term stability and accommodation of potential spoilers. Some States – including those seeking to withdraw international forces and to facilitate returns of asylum seekers - have viewed transitional justice as potentially destabilizing. ¹ According to this view, transitional justice is a Pandora’s box that could threaten powerful officials, undermine negotiations with armed actors, deter disarmament, and/or complicate US-led counter-insurgency efforts that rely on former militia commanders. ² Further, an element of self-preservation drives the lack of political will among certain members of the Security Council to reckon with human rights violations. Virtually all those involved in the Afghan conflict - not only the Taliban, affiliated armed groups, and Afghan security forces, but also international actors, including US armed forces and the CIA, ³ UK armed forces, ⁴ and others ⁵ – may have committed violations of international humanitarian law. ⁶ US and other States’ opposition to efforts to hold perpetrators to account, for example through an ICC investigation, is instrumental in shaping the Council’s reticence on transitional justice. ⁷ That said, Security Council resolutions have evolved over the years toward expressing support for some aspects of transitional justice that are less obviously contentious than accountability. From 2006-09, for instance, the Council repeatedly called for the implementation of an Action Plan on transitional justice. In the late 2000s, the Council strengthened its expressed support for the Afghan Independent Human Rights Commission (AIHRC), the main institutional lead in Afghanistan on transitional justice. The Council also introduced references to vetting in relation to demobilization, disarmament and reintegration (DDR) and security sector reform (SSR). However, few of these resolution references appear to have had significant impact on transitional justice on the ground. In fact, the late 2000s is a period when traction on transitional justice was waning in Afghanistan, due primarily to: 1) the passage of a near-blanket amnesty law in 2008, which “dealt a near fatal blow” ⁸ to efforts to counter impunity; 2) attacks, including by the Government of Afghanistan, on the AIHRC; 3) the lack of implementation of most
of the Action Plan; and 4) the US Government’s shift in strategy toward negotiations with the Taliban.\textsuperscript{11} Thus, strengthened language during this period was likely an aspirational attempt by the drafters to inject momentum into transitional justice efforts when they appeared all but dead. That is, Security Council resolution language during this time was more a reflection of the declining prospects of transitional justice on the ground than of an impactful and purposeful initiative by the Council.

This study is based on a review of open-source literature and 20 interviews, including with: Afghan civil society, former and current staff of the Afghan Independent Human Rights Commission (AIHRC), international transitional justice and Afghanistan experts, former and current UN Assistance Mission in Afghanistan (UNAMA) staff, and diplomats. The study presumes a level of knowledge about the conflict in Afghanistan. For background on the post-Bonn context refer to the footnote.\textsuperscript{12}
Overview of the Council’s Approach to Transitional Justice in Afghanistan

Reconciliation

The Council’s stance on transitional justice in Afghanistan is most evident in its language on “reconciliation,” a term frequently used to refer to deals struck between the Government of Afghanistan and individuals or groups involved in the conflict. In exchange for ceasing armed activity against the State, the Government has granted “reconciled” individuals (de facto or explicit) immunity from prosecution for past crimes and, in many cases, official Government or security posts and the green light to run for elections. The Council has implicitly supported this approach, stating that “all Afghans” who meet the three basic conditions are eligible to reconcile with the Government: 1) renounce violence; 2) have no links to terrorism; and 3) respect the Afghan constitution. These criteria are derived from the Afghanistan Peace and Reintegration Programme (APRP), which was launched in 2010 to facilitate the reintegration into civilian life of rank-and-file ex-combatants and to engage Taliban and other armed groups’ leaderships with the aim of reaching a political settlement. The three eligibility criteria laid out in Council resolutions are forward-facing; that is, they do not take into account an individual’s past human rights record, nor do they account for command or superior responsibility, as they are open to “all,” regardless of rank.
The Council has, thus, delinked the rules of war and reconciliation, rather than making the latter conditional on a minimum degree of past compliance with the former. For example, many Council resolutions have condemned the Taliban’s attacks on civilians. These same resolutions also call for individuals affiliated with the Taliban to reconcile with the Government, without conditioning reconciliation (and any corresponding pardon, amnesty or leniency) on any degree of compliance with human rights. Beyond endorsement, the Council has, in fact, facilitated some of these deals by delisting from UN sanctions “reconciled” individuals - a crucial incentive for many actors to enter such deals. For example, in 2017, the Council lifted sanctions on Gulbuddin Hekmatyar, a notorious insurgent leader and war crimes suspect.

The Council’s endorsement and reinforcement of such reconciliation deals in Afghanistan is notable because the deals that grant immunity to war crimes suspects (such as Hekmatyar) arguably violate Afghanistan's obligations under international law. It also potentially conflicts with the UN's longstanding position that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.” Further, the Council's support for these deals stands in stark contrast to its affirmation of the inapplicability of amnesty to international crimes in other cases, such as Sierra Leone.

**AIHRC and the Action Plan**

Although the Council has largely ignored the issue of accountability for past crimes, it has repeatedly commended the work of the AIHRC, the institutional lead on transitional justice in Afghanistan. The AIHRC was itself born of the Bonn Agreement, which the Council endorsed. The AIHRC led the development of a national Action Plan for peace, reconciliation and justice, which the Afghan Government adopted in 2006. The Action Plan put forward several transitional justice measures for implementation over a three year timeline, including in relation to truth-telling, vetting and institutional reform, symbolic forms of reparation, and the creation of a task force to make recommendations to the President on accountability. As an outcome of the Action Plan, the AIHRC undertook a landmark conflict mapping study. This study was intended to provide a basis for dialogue about the pre-2001 phases of conflict. However, it was never released due to resistance from key players - including the US, many Europeans, the Afghan Government, and even reportedly UNAMA - who feared it would rock the boat in Kabul. Then-President Karzai in 2011 did not renew the tenure of the AIHRC’s Commissioner, Nader Nadery, who had overseen the report and had been an outspoken critic of electoral fraud in Karzai’s bid for reelection in 2009.

The Council has repeatedly praised the AIHRC over many years and strengthened its language supporting the institution as it came under attack. In the first resolution passed after Nadery’s dismissal, the Council augmented its commendation of the AIHRC’s work and introduced reference to the need to protect the institution's independence. Beyond praise, the Council has also repeatedly mandated UNAMA, in collaboration with Office of the High Commission for Human Rights (OHCHR), to strengthen the capacity of the AIHRC, including in some resolutions with an explicit view to promoting accountability. However, the Council stopped short of referencing or calling for the publication of the AIHRC’s most important work: the mapping report.

In several resolutions between 2006-09, the Council expressed support for the Action Plan, and encouraged international support for the Plan. In March 2009, after the timeline for implementing the Action Plan has passed, the Council called for “enhanced efforts to ensure [its] full implementation.” The Council’s support for the Action Plan - which has a past-facing stance and victim-centered approach, and which affirms the inapplicability of amnesty to war crimes - appears inconsistent with its support for reconciliation processes in Afghanistan that offer immunity regardless of an individual’s past human rights record.
The UN enjoys a broad mandate granted by the Bonn Agreement, which was endorsed by the Security Council, to investigate human rights violations and recommend corrective action in Afghanistan. For over a decade, the mission (in more recent years in partnership with OHCHR) has issued regular, methodologically rigorous reports on civilian casualties, including those caused by international forces and Afghan security forces. Some Security Council resolutions have noted UNAMA’s reports on protection of civilians and recognized the importance of reporting the situation of civilian casualties back to the Council. Further, some Council resolutions have specifically mandated UNAMA to report on violations against children.

Although the Council mandated UNAMA to support the capacity of the AIHRC as early as 2003, it only began to explicitly mandate the mission to work on transitional justice in 2010. However, the Council references transitional justice in relation to UNAMA’s work on rule of law, rather than on broader human rights or reconciliation. Given the timing, this introduction into UNAMA’s mandate was likely a deliberate attempt by the drafters to revive traction on transitional justice despite the recent passage of the amnesty law, the attacks on the AIHRC and the lapsing of the Action Plan. The reference to transitional justice is maintained in subsequent UNAMA mandates. More recent resolutions expand on the concept. A 2019 resolution includes innovative and more open-ended language on transitional justice, originally suggested by OHCHR, calling on UNAMA to advise on the “establishment and implementation of judicial and non-judicial processes to address the legacy of large-scale human rights violations and abuses as well as international crimes and to prevent their recurrence.” This language is placed squarely in the human rights section of the mandate.

Security Sector Reform

Early resolutions do not explicitly link SSR to human rights and transitional justice. Starting in 2007, however, the Council began to reference
the need to increase the “accountability” of the Afghan security sector. In 2010, amidst the weakened climate for transitional justice described above, the Council explicitly referred to “appropriate vetting procedures” as part of SSR, a reference that is repeated in several future resolutions.

Demobilization, Disarmament and Reintegration

The Council expressed support for DDR processes in Afghanistan, even where such programmes are widely deemed to have failed or been carried out to the detriment of transitional justice aspirations. Starting in 2011, the Council began to introduce a generic reference to the need for an “appropriate vetting mechanism” to address operational challenges in the APRP. Beginning in 2012, the Council starts to more explicitly link human rights and DDR by stressing the need for collaboration between the APRP and the AIHRC in assessing the human rights and gender implications of the peace and reconciliation process.

Victims

In general, the Council’s resolutions have not been victim-centered, neither for victims of prior phases of the war nor the ongoing one. One exception is with respect to child victims, as many resolutions do refer to the need to “bring to justice” those responsible for abuses committed against children in the conflict and, as noted above, UNAMA is mandated to report on violations and abuses against children. Although there are repeated references in Council resolutions to the need to protect the rights of women, these are not linked to any parallel call for accountability for those who violate women’s rights, as appears in the case of children. In the case of civilian casualties caused by international forces, the Council merely notes the importance of “after-action reviews” and “joint investigations” where the Government of Afghanistan finds those investigations appropriate.

What the Council has Left Out

It is important for this study not only to analyse what the Council has said, but also what it has not said, on transitional justice. The Council’s most noteworthy points of silence include the following:

- **Dasht-e-Leili:** Although the Council has condemned the Taliban for a multitude of violations, it has been quieter regarding atrocities committed against the Taliban. In 1998, the Council did call for an investigation into alleged mass executions of prisoners of war and civilians (indirectly referring to, *inter alia*, the 1997 killings of large numbers of Taliban prisoners in and around Mazar-i-Sharif), although the UN failed to follow through effectively. By contrast, the Council was silent regarding the deaths in custody of reportedly as many as 2,000 Taliban prisoners under the control of Dostum-aligned forces in 2001 (the Dasht-e-Leili massacre). Neither is there Council reference to the finding, in 2008 by a Physicians for Human Rights (PHR) forensic specialist seconded to UNAMA, that evidence at the site had been tampered with and destroyed (a potential war crime in and of itself). This silence endured despite significant efforts by advocacy groups, namely PHR, to pressure the Council into mandating an investigation into the gravesite. (Dasht-e-Leili was particularly sensitive for the US, which was backing Dostum (a paid CIA asset) at the time and whose special forces were allegedly present when Dostum’s forces compelled Taliban prisoners into containers – where they eventually suffocated and some were reportedly shot.)

- **International Criminal Court (ICC):** The Council has been silent regarding efforts led by Afghan and international civil society and activists to open an ICC investigation into possible war crimes committed in Afghanistan. By contrast, the Council has referred two other situations to the ICC and, in some cases, called on...
States to cooperate with the Court. While the Council’s silence on the ICC is by no means unique to Afghanistan, it is more deafening in this case due to the high-stakes implications for members of the Council. The US, for example, vehemently opposes ICC involvement in Afghanistan, fearing it would expose American forces and members of the CIA to the Court’s jurisdiction (Russia and China are also not supportive).

- **Others:** The Council has not made any reference to Afghanistan’s near-blanket amnesty law, even though it arguably conflicts with Afghanistan’s obligations under both domestic and international law. The Council does not make reference to reparations for victims, though it has indirectly supported symbolic reparations through expressed support for the Action Plan. Although the Council repeatedly refers to the need for credible, transparent and inclusive elections, it made no reference to vetting electoral candidates – a particularly contentious issue in Afghanistan.
Interviews with Afghan civil society, national and international human rights experts, UN and other multilateral officials, and diplomats reveal little evidence of the proponents of transitional justice being able to draw on Security Council resolutions to augment their advocacy, even in cases where Council language has been relatively strong. The main impediment to the implementation of some of the Council’s stronger language on transitional justice, for instance with respect to the Action Plan, has been the absence of domestic and international political will to address a legacy of past – and ongoing - human rights abuses. Domestically, transitional justice was described by one interviewee as a “circular firing squad,” in that virtually all parties to the conflict have been complicit in violations, so nobody wanted to open the file. In this context, human rights defenders have faced intimidation, harassment and worse, shrinking the space for civil society to bring transitional justice issues to the fore. Internationally, the US and others continued to object to meaningful transitional justice, which they saw as having the potential to undermine their broader security goals in Afghanistan. The US and other Member States also saw some accountability efforts, such as calls for ICC involvement, as threatening to its own personnel.
The clearest aspect of transitional justice on which the Council appears to have had impact is accountability. However, this impact has rolled back, rather than advanced, the transitional justice agenda. Several Afghan civil society interviewees argued that the Council’s endorsement of “reconciliation” deals struck without due regard to human rights has made it harder to argue against impunity in Afghanistan. They argued that these endorsements have appeared to confer international approval for impunity deals for war criminals. Although sanctions lists are distinct from judicial proceedings and have no bearing on whether an individual can be prosecuted at home or abroad for human rights violations, the Council’s delisting of certain individuals (e.g., Hekmatyar) has, according to interviewees, reinforced this perception of international approval.

Further, interviewees argued that the Council’s simultaneous condemnation of Taliban attacks against civilians, and calls for those affiliated with the Taliban – regardless of their involvement in such attacks – to reconcile with the Government, have signaled that the international community prioritizes the negotiation of a deal with the group at the near-complete expense of accountability. Afghan human rights defenders argued that the Council’s silence on the ICC and the amnesty law has sent similar signals.

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Accountability/Reconciliation

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avenues to push for tying reconciliation to transitional justice – for example, by making amnesty, pardon or other forms of leniency conditional on an established degree of past and future compliance with human rights, and on participation in truth-telling, reparations, and/or guarantees of non-recurrence. As one Afghan civil society actor put plainly, “The approach of the Security Council has further strengthened the culture of impunity in Afghanistan.”

UNAMA

UNAMA, as a Security Council-mandated mission, refers to Council resolutions for both guidance on how to prioritize its human rights-related work, and cover for certain sensitive activities. For example, the original Bonn mandate, combined with continued references by the Council, allows UNAMA to claim a Council mandate to continue its highly sensitive reporting work on civilian casualties. Although these reports are not a transitional justice exercise per se, they constitute an impartial and credible documentation effort that could be an important part of future transitional justice efforts. UNAMA has also, in accordance with its mandate, worked with the AIHRC. For example, the mission’s Human Rights Unit recently facilitated the provision of technical advice and assistance on transitional justice to the AIHRC. Overall, UNAMA’s support does not appear to have been vital to the AIHRC’s work on transitional justice issues increased considerably. Due to its broader political mandate, parts of UNAMA have, at times, been wary of some of the AIHRC’s most important but politically sensitive work, such as the mapping report.

As is common in integrated missions, UNAMA has, at times, experienced tension between its political and human rights work. Many interviewees argued that some within UNAMA have occasionally viewed transitional justice as a “showstopper on the road toward a negotiated settlement... it was looked at as in, how do we make this not a roadblock, and how do we get around the question?” Another interviewee argued that “The political section of UNAMA was making the decisions, and even blocking human rights.” For example, UNAMA in the mid-2000s argued against the publication of an OHCHR-produced conflict mapping report, arguing it “would endanger UN staff and complicate negotiations surrounding the planned demobilization of several powerful militias.” The report was later leaked.

The Council’s mandating of UNAMA explicitly to work on transitional justice starting in 2010 does not appear to have had a major impact on the mission’s work. In fact, many interviewees argued that although UNAMA had offered some support to transitional justice efforts prior to 2009, particularly in relation to backing the Action Plan, its work on transitional justice dropped off significantly after 2009/2010. One Afghan civil society actor, who had previously worked with UNAMA, said: “simply nothing was done after 2010 at UNAMA on transitional justice, except that sometimes here and there they attended meetings... before 2009 they helped with the development of the Action Plan and provided technical support to the AIHRC’s work on the mapping report,” and some smaller projects. But “2009 was the year that the international community, including the UN, dropped transitional justice from their agenda... I didn’t see UN staff after 2010 coming to meetings and making strong reference to the [Security Council] mandate for UNAMA to work on transitional justice.”

In some ways, this is understandable – as discussed above, the environment for transitional justice in Afghanistan grew much more challenging in the late 2000s. Further, as the US began to consider and hold talks with the Taliban, UNAMA felt the need to avoid being seen as negatively impacting the peace process. The mission has also been conscious of the need to avoid high-profile work that might prompt blowback; a cautionary tale, for instance, concerns the publication of a Human Rights Watch report identifying individuals responsible for war crimes that may have triggered Afghanistan’s Parliament to expedite
the development of the amnesty law. But – notwithstanding widespread appreciation for UNAMA’s Human Rights Unit – interviews suggest that the mission as a whole at times erred too far on the side of caution. Several Afghan human rights defenders and some international experts expressed disappointment at UNAMA’s reticence, saying they had hoped for more open advocacy and support from the mission at key junctures.

UNAMA appears to now be poised to ramp up its work on transitional justice after a decade-long lull. In early 2019, UNAMA began looking intensively at transitional justice challenges and needs in Afghanistan. This renewed attention was reflected in the 2019 Council resolution mandating the mission to advise on judicial and non-judicial processes to address the legacy of human rights violations, and to prevent their recurrence. This language is sufficiently specific, yet covers a broad range of potential processes (ranging from accountability to institutional reform as a guarantee of non-recurrence). Its placement helpfully connects it to UNAMA’s and OHCHR’s broader human rights work in Afghanistan. Because of its wording and placement, this language appears to be more enabling to UNAMA than the brief references to “transitional justice” in connection with rule of law found in earlier resolutions. Indeed, UNAMA officials interviewed for this report confirmed that they prefer this language as it makes it easier for them to support transitional justice in a highly sensitive political environment. A former UNAMA official argued that although the Council has not been a “driver” of how the mission interprets its human rights mandate, the 2019 language has been one factor among many that is enabling the mission to increase its focus on transitional justice. While promising, it is too early, however, to ascertain the ultimate impact that the language found in the 2019 resolution will have.

Finally, the Council’s inconsistent approach to condemning violations committed by the Taliban, but not always those against the Taliban (namely, Dasht-e-Leili) may have, according to some international experts, undermined the UN’s credibility as an impartial partner on transitional justice. However, a former UNAMA staff member noted that the Taliban was generally able to distinguish between the Council and the mission, particularly due to the latter’s credible and impartial reporting on civilian casualties.

**AIHRC**

The Bonn Agreement, which was endorsed by the Council, had a clear impact on transitional justice in Afghanistan by calling for the creation of the AIHRC. The Council’s consistent commendation of the AIHRC’s work, and its increased calls in the late 2000s for protecting its independence and providing it with funding, may have been beneficial. Some former AIHRC staff and experts pointed to the Council’s support as one factor, though by no means a determinative one, that may have helped buoy the institution during pressure it faced in the aftermath of the mapping report. Another former AIHRC staff member who worked on the mapping report, however, argued that the Council’s support was not felt strongly in the country: “No, you never felt that you had the support of this big international body and that you could work freely, or that you would see that this international body is putting pressure on the Afghan Government [to support transitional justice].” Another civil society actor noted that strong international support for the AIHRC was crucial to its survival, but that the Security Council was only a small part of that; far more important was financial support coming largely from European countries, which allowed the AIHRC to maintain its independence. The Council praised the AIHRC’s work in mostly general terms. It did not support in specific terms the Commission’s most sensitive – but arguably most important – work: the mapping report. The mapping report offered a critical documentation effort akin to a truth commission report, which, had it been published, could have provided a basis for broader transitional justice efforts. An interviewee argued that the Council’s silence on the report was a missed opportunity to support transitional justice efforts. Given the resistance of key players, including the US, the Council would have been unlikely to call for the report’s publication. But it could, perhaps, have
been persuaded to call for the compilation of the report, even if only confidentially and to professionally document facts.\(^9\)

### Action Plan

Interviews with Afghan civil society actors, diplomats, and international human rights experts reveal that the Council's expressed support for the Action Plan was not felt strongly on the ground. As one former diplomat put it: “I didn't go to the President and say you have to do this because the Council is asking for it. I don't think anyone paid attention to the Council on this.”\(^9\) A prominent human rights expert, in response to the question of whether he had ever leveraged language in Security Council resolutions in his advocacy for the implementation of the Plan, said the thought had never crossed his mind.\(^9\) Instead, the President's signing of the Action Plan and the few measures that were implemented are owed primarily to the advocacy efforts of the AIHRC (particularly Dr Sima Samar) and a progressive adviser to President Karzai (Dr Rangin Dadfar Spanta).\(^3\) The Action Plan's timeline for implementation passed in 2009 and, aside from the mapping report and some memorialization initiatives, it remains largely unimplemented at the time of writing.

### Integrated Approach to Conflict Prevention

The Council, for the most part, has mirrored the international community's failure to adopt an integrated approach to conflict prevention and institutional reform in Afghanistan. In fact, the Council has arguably reinforced the separation between DDR and transitional justice by endorsing “reconciliation” under the terms of the APRP disarmament programme. The APRP incentivized the participation of senior commanders from major anti-Taliban forces by offering them Government posts and did not vet on human rights grounds, “with the result that former fighters responsible for past abuses or war crimes were reappointed to security posts.”\(^3\)
The lack of an integrated approach to such issues\textsuperscript{100} has, according to Patricia Gossman, “stymied efforts to build a competent police force, reform government ministries, disarm militia forces and establish a functioning judicial system.”\textsuperscript{101} The “incentive” approach to DDR has been criticized as a means of “buying” the support of powerful figures with the potential to spoil the peace process, thereby “entrench[ing] the very people responsible for rampant lawlessness in the first place.”\textsuperscript{102} The Council, by treating DDR, SSR and related matters mostly separate from transitional justice is, thus, reflecting a non-integrated approach that has not only hurt the human rights agenda but also broader State-building and governance efforts in Afghanistan.

\textbf{ICC}

Despite the Council’s silence on this issue, sustained advocacy by Afghan civil society and activists bore fruit in March 2020 when the ICC Appeals Chamber authorized the Prosecutor to open an investigation into alleged war crimes related to the situation in Afghanistan.\textsuperscript{103} (Afghanistan is a State party to the Rome Statute.) However, an Afghan civil society actor warned that without international pressure, the Government of Afghanistan would be less likely to cooperate with the Court.\textsuperscript{104}
THE PERILS OF PERMANENT FIVE MILITARY INVOLVEMENT

In cases where one or more permanent members of the Security Council (or another powerful Member State) is involved militarily, and potentially implicated in war crimes, the Council is highly unlikely to be a positive influence on transitional justice efforts. This is hardly a novel finding (see, for instance, the Syria case), but one that Afghanistan demonstrates starkly.

TRANSITIONAL JUSTICE AMIDST ONGOING CONFLICT

Transitional justice, as traditionally conceived, is a set of tools to be implemented in the context of post-authoritarian and post-conflict transitions. In cases like Afghanistan, where conflict is ongoing, transitional justice must compete with other priorities, such as incentivizing defections and negotiating with armed groups. In all contexts, but especially contexts of ongoing conflict, therefore, it is crucial to approach transitional justice in an integrated fashion. This does not mean that States attempting to transition away from conflict should try to do everything at once – policy interventions must be sequenced and tailored appropriately for the context. However, “efforts should be taken to constructively connect [transitional justice and DDR] in ways that contribute to a stable, just and long-term peace.”105 In the case of Afghanistan, the failure to coordinate transitional justice with DDR and other conflict resolution tools has contributed to unsustainable compromises that have entrenched abusive elites and failed to guarantee non-recurrence. The Council should explicitly push for integrated approaches to transitional justice, rather than addressing it on a track separate from other conflict resolution approaches. As Patricia Gossman has argued, “the

Key Takeaways

1 THE PERILS OF PERMANENT FIVE MILITARY INVOLVEMENT

2 TRANSITIONAL JUSTICE AMIDST ONGOING CONFLICT
principles of transitional justice should inform security sector, judicial and political reforms to create effective, accountable institutions.\textsuperscript{106}

3 **WHERE POLITICAL SPACE IS LIMITED, DO NOT LOSE SIGHT OF THE IMPORTANCE OF DOCUMENTATION**

In the case of Afghanistan, insufficient political will among national, and some key international, actors has precluded much action on transitional justice. Yet, despite the unforgiving context, some actors, at times with Council support, have managed to document the conflict in ways that contribute to transitional justice goals. Arguably, UNAMA’s most important contribution to transitional justice has been something that is not, at first glance, transitional justice: its civilian casualties reporting. These reports constitute an important documentation effort that could become a part of future transitional justice efforts. A mandate from Bonn, and repeated reference in Security Council resolutions, has given UNAMA cover to undertake this highly sensitive and important work. UNAMA’s civilian casualties reporting may also have helped protect the mission’s credibility as an impartial partner on human rights and transitional justice, distinguishing it from the Security Council’s uneven approach to condemning human rights violators. Another documentation effort that the Council could have, but failed to, provide cover for was the AIHRC’s mapping report. A nod from the Council to this report – for example, by calling for its compilation, even if only confidentially – might have helped protect those who worked on the report from attacks and intimidation, and perhaps enabled private discussion of its findings among policymakers.

4 **AMNESTY**

The case of Afghanistan demonstrates that the Council’s endorsement of reconciliation deals that entail amnesty for possible war crimes can reinforce a climate of impunity. Further, and although sanctions are distinct from judicial proceedings, the Council’s decision to delist individuals who are amnestied at home can (perhaps inadvertently) signal that the international community finds such amnesties acceptable. This does not mean that the Council should automatically reject amnesties. If designed with eligibility and other conditions attached, amnesties can contribute to accountability\textsuperscript{107} and facilitate transitions away from conflict.\textsuperscript{108} However, before deciding whether to endorse, condemn or remain silent on an immunity or legal leniency measure, the Council should assess whether the measures in question advance accountability or impunity. In Afghanistan, the latter was the case.

5 **SNOWBALLING LANGUAGE**

The case of Afghanistan shows that language on transitional justice in Council resolutions can snowball over time. Starting around 2010, Council resolutions began to include strengthened language on transitional justice, which was then repeated and expanded upon in future resolutions. Language sticks because it is far easier to replicate and build upon wording from past resolutions than to introduce new, more ambitious language from scratch.\textsuperscript{109} To some advocates of transitional justice, consistent Council reference to an issue over several years may be helpful – as may have been the case for the AIHRC.

6 **COUNCIL LANGUAGE MATTERS, HOW IT IS USED MATTERS MORE**

Ultimately, what matters is not only the language in the resolutions, but whether and how advocates on the ground leverage that language. In Afghanistan, for instance, despite relatively strong language in support of the Action Plan, few actors appear to have leveraged the relevant resolutions in their advocacy for the Plan’s implementation. (In Colombia, by contrast, the Council produced far less language on transitional justice, but advocates leveraged the available language more effectively). There may be a role for UN missions to alert civil society and other advocates to relevant references in Security Council resolutions that may augment their advocacy strategies.
7 Wording and Placement Matters

In the case of Afghanistan, the 2019 resolution’s more open-ended language on “judicial and non-judicial processes” is preferable to the generic references to “transitional justice” found in earlier resolutions. The former illustrates the fuller range of measures that can be considered transitional justice, and helpfully acknowledges that not all these measures need be judicial. Indeed, non-judicial exercises, such as truth-telling, may be as important for accountability as judicial processes, such as criminal trials. Further, the placement of the 2019 resolution’s language squarely in the human rights section of the UNAMA mandate is more appropriate than referencing transitional justice in relation to rule of law.
References


2. As Patricia Gossman has noted: “[I]nternational actors, who saw the principal threat to security as the Taliban and al-Qaeda, opted to rely on former militia commanders and faction leaders to act as a bulwark against Taliban insurgent forces to guarantee stability… by the end of 2002, commanders and factional leaders who not only had long records of human rights abuses and war crimes accusations… had entrenched themselves in new positions of power. Questions of past war crimes were suppressed or deferred, and the disarmament process proceeded selectively in order to avoid confrontation with the most powerful players.” Patricia Gossman, *Transitional Justice and DDR*. For more on the politics of disarmament and rearmament in Afghanistan, see, Deedee Derksen, *The Politics of Disarmament and Rearmament in Afghanistan* (Washington DC: United States Institute of Peace, 2015).


7. A former diplomat criticized the Council’s weakness on transitional justice in Afghanistan, saying “it simply went along with whatever the US wanted.” Interview, November 2019.

8. This is the result of the particular nature of Afghanistan’s post-2001 transition. Unlike other transitions in more “classic” transitional justice cases, where abusive authoritarian regimes were swept aside by popular resistance and replaced with new leaders willing to hold their predecessors to account, the Northern Alliance in Afghanistan reassumed power in the post-2001 era after having committed many abuses in prior phases of the conflict. As Patricia Gossman and Sari Kouvo have noted, their culpability for past atrocities “left them unwilling to pursue justice once the Taliban were gone.” Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.


16. See, for example, United Nations Security Council, “Resolution 2255, Adopted by the Security Council at its 7590th meeting,” United Nations, 22 December 2015, S/RES/2255. Although the Afghan constitution does contain human rights provisions, in practice these have not been applied in a past-facing way to determine individual eligibility into the APRP or “reconciliation.” In fact, at least one part of the constitution (Article 62) has arguably impeded transitional justice – interviewees argued that the provision that ministers must not have been “convicted of crimes against humanity” places an excessively high bar for vetting efforts. Interviews, November 2019. See, Islamic Republic of Afghanistan, “The Constitution of Afghanistan,” Ratified 26 January 2004, http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf. Interestingly, the Council, starting in 2010, begins to add a slight tweak to the wording of these conditions, so that the third reads “accept the Afghan constitution, particularly as it relates to gender and human rights issues.” Although the text in italics is not found in the Kabul Communiqué laying out the APRP conditions, several future Security Council resolutions maintain it (e.g., S/ RES/2120 (2013)). Thus, it appears that the dratfers slipped in a reference to human rights in the eligibility conditions, but still not one that would take into account an individual’s past human rights record and thereby exclude from reconciliation those accused of serious crimes.
17 Kabul International Conference on Afghanistan, “A Renewed Commitment by the Afghan Government to the Afghan People, A Renewed Commitment by the International Community to Afghanistan.”
19 It is worth noting is that in 2016, the Council does draw a somewhat generic link between human rights to reconciliation, stressing the role of UNAMA in collaborating with the AIHRC to assess the human rights and gender implications of the peace process (see, United Nations Security Council, “Resolution 2274, adopted by the Security Council at its 7645th meeting,” United Nations, 15 March 2016, S/RES/2274). However, this stops short of conditioning reconciliation (and any corresponding pardon, amnesty or leniency) on compliance with human rights.
30 Praise for the AIHRC has featured in resolutions over many years; for example, in 2005 the Council expressed support for the AIHRC’s report, A Call to Justice, which surveyed Afghans country-wide to show that most Afghans support justice for past crimes. This signaled the close attention and appreciation of the Council to the AIHRC’s work. United Nations General Assembly, “Resolution 1589, adopted by the Security Council at its 5148th meeting,” United Nations, 24 March 2005, S/RES/1589.
31 In 2012, the Council commended the “courageous efforts to monitor respect for human rights in Afghanistan as well as to foster and protect these rights and to promote the emergence of a pluralistic civil society” and stressed the “importance of full cooperation with AIHRC by all relevant actors and of allowing their independence as well as ensuring their safety.” United Nations General Assembly, “Resolution 2041, adopted by the Security Council at its 6738th meeting,” United Nations, 22 March 2012, S/RES/2041.
For example, in 2010 the Council mandated UNAMA and the Special Representative to lead international civilian efforts in “support[ing] and strengthen[ing] efforts to improve governance and the rule of law including transitional justice...". Ibid.


Eventually OHCHR did investigate and write a report, but one that did not attribute responsibility for war crimes, leading Human Rights Watch to criticize the report as showing the UN “at its cautious worst.” Gossman and Kouvo write, “the UN dragged its feet... there was simply no support for such an investigation.” Patricia Gossman and Sari Kouvo, Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan.


Mark Benjamin, “Did US Forces Watch Afghan Massacre?” Salon, 22 July 2009, www.salon.com/2009/07/22/mass_graves/. The US was also very resistant to any efforts to investigate Dasht-e-Leili because the episode tied into the broader issue of CIA black sites and torture, as the survivors of Dasht-E-Leili were sent to Guantanamo. Interview with investigator, November 2019.


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The former chairperson argued that the Council’s support gives off the impression that the UN Security Council is not looking for accountability in Afghanistan, but is endorsing the acceptance [of such persons].” Interview with Afghan civil society actor, November 2019. Another Afghan human rights defender said that delisting those implicated in war crimes has “reinforced the perception among people engaged in violations, and among the Afghan public, that for the international community, the plight of victims does not matter.” Interview, Afghan human rights defender, December 2019.

Interviews with Afghan civil society actors, November 2019.


Interview with Afghan civil society actor, November 2019.

“What UNAMA has done with reporting on civilian casualties is something that could be a part of transitional justice, and since 2009 is the main accurate source for most Afghans and others reporting about human rights in Afghanistan… we are all using reports provided by UNAMA.” Interview with Afghan civil society actor, November 2019.

Interviews, November 2019.

Interviews, November 2019. For example, one interviewee who has worked with the AIHRC said: “When I look for support on more controversial issues, I would go to Human Rights Watch or Amnesty International. UNAMA would not be the first place I look, because they try to be more cautious because of their wider political mandate.” Interview, December 2019.

Interview with former UNAMA staff, November 2019.

Interview with former UNAMA staff, November 2019.

Patricia Grossman, Transitional Justice and DDR: The Case of Afghanistan


Interview with Afghan civil society actor, November 2019.

Interview, November 2019.


For example, interviewees lamented that UNAMA has not supported efforts by Afghan civil society to support an ICC investigation. An Afghan civil society actor said, “Unfortunately we don’t see support from the UN to stand up to US bullying and threats and support the [ICC] process.” Interview, November 2019.


Interview with UNAMA staff, November 2019.

Interview with former UNAMA staff, November 2019.

Interview with international expert, November 2019.

“In the end, the Taliban more or less respected the UN. Since 2009 the Taliban has been engaging [with UNAMA] in a regular dialogue on civilian casualties. They wouldn’t do that if they thought the UN was illegitimate.” Interview with former UNAMA staff, 2020.

The former chairperson argued that the Council’s support offered the AIHRC “a little bit of protection, or at least confidence.” Interview, November 2019. An external expert argued that the Council’s continued support was a positive factor in efforts to reinvigorate the AIHRC after 2010. Interview, November 2019.

Although the AIHRC suffered after the attacks it faced in the aftermath of the mapping report, the institution managed to sustain, for the most part, its political independence. It has since regained its footing with a fresh crop of commissioners. Ehsan Qaane, “Beginning of a New Era at the AIHRC: Nine Fresh Commissioners,” Afghanistan Analysts Network, 20 July 2019, www.afghanistan-analysts.org/beginning-of-a-new-era-at-the-aihrc-nine-fresh-commissioners/.

Interview with former AIHRC staff, November 2019.

Interview with Afghan civil society actor, November 2019.


Interview with former UNAMA staff, November 2019.

Interview with former diplomat, November 2019.

Interview with international expert, November 2019.

Interviews, November 2019.

Patricia Grossman, Documentation and Transitional Justice in Afghanistan

The only explicit link between DDR and transitional justice was with respect to data collected by the Disbandment of Illegal Armed Groups program for the purposes of electoral vetting, but this process largely failed, with very few candidates disqualified and powerful candidates known to have their own private militias not targeted. Patricia Gossman and Sari Kouvo, Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan.


Ibid.

ICC Prosecutor requested in November 2017 to open an investigation; a panel of ICC judges unanimously rejected this request in 2019, on the grounds that commencing an investigation would not serve the interests of justice. The Pre-Trial Chamber II authorized the prosecutor to appeal the ruling, and Afghan civil society continued to lobby for ICC involvement. “Afghanistan: ICC Pre-Trial Chamber II Authorizes Prosecutor to Appeal Decision Refusing Investigation,” International Criminal Court, 17 September 2019, www.icc-cpi.int/Pages/item.aspx?name=p1479. The Appeals Chamber amended the 2019 decision of the Pre-Trial Chamber II, approving the commencement of an investigation in March 2020. See, “Afghanistan: ICC Appeals Chamber authorizes the opening of an investigation,” International Criminal Court, 5 March 2020, https://www.icc-cpi.int/Pages/item.aspx?name=p1516.


For example, amnesty deals that require individuals to participate in truth-telling processes can contribute to accountability. Louise Mallinder, The Belfast Guidelines on Amnesty and Accountability (Ulster: Transitional Justice Institute at the University of Ulster, 2013).


Interview with Council member, November 2019.