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**Research Report**

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## “Culture of Peace” or “Culture of War”?

War Crimes and Resurgent Violence in Afghanistan

*Citha D. Maass*

The latest outbreaks of violence in Afghanistan corroborate a phenomenon which has frequently been observed in other post-war countries. It seems that one of the reasons why post-war countries experience a resurgence of conflict after a relatively peaceful transitional phase is that they have failed to come to terms with their war-torn past. Supported by the United Nations (UN) and the European Union (EU), Afghanistan has begun to develop its own approach to dealing with its past. However, this process is meeting resistance from influential warlords who are important for President Karzai's government and who fear having to face charges. As an added complication, Afghanistan lacks certain fundamental structures which are needed for the process. For example, the judicial sector would need to be reformed and frameworks developed for due criminal procedures. However, Afghanistan will have to deal with its war experiences in one way or another if it wants to escape the spiral of violence which also represents a threat to the troops of the International Security Assistance Force (ISAF).

The outbreak of violence that shook Kabul for several hours on 29 May 2006 destroyed the international community's illusions about the status of the capital of Afghanistan as a safe city. The violence broke out after a US military convoy caused a traffic accident with several fatalities in a suburb of Kabul.

The violence represents a watershed for several reasons. For one thing, the riots were specifically directed against international organisations. Additionally, this was the first time that Karzai's government was directly criticised for its lack of efficiency. And finally, the Kabul population suffered a shock which resulted in repressed war

traumas coming suddenly to the surface once again.

Even if the extent of the violence was new, the incident represents the recurrence of a pattern which was observed in earlier outbreaks as well. For example, the controversy about the cartoons of the prophet Mohammed sparked demonstrations all over the country in February 2006 and culminated in an attack in Faryab Province on the Provincial Reconstruction Team (PRT) from Norway, which was set up as part of the NATO-led ISAF mission. To give another example, a wave of violence swept through several provinces in May 2005 in response to the rumour that the Holy Koran

had been desecrated in the US prison camp at Guantánamo Bay. In each case, demonstrations which began spontaneously were then swiftly instrumentalised in the internal Afghan power struggle and threatened to spread out of control.

This raises the question why limited local unrest can quickly escalate into riots of this magnitude. Why has so great a capacity for violence survived in the otherwise war-weary Afghan population?

### **Transitional justice: Supported by the international community**

Experiences in post-war countries have shown that they are in danger of relapsing into renewed violence if the cycle of recurring warfare (otherwise known as the conflict trap) cannot be broken. This shows that nations must come to terms with their wartime history in order to create lasting peace. In the process, they must develop an awareness of the causes that trigger violence with a view to replacing their previous “culture of war” with a “culture of peace.”

In the parlance of the United Nations, the term *transitional justice* was introduced in 2004 to describe the mechanism with which societies confront their wartime past. The term denotes a complex process which includes coming to terms with the past, searching for the truth, documenting war crimes, prosecuting war criminals, and developing forms of national reconciliation which will be specific to each country’s individual culture.

To assist in this process, the International Criminal Court in Den Haag was especially created to prosecute war crimes, genocide, and crimes against humanity. Known internationally under the acronym of ICC, the court took up its duties on 1 July 2002. However, its authority was limited to war crimes committed after this date. The ICC cannot deal with crimes committed earlier, and this presents a dilemma for attempts to bring war criminals in Afghanistan to justice. The jurisdiction of the ICC—

of which Afghanistan is a member—does not cover the crimes committed during the protracted Afghan War between 1978 and 2001.

The Afghanistan Independent Human Rights Commission (AIHRC) is assisted by the UN and the international community in its search for a way out of this dilemma. For instance, a conference negotiated by the UN took place under the auspices of the European Union in Den Haag in June 2005. At this conference, the Afghan government and the AIHRC agreed on a political compromise in the form of the “Action Plan for Peace, Reconciliation, and Justice.”

### **The action plan: A political controversy**

In a three-year preparatory phase, the action plan aims to design a specifically Afghan process of transitional justice. The action plan was accepted by the Karzai cabinet in December 2005. The “Afghanistan Compact”, a five-year plan for the second phase of reconstruction approved by the Afghanistan Conference in London on 31 January 2006, explicitly mentioned the action plan as one of the benchmarks to be implemented.

However, although Present Karzai was expected to make the official announcement of the action plan in spring of 2006, he has not yet done so. An official announcement would be necessary in order to oblige the relevant ministries (e.g. the ministry of justice) and their provincial offices to participate. Instead, political resistance is forming among the former *mujaheddin* commanders, who now hold high political offices and fear having to face charges before a special court. As Karzai is dependent on the support of some of these *mujaheddin* politicians, the deteriorating security situation offers him a welcome pretext for further delaying the official announcement of the action plan.

Karzai’s hesitation must be evaluated in the context of the fundamental controversy over priorities which has been dominating

the reconstruction process since 2002: Should creating political stability take precedence over justice—in other words, over prosecuting the war criminals?

At the UN Assistance Mission in Afghanistan (UNAMA), signs of a paradigm shift have recently been observed. In agreement with the USA and the international community, the then UN Special Envoy, Lakhdar Brahimi, argued from 2002 onwards that stability should come first and justice second. In contrast, Germany's Tom Koenigs, who has held the post of UN Special Envoy since March 2006, supports the demands of international human rights organisations for "stability *and* justice."

The AIHRC caused the controversy to heighten further with its postulate of "no peace without justice." Led by its chairperson, Dr. Sima Samar, and commissioner Ahmad Nader Nadery, the AIHRC assigns top priority to criminal prosecutions. Additionally, it categorically rejects an amnesty and impunity for certain perpetrators—both of which have been demanded by voices within the *mujaheddin* camp. The AIHRC adopted this uncompromising attitude in order to put pressure on the still-indecisive President Karzai. It justifies its hard-line policy with international evidence that peace can only be assured in the long term if war criminals are brought to justice. For the AIHRC, therefore, the only points still requiring clarification are *how* the future special court will be put together and *when* it will be instituted.

### **Unfavourable conditions for transitional justice in Afghanistan**

The conflict over priorities cuts to the core issue of the balance that must be struck between criminal proceedings and reconciliation, the two fundamental components of any transitional justice process. However, in the case of Afghanistan, the process cannot even begin before the appropriate structural prerequisites are created. Dealing with the country's war traumas could help to reduce the risk of violence escalating in

the ways described above. As almost every family in Afghanistan is affected by the consequences of the war, an environment must be created in which these traumas can be addressed.

This requires structural changes which are also urged by the action plan, namely the reform of the judicial sector as a whole and the restructuring of government institutions to make them accountable, credible, efficient, and transparent. In other words, the political system must be purged of corruption, nepotism, and incompetence and protected from interference by the former rulers. As important and necessary as these structural reforms are, it remains questionable whether they can be put into practice politically.

This illustrates a fundamental institutional dilemma. Although the population distrusts the judicial system and its widespread corruption, it is nevertheless calling in a general way for the war criminals to be punished. When asked about the form that criminal prosecutions should take under these circumstances, Afghans typically reply that the existing courts are incompetent and that a new generation of legal experts must be trained first. However, this would delay criminal proceedings indefinitely and entail the risk of victims, witnesses, and perpetrators dying before the trials begin.

The problem of the legal basis of any such trials is equally awkward, but so politically controversial that it is rarely discussed in public. The action plan contains a formula involving the political compromise that war crimes should be tried in accordance with the "principles of the holy religion of Islam, international law, and transitional justice." However, there is no agreement about whether these different legal norms can be reconciled with one another.

Talks with representatives of the AIHRC reveal that their focus is exclusively on (secular) international law. In contrast, however, the majority of the population is predominantly conservative and calls for

the criminals to be punished according to the stipulations of the Sharia, which includes the death penalty. A smaller, liberal part of the population wants the criminals to be punished under both systems—without, however, being able to spell out the relationship between the two. Additionally, the rural areas have a third legal tradition in the form of many different traditions of uncodified customary law. Customary law would come into play in the case of atonement for less serious war crimes and reconciliation between perpetrators and victims.

This situation presents an almost insoluble problem for the special court demanded by the AIHRC. Which code of law should this court follow? And how will the choice of law code affect the composition of the special court? Should it be composed only of Afghan judges (who have yet to be trained) or should it include international members? If the latter, it is unlikely that the Sharia would be adopted as the legal norm. Furthermore, how can the court ensure that its verdicts will not be rejected as the unilateral “justice of the victor” and that the wider (conservative) public will accept its decisions as being “fair”?

Another fundamental problem is that of obtaining evidence that can be used in court. The action plan includes a separate “truth-seeking” process which will document the war crimes and the names of victims, witnesses, and perpetrators. This data will be collected in a special centre. However, the preconditions for this process are particularly unfavourable in Afghanistan. Many written documents were lost in the war, so that the process would have to depend on the statements of witnesses. But even they would be unable to shed light on many issues. For example, for some phases of the war it is almost impossible to reconstruct the chains of command from commanding officers down to the combatants. Thus there is a high risk that persons known to have committed crimes will have to be released due to lack of clear evidence.

Finally, there is also a socio-political impediment which jeopardises the success of the overall process. The national unity that is so often invoked in festive speeches is non-existent in reality. Afghan society is polarised along ethnic lines and split into the adherents of various former wartime regimes which fought one another during the 23 years of the war. Additionally, it is socially, economically, and mentally divided into those who stayed in the country and those who have returned from exile, often with better levels of education.

These dividing lines are already making themselves felt in the ways each group perceives the country’s wartime past. Each socio-political group has created its own “collective myth” about the events of the war.

Based on its experiences in its own history, Germany can contribute in two ways to the process of dealing with Afghanistan’s past. For one thing, Germany can promote dialogue between the estranged groups in the truth-seeking and documenting processes. Additionally, the country can support the search for a social consensus about the facts and the evaluation of wartime events by promoting the formation of an independent Afghan historical commission.

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