

INCONVENIENT JUSTICE: THE STRUGGLE TO "CLOSE THE BOOKS" IN

AFGHANISTAN AND NEPAL

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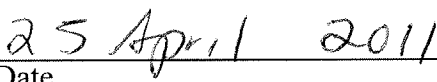
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ABSTRACT

Inconvenient Justice argues for a more nuanced understanding of the dynamic “local” that goes beyond the realm of a cultural framework. Correspondingly, it suggests that conceptualization of the “local” needs to be problematized further to expose the tensions and hierarchies of and within the local, and to question whose version of the local is actually prioritized in transitional justice programming. Specifically it asserts that the local must be understood as an inter-subjective concept and that the “local” in transitional justice should be seen as a dynamic, evolving phenomenon.

This research examines five specific areas, which it insists, *are* critical components defining the local: (i) the historical context within which “transitional justice” mechanisms are implemented; (ii) the limitations of, and opportunities for, local legal systems to engage with transitional justice questions; (iii) the internal/domestic and international politicking around the “transitional justice” discourse; iv) the importance of centrally placing the local to define justice; and, (v) as an illustration of the domestic struggle for long-term justice, the role of National Human Rights Institutions (NHRIs) which link local voices to national and international platforms of decision-making and

balance their role of advocating for human rights, while looking into past instances of abuses. Using a comparative case study approach, this research draws on one hundred and fifteen in-depth interviews conducted with international and national organizations, policy-makers, government officials, journalists, experts, and victims' groups in Kabul, Kathmandu, Washington D.C., and New York. It also incorporates participant observation, narrative research and analyses of reports, correspondence, press releases, agreements, bills, official texts, newspaper articles and petitions to provide an in-depth understanding of the complexities of the justice question in both these contexts.

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LIST OF ACRONYMS

AC	Afghanistan Compact
ACAP	Afghan Civilian Assistance Program
ACHR	Asian Center for Human Rights
ACSF	Afghanistan Civil Society Forum
AF	Advocacy Forum
AI	Amnesty International
AIHRC	Afghanistan Independent Human Rights Commission
AJP	Afghanistan Justice Project
AL	Awami League
ANBP	Afghanistan New Beginnings Program
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
APF	Armed Police Force
APRP	Afghanistan Peace and Reintegration Program
AREU	Afghanistan Research and Evaluation Unit
AW	Accountability Watch
AWN	Afghanistan Women's Network
CAT	Convention Against Torture

CEDAW	Convention for Elimination of Discrimination Against Women
CERP	Commander's Emergency Response Program
CCF	Canadian Commander's Contingency Fund
CCDH	Human Rights Consultative Council
CHD	Center for Humanitarian Dialogue
CHR	Commission on Human Rights
CHRP	Commission on Human Rights of the Philippines
CIA	Central Intelligence Agency
CIPs	Community Impact Projects
CIVIC	Campaign for Innocent Victims in Conflict
COCAP	Collection Campaign for Peace
CoA	Constitution of Afghanistan
CPA	Communist Peace Agreement
CPN-M	United Communist Party of Nepal-Maoist
CRC	Convention on the Rights of the Child
CSHRN	Civil Society and Human Rights Network
CSJ	Committee for Social Justice
CVSJ	Conflict Victims' Society for Justice
DDR	Disarmament Demobilization and Reintegration
DIAG	Disbandment of Illegal Armed Groups
DFID	UK Department of International Development
DIHR	Danish Institute of Human Rights

DPKO	Department of Peacekeeping Operations
DRA	Democratic Republic of Afghanistan
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	Convention on Economic Social and Cultural Rights
EU	European Union
FEDO	Feminist Dalit Organization
FIR	First Information Report
FOHRID	Human Rights and Democratic Forum
FSV	Foundation for Solidarity for Victims
GoA	Government of Afghanistan
GoN	Government of Nepal
GTZ	German Technical Agency
HRC	Human Rights Council
HRW	Human Rights Watch
HRAG	Human Rights Advisory Group
IAGs	Illegal Armed Groups
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IDPs	Internally Displaced Peoples
IHCHRP	The International Council on Human Rights Policy
IMF	International Military Forces
INHURED	International Institute for Human Rights, Environment Development
IOM	International Organization for Migration
ISA	Islamic State of Afghanistan
ISI	Inter-Services Intelligence
JI	Jamaat i-Islami
KGB	Komitet gosudarstvennoy bezopasnosti/Committee for State Security
KHAD	Khidamati Ittila’at-i Dawlati
LAA	Local Administration Act
LSGA	Local Self-Governance Act
MDCs	Municipal Development Committee
MOI	Ministry of the Interior
MOJ	Ministry of Justice
MoLSAMD	Ministry of Social Affairs, Labor, Martyrs, and Disabled
MOU	Memorandum of Understanding
MP	Member of Parliament

MPA	Maoist People's Army
MVA	Maoist Victims Association
NA	Nepal Army
NATO	North Atlantic Treaty Organization
NBA	Nepal Bar Association
NCICC	National Coalition for the International Criminal Court
NCPJ	National Consultative Peace Jirga
NCS	National Security Council
NEFAD	National Network of Families of Disappeared and Missing Persons
NGO	Nongovernmental Organization
NHRC	Nepal Human Rights Commission
NHRI	National Human Rights Institutions
NP	Nepal Police
NRC	Norwegian Refugee Council
NSC	National Security Council
NTTP	Nepal's Transition To Peace
NWC	National Women's Commission
OEF	Operation Enduring Freedom
OHCHR	Office of the High Commissioner for Human Rights
OHCHR-N	Office of the High Commissioner for Human Rights-Nepal
OIC	Organization of Islamic Countries
OSCE	Organization for Security and Cooperation in Europe

OSI	Open Society Institute
PD	Protection Desk
PDPA	People’s Democratic Party
PHR	Physicians for Human Rights
PLA	People’s Liberation Army
POHRF	Post-Operations Humanitarian Relief Fund
PRTs	Provincial Reconstruction Teams
PTS	Strengthening Peace Program (Proceay -i Tahkeem -i Sulha)
QIPs	Quick Impact Projects
RAWA	Revolutionary Association of the Women of Afghanistan
RNA	Royal Nepal Army
SPA	Seven Party Alliance
TADO	Terrorist and Disruptive Activities Ordinance
TCA	Torture Compensation Act
TLO	Tribal Liaison Office
TRC	Truth and Reconciliation Commission
TJCG	Transitional Justice Coordination Group
UDHR	Universal Declaration of Human Rights
UIFSA	United Islamic Front for the Salvation of Afghanistan
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan

UNDP	United Nations Development Program
UNIFEM	United Nations Entity for Gender Equality and the Empowerment of Women
UNMIN	UN Mission in Nepal
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
US	United States
USAID	United States Agency for International Development
USIP	United States Institute of Peace
VDCs	Village Development Committees
WGEID	Working Group for Enforced and Involuntary Disappearances
YCL	Young Communist League

CHAPTER 1

INTRODUCTION: EXAMINING THE JUSTICE QUESTION IN AFGHANISTAN AND NEPAL

On December 10, 2006, the Government of Afghanistan (GoA) officially launched the National Action Plan for Peace, Reconciliation and Justice in Afghanistan (henceforth National Action Plan). The national strategy was drawn up by the Afghanistan Independent Human Rights Commission (AIHRC) in consultation with other international and national human rights organizations to address the questions of wartime atrocities committed in the country in almost three decades of conflict. The plan included the strongest statement yet against impunity: “Considering the clear Koranic verses and the international law, no amnesty should be provided for war crimes, crimes against humanity and other gross violations of human rights.”¹

Yet, on January 31, 2007, the lower chamber of Afghanistan’s parliament, the Wolesi Jirga (People’s Council), passed an amnesty bill forgiving all those responsible for committing war crimes and crimes against humanity. Within a month, on February 20, the Meshrano Jirga (Council of Elders) approved the bill by a 50-16 majority. Finally, in December 2009, the Afghanistan’s National Reconciliation and Stability Law, also known as the “Amnesty Law

¹ Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan, p.10 http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/Thematic/Action_Pln_Gov_Af.pdf. (Accessed January 10, 2007)

appeared in the *Official Gazette* (no. 965), thus ending speculation among the international community and national civil society actors regarding the legal status of the bill.²

Two specific events in particular had direct bearing on the passage of the amnesty law. On December 17, 2006, a mere week after the National Action Plan was launched, Human Rights Watch (HRW) published a report titled *Afghanistan: Justice for War Criminals Essential to Peace, Karzai Must Hold Officials Accountable for Past Crimes*.³ The report contained a list of names of individuals allegedly guilty of massive human rights violations during the years of conflict and who today occupy positions of significant political influence.⁴ And, on December 30, 2006, Iraqi dictator Saddam Hussein was executed after a speedy trial by the Iraqi

² There was significant confusion about when exactly President Karzai signed the bill. According to some, Karzai signed the bill sometime in March 2007. However, interviews conducted in Kabul and Washington DC indicated that although the National Assembly approved the National Reconciliation Bill, the president actually did not sign it. A review of the Afghan Constitution indicates that a President's signature is not required for the passage of a bill. However, if there is disagreement between the President and the National Assembly, he can send it back to the Wolesi Jirga within 15 days. Indeed, Karzai made changes to the original bill allowing for victims' rights before sending it back to the Parliament and both the Wolesi Jirga and the Meshrano Jirga accepted these changes. According to the Afghan Constitution, once the bill is returned to the president it is considered endorsed and enforced after 15 days, regardless of whether he actually signs the document. Several of the interviews taken during the research revealed that particularly for civil society (national and international) this confusion was not considered necessarily a bad thing. Instead, questions about the bill's legal status allowed the space for work to be done quietly around "transitional justice." There was genuine fear that too many questions about the "amnesty" bill would bring the issue into the limelight, which in turn would negatively impact any movement on "transitional justice" activism.

³ Emily Winterbotham, The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges, A Discussion Paper, *Afghanistan Research and Evaluation Unit (AREU)*, April 2010 <http://www.areu.org.af/Uploads/EditionPdfs/1009E-The%20State%20of%20Transitional%20Justice%20in%20Afghanistan%20-%20Actors,%20Approaches%20and%20Challenges%20DP%202010%20Final%20Web.pdf> (Accessed April 30, 2010).

⁴ This list initially had appeared in Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity, *Human Rights Watch*, July 6, 2005 <http://www.hrw.org/en/reports/2005/07/06/blood-stained-hands>. (Accessed January 5, 2007)

Special Tribunal, which had convicted him on the charge of crimes against humanity for the murder of 148 Iraqi Shi'ite in the town of Dujail in 1982. Warlords openly condemned HRW for its “naming, shaming and blaming” report, and many are certain that the report’s publication and in particular, the developments in Iraq expedited the momentum for the passage of the amnesty law.

While the world’s attention was diverted by the Iraq war for much of the early and mid 2000s, a little over two thousand miles away, the land-locked mountainous country of Nepal was experiencing its own political revolution. In November 2006, after a series of failed peace talks, the Nepalese government (GoN) and the United Communist Party of Nepal-Maoist (CPN-M) finally signed the historic Comprehensive Peace Agreement (CPA), officially ending ten years of a bitter and brutal conflict. In addition to commitments for permanently ceasing hostilities, and moving former People’s Liberation Army (PLA) into cantonments and the army into their barracks, the Comprehensive Peace Agreement (henceforth the CPA) had three provisions to address abuses that took place during the war: a truth and reconciliation commission (TRC); a national peace and rehabilitation commission, and a commission for the “disappeared” (henceforth the Disappearance Commission). Beyond these broad mandates, however, the CPA contained no detailed guidance about how to form these investigative bodies. The greatest amount of civil society mobilization has been around the drafting of legislations for the Disappearance Commission and the TRC, but as of this writing, neither of the institutions has yet been established.

What do these two narratives, unfolding in two very different contexts, reveal about the question of justice in societies in a continual state of turmoil? While contextually distinct, Afghanistan and Nepal have both experienced atrocities that violate existing international legal norms and defy any established norms of civility. These are atrocities of a kind Hannah Arendt, borrowing from Kant, once labeled “radical evil.”⁵ Such acts have had scholars scrambling for a moral and linguistic discourse to emphasize their *extraordinary* nature, which simultaneously propels a moral compulsion to act -- to prevent and to punish -- resulting in a prescriptive package called “transitional justice.”⁶

The cases of Afghanistan and Nepal offer an opportunity to engage with the immensely complex issue of facilitating transition from conflict to stability (which some would call “negative” peace⁷) in contexts where extraordinary crimes have been committed, but where ordinary legal modalities and political circumstances raise questions about how war-time accountability and extremely antagonistic relationships between different parties can reach some level of conciliation. Such conditions also provide an occasion to closely examine what is offered in standardized transitional justice toolkits to address culpability for human rights atrocities, re-establish broken

⁵ Hannah Arendt, *The Human Condition*, (Chicago: University of Chicago Press, 1998), 241

⁶ Ruti Teitel first coined the term “transitional justice” in her seminal work *Transitional Justice*, (New York, NY: Oxford University Press, 2002). Other scholars have offered alternative terms to define the same processes and mechanisms. In this study, transitional justice is used synonymously with “closing the books” a term suggested by Jon Elster in *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, UK and New York, NY: Cambridge University Press, 2004) and the commonly used term “accounting for the past.”

⁷ According to Johan Galtung, negative peace refers to the absence of violence or an end to conflict. See Johan Galtung, An Editorial, *The Journal of Peace Research* 1, no.1 (1964), 1-4.

relationships and societal healing. Finally, their need for culpability for the past and accountability for the future provide an opportunity to scrutinize the tensions that may emerge between the understandings of justice in transitional justice packages and those that emerge in local contexts.

This research initially set out to explore the question of impunity for wartime crimes and the efforts of civil society actors to assist in the transition from a lawless society to a rule of law state. Soon after initiating the research, however, I found that the issue was much more complex than I had originally envisioned, and that these actors could not be studied in isolation from the context in which they were active. The NGOs in particular I had wanted to study became, in fact, the entry points to a far more nuanced and extensive problem -- the dynamic and contentious environment in which they function. The positions they occupy in relation to international actors, and the marginalized voices they seek to represent within such circumstances also provide insight into the complex sociopolitical landscapes within which they operate. This led me to make five observations. First, transitional justice programming and practices do not seem to take into account the legacy of past initiatives of making peace and/or doing justice; in both Afghanistan and Nepal, current efforts seemed, for the most part, far removed from acknowledging the history of, and drawing on the lessons from past efforts at “reconciliation” in Afghanistan and the commissions of inquiry in Nepal. Second, there is a need to further examine existing legal infrastructures, which may compliment, obstruct and/or benefit from the openings that transitional justice practices provide. Third, the politics around transitional justice programming is not only a consequence of such an initiative, but such dynamics can determine the course

and set limitations for transitional justice processes. Fourth, it is critical to examine the degree of inclusiveness within current transitional justice efforts. In other words, it is no longer sufficient to question to what extent the local is privileged in the design and implementation of such programs, but more importantly *which* local, and *whose* local are prioritized in such efforts. Finally, given the nature of a weak state in aftermath of conflict, it is important to examine if domestic struggles for addressing questions of retroactive and successive justice can manifest in institutional structures that attempt to bridge the gap between a very weak state and a possibly fragmented civil society.

Based on these observations, this study asks the broad overarching question: How, and to what extent, are specific understandings of the local situated and, in fact, privileged, in transitional justice processes? More specifically, have Afghanistan and Nepal experienced past efforts to “close the books” or instituted mechanisms or processes that can compare to the transitional justice practices of today? Do current transitional justice efforts acknowledge and/or engage with the legacies of such local initiatives? Considering the role and position of law in transitional justice processes, what constitutes the local legal infrastructure in both contexts? How do these existing legal provisions provide opportunities and/or function as obstacles for mobilization on transitional justice? How does internal/local and external politicization around the transitional justice process impact the objectives set such packages? What do such tensions reveal about *which* local is heard and prioritized? To what extent do the respective transitional justice packages address the voices at the margins? And finally, how does the domestic struggle to address wartime atrocities and ongoing

injustices manifest itself? What does it expose about the friction and relationships at the local level?

Transitional Justice as a Discipline

Once inhabiting the outer edges of the field of political science, predominantly as a study of regimes in transition,⁸ transitional justice has emerged as a core discipline in scholarship and practical policy-making⁹ to provide answers for how to deal with extraordinary crimes. Harnessing a “liberal vision of history,”¹⁰ transitional justice broadly recommends the establishment of a redemptive model of justice through which atrocities of the past are addressed with a view to prevent future violence, a robust and enduring rule of law and a culture of human rights. In so doing, it assumes a *clean* slate and a *clear* break from conflict. Armed with this “liberal ideological framework, which favors homogenizing jurisdictions and cultures in the guise of developing global governance mechanisms,”¹¹ international donors have rushed in to promote neatly packaged transitional justice toolkits. These have consisted of programs to establish the rule of law; disarm, demobilize and reintegrate

⁸ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Julian J. Rothbaum Distinguished Lecture Series, (Norman, UK: University of Oklahoma Press, 1993).

⁹ See Ruti Teitel, *Transitional Justice* (New York, NY: Oxford University Press, 2002). Also see The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies, *Report of the Secretary General to the Security Council*, UNSC, S/2004/616, August 23, 2004, <http://www.undp.org/cpr/documents/jssr/ssr/rule%20of%20law%20and%20transitional%20justice.pdf>. (Accessed January 10, 2007).

¹⁰ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 3

¹¹ Moses Chrispus Okello, “Afterward: Elevating Transitional Local Justice or Crystallizing Global Governance?” in Rosalind Shaw and Lars Waldorf with Pierre Hazan, eds. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford, CA: University Press, 2010), 277.

(DDR) former combatants; and vet (to some degree) candidates in election bids. Increasingly, they have also included efforts to create and/or support rights-based civil society actors, particularly NGOs whose core mandate has become the promotion and protection of human rights as defined internationally¹² and establish a “culture of responsibility” or a “culture of rights.”¹³ In short, their actions reflect the normative values of a neoliberal ideology.

In recent years, the tenets of the transitional justice paradigm have come under serious criticism. These concerns have ranged from critiquing the political ideology on which it is based (i.e. the neoliberal paradigm), to questions about the historically heavy reliance on the maximalist position, the tendency of many states to desire a minimalist approach, to the absence of gender analysis in its assumptions and implementation. The maximalist and minimalist approach require a short explanation. The former strictly adheres to the notion that punitive punishment, i.e. trials which hold individuals accountable for their crimes serves as a deterrent for the future commission of violence. It also holds that the establishment of the rule of law strengthens democracy. A failure to prosecute, it follows, results in “a culture of impunity, [that] erodes, the rule of law and encourages vigilante justice.”¹⁴ The latter,

¹² Laurie S. Wiseberg, “Human Rights Nongovernmental Organizations” in Bruce Weston and Richard Claude, eds. *Human Rights in the World Community: Issues and Actions*, (Philadelphia, PA: University of Pennsylvania Press, 1992), 372-382. See also Stanley Cohen, “State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past,” *Law and Social Inquiry* 20 No.1, (Winter 1995).

¹³ David Crocker, “Truth Commissions, Transitional Justice and Civil Society,” in Robert I. Rotberg and Dennis Thompson, ed. *Truth V. Justice: The Morality of Truth Commissions*, (Princeton, NJ: Princeton University Press, 2000), 99-121.

i.e. the minimalist approach, critiques the assumption that trials will lead to deterrence. Instead, adherents of this approach espouse that trials in fact generate greater violence and instability since such punitive measures do not take into account the political realities of a given context. Instead, they support the provision of amnesties to best protect the period of transition from unnecessary violence.¹⁵

The widely popular transitional justice rhetoric among scholars and practitioners has, until very recently, been supported more by rhetorical platitudes than solid empirical evidence. Olsen, Payne and Reiter may be the first to make a scholarly attempt to evaluate transitional justice using a comparative empirical study. In *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, they empirically demonstrate that in general, transitional justice has a positive impact on both human rights and democracy, although they advise caution, warning against over-enthusiasm in such findings. Their study shows that while transitional justice mechanisms in general advance these goals, such an outcome is not immediate and may take over a decade after the transition to manifest.¹⁶ Further, they unveil that neither the maximalist nor the minimalist approach by themselves fare well.¹⁷ A

¹⁴ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, (Washington D.C.: USIP Press, 2010), 17.

¹⁵ For a discussion of the minimalist approach also see Mark J. Osiel, "Why Prosecute? Critics for Punishment for Mass Atrocity," *Human Rights Quarterly* 22, no 1 (2000), 118-147. For a succinct discussion of the maximalist and minimalist positions as well as a discussion on moderate and holistic approaches see Olsen, Payne and Reiter, *Transitional Justice in Balance*, 16-25.

¹⁶ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, (Washington D.C.: USIP Press, 2010), 146.

¹⁷ Ibid.

particularly interesting finding in their work is that “truth commissions, when used alone, have a negative and significant effect, [i.e.] a decrease in the measures of democracy and human rights.”¹⁸ In the very recently published *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, Wiebelhaus-Brahm offers similar findings on the relationship between TRCs, democracy and human rights. His study concludes, “truth commissions are consistently negatively related to subsequent human rights [and that there is] no statistically significant relationship between truth commission operations or having conducted a truth commission and subsequent democratic developments.”¹⁹ Both these recent studies provide impetus for further research as to what kind of truth commissions are the most effective and under what circumstances. In the interim, the underlying findings of both *Transitional Justice in Balance* and *Truth Commissions and Transitional Societies* effectively challenge a long held perception by advocates of such mechanisms both in scholarly and practitioner circles, which is that victim-centered and less adversarial commissions with its focus on “truth-seeking” and rebuilding fractured relationships are ultimately more effective in delivering justice that is non-adversarial.²⁰ Last but not the least, more recently, criticism has also been

¹⁸ Ibid, 153.

¹⁹ Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, (New York, NY and London, UK: Routledge, 2010), 140.

²⁰ The premises of restorative justice perhaps best define justice that goes beyond the punitive. Restorative justice recognizes the humanity of the offender as well as the dignity of the victim. It is most commonly expressed in the form of truth commissions. Since it is victim-centered and future oriented it can outline necessary reforms, allow victims to speak of their pain, provide acknowledgement of the past and keep abuses from happening in the future. Martha Minnow, an advocate for restorative justice and truth commissions argues that promoting prosecutions ultimately

leveled against the “top-down” internationalized approach that marginalizes the local customs and cultures of the contexts in which they have been operationalized, an issue that will be more closely discussed toward the end of this chapter.

This dissertation takes into serious account these criticisms of transitional justice processes and their proffered mechanisms, particularly focusing on the tensions between the international approach and local context and the recent findings on truth commissions, which temper the enthusiasm around such mechanisms. It essentially argues that while the “local” should still matter in the international community’s (i.e. the United Nations, human rights and transitional justice-oriented international actors) desperate scramble to push a society in transition to account for the past, the existing conceptualization of the “local” needs to be problematized further. It is urgent to unpack the meaning and understanding of the local as is now accepted and consulted by international actors to expose the tensions and hierarchies of and within the local, and to question whose version of the local is actually prioritized in transitional justice discourse and programming.

The use of the terms local and “margins,” which will be used interchangeably over the course of this dissertation requires further discussion. In this study, margins and local are not used to denote a descriptive geographical site, nor a particular

foments more tensions and can deepen the schisms while commissions of inquiry promote catharsis for victims, perpetrators and witnesses through the restorative power of speaking about trauma. Ultimately, restorative justice creates the space for true reconciliation and healing to take place. Hence, both justice is served and relationships are restored in the best-case scenario. For a deeper discussion on restorative justice, see Elizabeth Kiss, “Moral Ambitions Within and Beyond Political Constraints: Reflections on Restorative Justice,” in Robert I. Rotberg and Dennis Thompson, eds. *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, NJ: Princeton University Press, 2000), 68-98.

location; they are neither tangible, nor inert concepts. The terms are also not used to signify a deviation from accepted social norms and standards. Instead, borrowing from Tsing who uses the term margin to “indicate an analytical placement that makes evident both the constraining, oppressive quality of cultural exclusion and the creative potential of rearticulating, enlivening and rearranging the very social categories that peripheralize a group’s existence,”²¹ local and margin signifies the points of entry, engagement and the central position from which the discussion and activities of transitional justice will be assessed and evaluated. Further, it stresses that the local that cannot be categorized within the realm of a singular “culture” or “tradition” and neither can it be captured in the ambit of such neat labels. The study harnesses Otto, Toro and Farley’s uncomfortable term “autistic isolation,” used to imply “absent while in the middle of the action”²² to underscore the situation of the most excluded of the local. Moreover, it argues that this is local is not only the silenced voices but also the difficult questions that lurk at the periphery of standardized transitional justice’s accepted local, namely culture and tradition. It is these understandings of the local that need to be harnessed to critique the existing discourse and practices in transitional justice.

The study recognizes that recent efforts have attempted to consult the “local” to inform mechanisms to do “justice,” such as Rwanda’s integration of the *gacaca*

²¹ Anna Lowenhaupt Tsing, From the Margins, *Cultural Anthropology* 9, no. 3 August, 1994), 279-297

²² Dianne Otto, Roberto Aponte-Toro and Anthony Farley, The Third World and International Law: Voices from the Margins, *American Society of International Law* 94 (April 5-8, 2000), 51.

courts for deliberating justice for the genocidaires, Northern Uganda's experimentation with ritual actions such as *mata oput* (drinking the bitter root) and *gomo tong* (bending of the spears) to mark the end of conflict and antagonistic relations, and current efforts in the Extraordinary Chambers of Chambers in the Courts of Cambodia (ECCC) to integrate Cambodia's customary laws with international legal norms to try war criminals of the Cambodian genocide. However, such international efforts seem to be missing a fundamental point: that even "culturally informed" programs to promote "reconciliation" does not necessarily address the question of a vibrant context, and neither do they *prioritize* the local. Further, this kind of engagement with the local at the level of culture perceives the former as a static entity. Instead, this study suggests that the local is active and evolving, influenced by external and internal forces, sociopolitical factors, and past experiences, resulting in a "dynamic" phenomenon, which, when brought to the center of the transitional justice discourse and practice, has the potential to influence the direction and scope of efforts to "close the books." This is a significant observation because it is the particularities of context, which ultimately inform and legitimize justice claims. Last but not the least, a core criticism that emerges from this study is that the paradigm of "societies in transition" approaches transition as a linear process, thereby overlooking its complex and fragmented landscape and the local power relationships that emerge within it. A transitional justice checklist does not take into account the fluid political context in which such programming intends to take place. It follows then that such packages could seem too disconnected from the

complexity of a conflict and its aftermath, the power arrangements that emerge and the privileging of certain local rhetoric and actors over others.

Given these concerns, the study first asserts that the fragmentations, peculiarities and specificities of local context should play a more central role in exploring and defining what “accounting for the past” could mean, and the extent to which it is a viable response to wartime atrocities. Second, an overt focus on specific and standardized mechanisms to deliver transitional justice, such as the commissions proposed in Nepal for example, can overshadow underlying and ongoing *ordinary* justice claims against impunity and the demands of immediate needs of survivors. In other words, “transitional justice,” unlike the less trendy “justice” relating to socioeconomic redistribution and law and order concerns, may focus on “truth-seeking” and reconciliatory mechanisms, which in turn, encourages states to deprioritize the identification and punishment of perpetrators or neglect questions of dire socioeconomic inequity. Correspondingly, a state’s progress toward “peace” is measured by the ability to stick to a short timeframe, to involve representatives of all warring factions and transform aggressors into invested political stakeholders; it is rarely focused on responding to deep-rooted questions of *in*justice, which require a long-term and targeted approach. In other words, (often internationally designed or informed) commissions with temporal mandates and limited powers neither have the scope nor the ability to deliver on long-term justice concerns or effectively draw the lines between past atrocities and ongoing injustices.

The Methodological Approach

It is important to reflect on this research project through the lenses of my own identity, experiences and background, which have played critical roles in drawing my attention to this issue and the countries selected for the study. I consider such a discussion on positionality and reflexivity to be indispensable to both the philosophical approaches and research methods I employed for the study and for understanding the rationale behind the case study selection.²³ Further, I believe it is not only advantageous but also prudent to locate myself in the questions I ask and why I ask them; to be constantly aware of how I understand and interpret the realities of war crimes and their subsequent impact on societies and political systems; state decisions for pragmatic/political reconciliation; international actors' search for alternate mechanisms for addressing the past; the constraints and politicking around such measures; the implications of institutionalizing cultures of impunity in fragile states; and to be conscious of how I am perceived by those whom I interview.²⁴ In the following sections, I chronologically provide some important aspects of my personal background and the continued engagement I have had with Nepal and

²³ For a discussion on the merits of case study selection, see Robert K. Yin, *Case Study Research: Design and Methods*, 2nd edition, Thousand Oaks, California: Sage Publication, 1994; Gary J. Anderson, *Fundamentals of Educational Research*, 2nd edition, (London, UK: Falmer Press, 1998); Jacques Hamel, With Steiphane Dufour And Dominic Fortin, *Case Study Methods*, (Thousand Oaks, California: Sage Publications, 1993; Khairul Baharein Mohammed Noor, Case Study: A Strategic Research Methodology, *American Journal of Applied Sciences* 5 no. 11 (2008), 1602-1604.

²⁴ This reflexive approach is largely inspired by feminist methodological theory. See for example Kim V. L. England, Getting Personal: Reflexivity, Positionality, And Feminist Research, *The Professional Geographer* 46, no.1 (1994), 80-89; Natasha S. Mauthner and Andrea Doucet, Reflexive Accounts And Accounts Of Reflexivity In Qualitative Data Analysis, *Sociology* 37, no.3 (2003), 413-431; Gayle Letherby, *Feminist Research In Theory And Practice*, (Buckingham, UK: Open University Press, 2003).

Afghanistan both as a scholar and a practitioner. I then go on to talk about my fieldwork, the case for comparative analysis, and the limitations of the study.

A Personal Narrative

I am the child of survivors of the genocide of 1971.²⁵ One of the first of the generation born in an independent Bangladesh, narratives of the struggle for freedom against a Pakistani political and military occupation and discriminatory practices framed my understanding of myself as a Bengali and a Bangladeshi ever since I can remember. However, I realized early on that the space to discuss the brutalities of the genocide and the aftermath was almost non-existent in the country. Bangladesh, from 1971 to 1990, went through periods of intense political turmoil punctuated by political assassinations of several of its leaders and seventeen military coups. Outside of eulogizing a handful of “heroes” and establishing a few national monuments, there was no discussion of culpability of the Pakistani generals or the complicity of those who participated in the genocidal campaign, the ten million refugees that filtered into India and the thousands of war babies born as a consequence of genocidal rape.

Neither were there any notable public discussions or debate about the distortion of the conflict as a religious one, which harnessed the ideology of the “jihad” in the mass

²⁵ For a background on the Bangladesh genocide, see Wardatul Akmam, “Atrocities Against Humanity During The Liberation War In Bangladesh: A Case Of Genocide,” *Journal of Genocide Research*, 4 no. 4 (2002), 543-559; Rounaq Jahan, “Genocide in Bangladesh” in Samuel Totten And William S. Parsons And Israel W. Charny, eds. *Century Of Genocide: Critical Essays And Eyewitness Accounts*, 3rd edition, (New York, NY and London, UK: Routledge, 2008), 295-320; Mohammad Omar Farooq, “Islam and Genocide: The Case of Bangladesh in 1971,” in Steven L. Jacobs, ed. *Confronting Genocide: Judaism, Christianity, Islam*, (Lanham, MD: Lexington Books, 2009), 139-149. See also Angela Debnath, “The Bangladesh Genocide: The Plight of Women,” in Samuel Totten, ed. *Plight and Fate of Women During and Following Genocide*, vol. 7, (New Brunswick, NJ: Transaction Publishers, 2008).

killings of the Bengali population. Instead, since the general amnesty of 1973, many of those culpable individuals occupied powerful political positions in successive governments. Several of them were founders and members of the initially banned *Jamaat-i-Islami* (JI), a key actor in the genocidal campaign, which quickly assumed its position after executive orders allowed its political participation. The question of accountability was never asked in political circles; the poor [wo]man's war remained the poor [wo]man's dirty secret.

On 25 July 2010, thirty-nine years since the genocide, the special prosecution for the International Crimes Tribunal founded under the International War Crimes Tribunal Act of 1972 filed the first petition seeking direction to show top four Jamaat leaders detained on charges of committing war crimes in 1971. The trial for war criminals was a one of the critical commitments in the election manifesto of the center-left party, the *Awami League* (AL) that claimed a landslide victory in the elections on December 29, 2008. One of the main reasons for JI's defeat has been attributed to an unprecedented nationwide grassroots movement that since late 2007 mobilized to create awareness about the war criminals of 1971, many of whom are now the senior leaders of the JI and who were running for parliamentary seats. The "forgive and forget" policy adopted both officially and unofficially, was finally revoked.

Influence on the Research and Researcher

The developments in Bangladesh made me reflect critically on the pragmatic rationale offered for political reconciliation after mass atrocities, about what

constitutes justice and the role of domestic actors in articulating justice claims. I do not make generalizations of the experiences in Afghanistan and Nepal and make predictions extrapolating from my observations in Bangladesh. I am cognizant of how international legal norms have changed over the years and how the professionalization of transitional justice is now a constitutive element in the “post-conflict” reconstruction package. I am also aware that the Cold War realpolitik of the seventies played a significant role in creating conditions for the genocide in Bangladesh to remain largely hidden from international narratives. In contrast, the ad hoc tribunals for former Yugoslavia and Rwanda, restitutive justice in the shape of truth commissions in Latin America and South Africa and hybrid tribunals informed by local norms have shaped the backdrop for the current attention to the atrocities in Afghanistan and Nepal. My background as a Bangladeshi however has granted me a unique “insider/outsider” position which merit reflection.

I have no direct ties to either Afghanistan or Nepal except for personal and professional connections given by my time spent in both the countries. However, I do acknowledge that the experiences of being a Bangladeshi (Bangladesh’s history of the genocide and its subsequent periods of upheaval is known in both Afghanistan and Nepal) and the fact that my home country has no political tensions with Afghanistan or Nepal, worked to my advantage. Further, my professional engagement in both the countries served to benefit my research significantly. These advantages however did not overshadow the sheer difficult in conducting research in Afghanistan. Creating a systematic and detailed narrative of “transitional justice,” when very limited documentation exists of the processes has been a highly challenging task. Regarding

the investigation process itself, off-site research meant phone lines would not always work, I was limited to people who had access to mobile services and my interviews had long lags when people were inaccessible. The high level of turnover within civil society, a common phenomenon in Afghanistan to which loss of institutional memory and fragmentation in the continuity of a program is attributed, also constituted significant challenges for the research.²⁶ Connections established during one period of the research did not necessarily ease the pathway for a second round of interviews because people tend to move quickly through different institutions and in and out of Kabul. Of far greater significance was the challenges faced once on the ground. Suicide bombings, violent demonstrations, attacks on local human rights actors, targeting of internationals and ad hoc security barriers were almost daily realities; mobility was mostly restricted to the hours of daylight; and access to some of the international actors was extremely difficult given their reluctance to talk to an outsider. There were far too many security protocols to comply with to enter highly secure compounds; meetings were constantly cancelled because of sudden political and/or security developments and general movement was severely restricted to the availability of a reliable vehicle. In Nepal, the scale of these challenges was significantly lower and I could better access individuals I needed to interview.

²⁶ Despite existing criticisms of the impersonal nature of telephone interviews, researchers have increasingly recognized that telephone interviews can sometimes be the only viable method of doing research. Berg for example argues that telephone research in particular can be most effective when there is already familiarity between the interviewer and the interviewee and/or when researcher has quite specific questions for investigation. For a discussion on telephone interviews and necessary steps to conducting effective telephone interviews. See Bruce L. Berg, *Qualitative Research Methods for the Social Sciences*, 3rd edition, (Boston, MA, New York, NY and San Francisco, CA: Pearson Education Press, 2004), 93-94. Also see Herbert J. Rubin and Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 2nd edition, (Thousand Oaks, CA: Sage Publications, 1997).

However, tracing the narrative of “transitional justice” was still challenging given the heavy reliance on people’s memories and their roles or their absences in the different deliberation processes. Further, the realities of being in a transitional environment defined by frequent violent clashes, bombings, great political uncertainty, *bandhs* (closures) and power shortages played a role in restricting my mobility to certain hours of the day and limiting access to places considered at times too turbulent given the developments on any particular day.

The issue of language needs to be mentioned. A significant portion of my interviews was conducted with representatives of international organizations and local organizations and specialists who were fluent in English. In Afghanistan, under certain circumstances, my knowledge of Urdu was useful; in Nepal, I relied on my fluency in Hindi in several circumstances. When required, I availed the services of interpreters. An additional factor to acknowledge is my south Asian cultural heritage and in the case of Afghanistan, my Muslim heritage, which filled in gaps in communication and association in more challenging moments. Berg would argue that “from an interactionist position, [such interviews] then were symbolic interactions; [f]rom the dramaturgical interview’s perspective, these interactions can [also] be described along the lines of performance.”²⁷ Further, Silverman would contextualize the interviews within the broader social setting, underscoring the importance of the context (in this case, the intersection between religious, cultural and social identities

²⁷ Berg, *Qualitative Research Methods*, 114.

and the subsequent perception of the researcher) to understand the data generated.²⁸

Finally, it is important to acknowledge that the very presence of any outsider in any situation naturally alters the environment, and I was aware of the dynamics of performance, rapport-building and access as a South Asian female professional in both these contexts.²⁹

The role of gender and its intersection with race and culture also needs acknowledgement. I recognize that both my cultural and religious identities as well the reality of being a woman, particularly a young woman, played central roles in influencing my experiences as a researcher. Berg states: “much of the literature of interviewing...suggests that the interviewee’s conception of the interviewer centers around aspects of appearance and demeanor. Overt, observable characteristics such as race, gender, ethnicity, style of dress, age, hairstyle, manners of speech and general demeanor provide information used by an interviewer to confirm or deny expectations about what an interviewer ought to be like.”³⁰ I was aware of how interviewees perceived my role and position not only as a researcher, but how the

²⁸ David Silverman, *Interpreting Qualitative Data*, (Thousand Oaks, CA: Sage Publications, 1993)

²⁹ De Santis for example suggests that the researcher may be seen to play an occupations role based on society’s assumptions of roles of different occupations. See Grace de Santis, “Interviewing as Social Interaction,” *Qualitative Sociology* 2, no 3 (1980), 77. For a discussion of role enactments see Louis A. Zurcher, *Social Roles: Conformity, Conflict and Creativity*, (Thousand Oaks, CA: Sage Publications, 1983). See also Jack D. Douglas, *Creative Interviewing*, (Thousand Oaks, CA: Sage Publications, 1984); Carol A. B. Warren, *Gender Issues in Field Research*, (Thousand Oaks, CA: Sage Publications, 1988); Erving Goffman, *Interaction Ritual: Essays in Face to Face Behavior*, (New York, NY: Anchor Books, 1967); Mary Margaret Fonow and Judith A. Cook, eds., *Beyond Methodology: Feminist Scholarship as Lived Research*, (Bloomington, Indiana: Indiana University Press, 1991).

³⁰ Berg, *Qualitative Research Methods*, 100.

composite package of all aspects of my identity impacted the depth and extent of my access to extract information. In Afghanistan, for example, depending on where I was conducting research -- government offices, embassies and military premises -- I was subjected to severe scrutiny, not only because of being an “outsider,” but also because my identity set (muslim, south Asian, foreigner, woman) presented multiple layers of security concerns. At the same time, in certain contexts, the same identity set determined how much access I had to certain individuals for interviews, how often the meetings were cancelled, how long a period was given to meetings and how the actual interactions played out between typically high-powered male officials and myself during the interview. However, in other situations, being a young woman was an asset since interviewers were interested in my experiences and in the pathway I had taken to get to this area of studies and the challenges I face as a south Asian Muslim woman working in the field of conflict and human rights. Interviews with civil society actors and indeed local female NGO actors created affinity and familiarity in some contexts; access to an empathetic south Asian perspective broke down some of the barriers that might have otherwise been present.³¹ I also found myself in conversations that drew on my own experiences as a practitioner in the human rights field, and questions on being the citizen of a country which frequently struggles with political turbulence, human rights violations, and which has not yet

³¹ Pamela Cotterill, “Interviewing Women: Issues Of Friendship, Vulnerability, And Power,” *Women’s Studies International Forum* 15, no. 5-6 (September-December 1992), 593-606. For a discussion of feminist methodologies, also see Diane Burns and Melanie Walker, “Feminist Methodologies in Research Methods in the Social Sciences,” in Bridget Somekh and Cathy Lewin, eds. *Research Methods in Social Science*, 1st edition, (Thousand Oaks, CA: Sage Publications, 2005).

comprehensively tackled the question of “justice” for the 1971 genocide.³² Such disclosures, some feminist researchers would argue, help develop relationships with interviewees beyond the boundaries of the structured roles of interviewer and interviewee.³³ Such engagement may also fall under the participatory model of interviewing through which power differentials between the researcher and interviewee are addressed and a non-hierarchical relationship may be established.³⁴ Last, but not the least, I was acutely aware of the position of privilege I occupied in being able to engage with actors working on transitional justice processes in two disparate countries.

Methodological Overview

This section argues that the comparative cross-national analysis is an appropriate research design for this study. But prior to making a case for comparative analysis, first, the issue of the case study approach will be discussed. Case study research is appropriate when “investigators either desire or are forced by circumstances (a) to define research topics broadly and not narrowly; (b) to cover contextual or complex multivariate conditions and not just isolated variables; and (c)

³² Richard Tewksbury and Patricia Gagne, Assumed And Presumed Identities: Problems On Self-Presentation In Field Research, *Sociological Spectrum* 17 (1997), 127-155.

³³ See Cotterill, *Interviewing Women*, 593-606. Also see Ann Oakley, “Interviewing Women: A Contradiction in Terms in Doing Feminist Research,” Helen Roberts, ed. (New York and London, UK: Routledge, 1981), 30-61.

³⁴ Lenore Lyons and Janine Chipperfield, (DE)Constructing the Interview: A Critique Of The Participatory Model, *Resources for Feminist Research*, (2000), 33-48.

to rely on multiple and not singular sources of evidence.”³⁵ When examining transitional justice through the single case study method, the approach has generated a vital basic source of information on individual processes. A single case study can offer insight into how and why a particular approach was adopted in a setting. It also supplies a narrative example of a causal link -- it explains the adoption of a particular setting and its eventual results in that setting. However, whether this apparent empirical relationship is characteristic of a general pattern can be rigorously evaluated only with the evidence of multiple cases. Notably, some single-country studies even engage in comparisons at different levels of analysis, including individuals,³⁶ communities³⁷ and racial groups.³⁸ However, a strong case can be made for a comparative analysis as a methodology for empirical research on transitional

³⁵ Robert K. Yin, *Applications of Case Study Research*. Vol 34, 2nd edition, (Thousand Oaks, CA: Sage Publications, 2003), xi.

³⁶ See for example, James Gibson and Amanda Gouws, Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid, *American Political Science Review* 93, no. 3, (1999), 501-17; James Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa, Experiments in Democratic Persuasion*, (New York, NY: Cambridge University Press, 2003). See also James Gibson, Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa, *American Journal of Political Science*, 46, no. 4 (2002), 540-56; Jeffrey Sonis, Hugo van der Merwe, Cyril Adonis, David Backer and Hlaha Masitha, “Forgiveness Among Victims of Political Violence: Evidence from South Africa’s Truth and Reconciliation Process,” presented at the American Psychological Association Convention, Chicago, IL, 2002.

³⁷ See for example, David Backer, Civil Society and Transitional Justice: Possibilities, Patterns and Prospects, *Journal of Human Rights* 2, no.3 (2003), 297-313.

³⁸ Gibson and Gouws, *Truth and Reconciliation in South Africa*, 501-517. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa*, 2003; James Gibson Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa, *American Journal of Political Science* 46 no.4 (2002): 540-56; James Gibson, The Legacy of Apartheid: Racial Differences in the Legitimacy of Democratic Institutions and Processes in the New South Africa, *Comparative Political Studies* 36, no 7 (2003): 772-800; James Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York, NY: Russell Sage Foundation, 2004); James Gibson, Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process, *American Journal of Political Science* 48, no. 2, (2004): 201-217.

justice processes, “which may advocate to enhance awareness of the processes’ origins, implementation and impact while reflecting the empirical landscape and raising substantive questions of interest in the field,”³⁹ and which may enhance understanding of the initiation, implementation and impact of transitional justice processes.⁴⁰ A cross-national perspective can also be helpful to ensure sufficient variation in both the outcomes of interest and the potential explanatory factors, thus permitting more rigorous and comprehensive tests of theories about how these variables are associated.⁴¹ Further, a cross-national comparative analysis can establish whether the motivations and mechanics for “transitional justice” processes are typical or unusual.

Succinctly, cross-national analysis may be warranted for three major reasons: (1) the prevalence of political transitions from repressive rule, civil war and genocidal violence over the past several decades; (2) the diversity of measures that have been adopted to address legacies of human rights violations in these settings; (3) the value of understanding how domestic and international factors shape the selection of approaches and their long-term impact on political and social development. There is also an identifiable and sizeable population of cases ranging from those which have experienced a complete change in political regimes to those that have undergone temporary or incomplete shifts in political circumstances, but have also endured

³⁹ David Backer, “Cross-National Comparative Analysis,” in Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman, eds. *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, (Washington D.C.: USIP Press, 2009), 23.

⁴⁰ Ibid, 23.

⁴¹ Ibid, 50.

violence and political turbulent in the process. Last, but not the least, situating cases in a comparative context takes into account that transitional justice processes rarely occur in isolation, an issue that will be emphasized in the selection of the two cases studies in the next section. Ultimately, (re) examining cases in a comparative perspective, could lead to a better appreciation of the principle issues, political constraints, potential courses of action, expectations of various stakeholders and significance of the decisions that were made. This deeper understanding, could, in turn, have the related benefit of honing retrospective evaluations of the transitional justice measures implemented in different contexts.

Finally, in the context of examining differences in transitional justice processes, the small-N comparative case study approach is suited to examine different institutions, sectors or communities whether across countries or within a single country.⁴² Under such conditions, the qualitative ethnographic approach of “thick description”⁴³ is the most appropriate course of action. Subsequently, each case has been documented in considerable detail, because this level of specificity is both feasible, given the limited number of cases, and integral to the analysis.

Comparative Analysis: Rationale for Case Study Selection

Van Der Merwe, Baxter and Chapman argue “the attachment of labels can give a misleading impression of uniformity across the population of cases, when in reality, such countries exhibit a wide range of political legacies and subsequent

⁴² Ibid, 54.

⁴³ Clifford Geertz, *The Interpretation of Cultures*, (New York, NY: Basic Books, 1973).

experiences.”⁴⁴ A country in transition could be emerging from a single-party monopoly, bureaucratic-authoritarian rule, dictatorship, military junta, totalitarian regime, racial oligarchy, colonial administration or even a theocracy. The labeling of Afghanistan as a “failed state,” where warlords have arisen in the absence of a central authority, as a consequence of lawlessness and violence and high-level international politicking deal-making is different from Somalia where the highly unstable government structure imploded internally.⁴⁵ Certainly, the labels “post-conflict” or “transitional” do not encapsulate the peculiarities of the Afghan and Nepali experiences, and neither do they reflect the same realities in both contexts. The former has slid back into conflict while having a weak, but constant government and a constitution, while the latter is still struggling with a highly unstable government, with the Maoists pulling in and out of the governing structure, and to date is still working on developing a new constitution. Despite these striking differences, countries classified under “transitional,” “post-conflict” and “failed” labels have a common characteristic: the experience of gross human rights violations and, consequently in the transition period, have raised the question of accountability for wartime violations. Transitions, in theory, present a unique opportunity to address human rights abuses during negotiations between opposition groups resulting, in a best-case scenario a peace agreement, or in constitutional provisions that acknowledges such events. However, even without formal negotiations, the question

⁴⁴ Backer, *Cross-National Comparative Analysis*, 24.

⁴⁵ Ibid.

of accountability enters public discourse, because of mobilization by victims' families and civil society networks and whom international organizations, donor agencies and sometimes other governments increasingly assist. Furthermore, globalization means such dynamic discourse and processes are no longer isolated events, but rather can, through the spillover effect, impact the trajectory and activities of other countries in the world.

Why choose Afghanistan and Nepal as the basis for a baseline comparison? After all, the general contention is that each transitional justice process has a distinctively "local" flavor and is therefore unique, undermining any prospect of making useful comparisons of individual processes. Undoubtedly, countries facing issues of transitional justice are politically, economically, historically and culturally different. Moreover, there are differences among the various modes of transitional justice appropriate in each context. Afghanistan and Nepal are irrefutably markedly different in their political histories, their customs and cultures. In addition, the time frame of their respective conflicts, the *raison d'être*, the scale and magnitude of their hostilities and the role of external actors in each context are strikingly different. However, I contend that observable differences need not imply that the cases are altogether incomparable. Adam Przeworski and Henry Teune's seminal work on *The Logic of Comparative Social Inquiry*⁴⁶ is highly illustrative in this regard. Perhaps borrowing from the premise offered by John Stuart Mill, Przeworski and Teune describe two primary techniques of comparative analysis. The first addresses the

⁴⁶ Adam Przeworski and Henry Teune, *Logic of Comparative Social Inquiry*, (New York, NY: Wiley-Interscience, 1970), 153.

question of “most similar cases”-- those that resemble each other with the exception of one specific aspect. The second involves studying “most different” cases -- those that are dissimilar but have a single common feature. In reality however, comparative case studies roughly come close to one or the other of these prototypes and fall somewhere between the two.⁴⁷

While there are glaring differences between Afghanistan and Nepal, there are certain similarities between these two landlocked mountainous countries that merit attention. The first is that both countries located in Asia are on parallel trajectories of transition at a time when the “transitional justice” toolkit is at its zenith in its circulation. Both are marked by the absence of strong, accountable governance structures and a robust rule of law. This has allowed for widespread corruption, systematic abuses of power, an absence of political will to account for the crimes of the past, continuing violations of human rights and the current slide back into conflict.⁴⁸ Both countries have over the years experienced both *de jure* and *de facto* impunity and have, to a greater or lesser extent, relied on the rationale of the political expedience of peace over that of justice. Years of intensive conflict had left Afghanistan’s judicial infrastructure in shambles; further, the combination of French

⁴⁷ Backer, *Cross-National Comparative Analysis*.

⁴⁸ The conflict in Afghanistan has indeed become even more intense since the fall of the Taliban in 2001 particularly since 2004 onwards increasing the need for more foreign troops on the ground to combat the intensification of Taliban attacks in different parts of the country. And, although Nepal signed the CPA in 2006 and has become a parliamentary democracy, the country is extremely unstable with the Maoists withdrawing from the government, rising levels of violence and mobilization of different ethnic groups across the country demanding autonomy and rights. The constitution of the country addressing critical issues of rights and access to Nepal’s over 100 ethnic groups has yet to be written.

and international jurisprudence, *Shari'a* law, the existing customary practices and tribal laws have made the legal system in the country almost impossible to navigate. Consequently, there is no standardized system of punishment and retribution that exists which would have significantly assisted a transitional justice process. In Nepal, the gaps in law have meant certain *jus cogens* crimes have yet to be criminalized. The country's overall poor condition of the legal infrastructure has meant little access to justice for the country's poor and marginalized. Third, both have struggled with a highly decentralized system of governance, where the center for command and control, that is, the capitals, Kabul and Kathmandu, have never been able to assert absolute authority over the rest of their corresponding provinces and regions. The richness of ethnic diversity, the unequal burden of poverty and human rights atrocities experienced also raise questions about the "right" answer to a transitional justice process. Fourth, the screening process for elections in both countries is questionable. In both Nepal and Afghanistan, there has been very little effective vetting.⁴⁹ Both cases also provide an interesting study of the consideration of TRCs as the international prescription for addressing the past. Both, through offers of pardons and reconciliatory measures, official or assumed, have consolidated the positions of individuals with very poor human rights records in public office.

⁴⁹ Although Afghanistan institutionalized a process through the Joint Electoral Management Body (JEMB) to ensure that individuals with poor human rights records did not participate in the elections, corruption, problems of coordination between the different bodies working on the election process, cronyism and other factors played a significant role in the Afghan elections of 2004 and 2005. In the Nepal context, the elections of 2008 did not witness a system of vetting where by those allegedly guilty of committing rights based violations were denied the opportunity of running for public office.

Afghanistan and Nepal share one additional commonality -- the presence of external actors in defining and influencing the scope, capacity and possibility of mechanisms and policies of accountability in each context. Transitional justice processes rarely occur in isolation. The extent of this influence has accelerated, particularly because of the Internet, the proliferation in transnational networks of nongovernmental organizations and other advocates (e.g. regional and international bodies, consultants and policy-makers) who greatly enhance the circulation of information, ideas and hands-on expertise. In both countries, international presence in the shape of the United Nations (UN), United States Institute of Peace (USIP) and the International Center for Transitional Justice (ICTJ) and their corresponding influence on the discourse and direction of transitional justice is prominent. The accumulative experiences of these institutions, the cross-fertilization of ideas, the involvement of local civil society beg for a closer examination of how these actors engage with “transitional justice” activism and how they navigate the tenuous political landscape.

Fieldwork

The findings of this research are based on several years of observations and data gathering. Between 2005-2006, I worked with an international human rights organization in Kabul in access to justice programs. I was therefore in close proximity to the actors and developments unfolding in the areas of rule of law and transitional justice during that period. These observations played a crucial role in encouraging me to think about questions about law, justice and civil society actors within the Afghan context. Formal data gathering for the dissertation took place between 2007 and 2009

in Washington D.C. and New York and field research conducted in Afghanistan and Nepal between 2008 and 2010. A total of one hundred and fifteen interviews were collected between the two case studies. Data collection involved incorporating narrative research with extensive formal and semi-formal interviews and conversations held with the international and national organizations, policy-makers, government officials, journalists, experts, victims groups and the national human rights commissions in both countries. Given the dynamic nature and the constantly shifting civil society landscape in both contexts, I regularly consulted representatives of different organizations, national and international to ensure that I connected with NGOs, victims' organizations, civil society representatives and other relevant authorities that were essential for this research. The resultant interviews provided an overview of the actors in the "transitional justice" field in both contexts, their opinions and analyses surrounding the peace and justice debate, their vision, achievements, challenges and their reflections on their relationships with each other. Finally, the research included reviewing organizational reports, correspondence, press releases, drafts of agreements and bills, official texts, newspaper articles, political analyses, letters and petitions to provide an in-depth understanding of the complexities of the justice and accountability questions in both these contexts.

Narrative Research

The project relies on narrative research to ground the study in ways that would reflect the personal. Clandinin and Connelly argue narrative research is uniquely capable of capturing individuals' stories and investigating how they perceive their

experiences in the temporal, spatial, and personal-social dimensions.⁵⁰ By drawing out participants' stories, interviews are not only descriptive, but rather serve both analytical and representational purposes.

Narrative research essentially probes beyond the mere reporting of events, and even beyond the individual's role in or opinion of such events. In contrast to interviews, which can take on the form of narrating a story weaving in the participation's interpretation of an event and her/his interpretation of it, narrative research provides the opportunity for multiple dimensions of analysis. Ricoeur explains, narratives are both lived and told, mediating between the world of action and the world of recollection/interpretation.⁵¹ Accordingly, narratives include dialectics that combine innovation and sedimentation, fact and fiction⁵² and neutral description and ethical prescription.⁵³ In addition, because of both the researcher and the reader, narratives undergo further interpretation such that the person telling the story simultaneously functions as the interpreter, the interpreted, and the recipient of interpretations.⁵⁴ Interpretation and perception were deliberately used in this study to allow for how understandings of concepts of transitional justice, truth and reconciliation from below confronted the imposed structures from above, and to capture the relevance of such mechanisms in the local context. Each individual

⁵⁰ See Jean D. Clandinin and F. Michael Connelly, *Narrative Inquiry: Experience And Story In Qualitative Research*, San Francisco, CA: Jossey Bass Publishers, 2000).

⁵¹ Paul Ricoeur, *Time and Narrative I*, (Chicago, IL: University of Chicago Press, 1984).

⁵² Paul Ricoeur, *Time And Narrative III*, (Chicago, IL: University Of Chicago Press, 1987).

⁵³ Paul Ricoeur, *Oneself As Another*, (Chicago, IL: University Of Chicago Press, 1992).

⁵⁴ Ricoeur, *Time And Narrative III*, (1987).

interviewed for this research was asked to reflect on her/his own understanding of “transitional justice” as a process and mechanism and also articulate their own reservations and misconceptions. This allowed for a rich, nuanced and complex insight into the actors of transitional justice grappling with their own cynicism and hope about what is feasible. It also allowed them to emerge as complex sites of contentious struggle. I would further argue that narrative inquiry is important for this type of pragmatic study because of the continued and pressing need to listen to the “voices from the ground” which in many cases continue to be marginalized in the face of macro structures and formal decision-making processes. I will use one example from each study to illustrate this. In Afghanistan, my interview with a long term civil society actor, Loya Jirga delegate and researcher revealed that he was a *mujahideen*,⁵⁵ who was deeply resentful and angry at the perception that many who fought in the war against the Soviets were guilty of war crimes. Further, he was both cynical and unwelcoming of an internationalized, institutionalized approach to culpability in Afghanistan and wanted punishment for criminals in “Afghan” terms, because the “international community” had “squandered away their chance...they failed their opportunity to deliver justice to the Afghan people.”⁵⁶ In Nepal, once the formal interviews were over, many of the local actors expressed deep cynicism about the “transitional justice” process and their own conceptual confusion about how the

⁵⁵ Muslim resistance fighters who comprised the loosely aligned opposition groups against the People’s Democratic Party of Afghanistan (PDPA).

⁵⁶ Phone interview with Loya Jirga delegate and former researcher with the Afghanistan Justice Project, Afghanistan, September 10, 2008.

instruments mentioned in the CPA would actually deliver justice, along with distrust of the term “reconciliation.” Their levels of palpable exhaustion with the political stalemate and deteriorating security situation were critical to capture, along with their tentative hopes of a positive change in the unforeseen future. The interpretive quality of narrative research were thus useful for ensuring that local perceptions were not only acknowledged but informed and guided the research.

The Interview Process

Both the content and the format of my interviews varied between my different periods in the respective fields and the methods applied. However, this variation contributes to, rather than detracts from, the strength of my narrative research, by reflecting the development of my study over time, the challenges that confront societies attempting to emerge from conflict and my own challenges to conduct research in two actively turbulent, conflict-ridden zones. As I acquired new data from both primary and secondary sources, and as the conflict dynamics themselves shifted, I made necessary revisions in the interview procedure. This was particularly important given the nature of the comparative analysis to examine whether similar themes were emerging from two very different contexts.

The interviews began with a verbal agreement. I also sent formal questionnaires to the participants in advance of the meetings when they were requested. Participants were told that their participation was voluntary. I asked permission to record the interviews on a digital voice recorder, and/or take notes during the interview, provided the option of speaking off the record and informed

them they could end the interview at any time. All recorded interviews were transcribed verbatim, except for slight changes to ensure comprehensibility, usually to correct language errors. Transcripts were completed as soon as possible after each interview to ensure that interviewee statements and interviewer observations were as accurate as possible.

I made a conscious choice not to use a standardized interview protocol. Instead, I chose a semi-structured interview format (also known as the focused interview approach method), in which the interviewer establishes the focus for the interview, but the actual content and order of the questions remained flexible. I used open-ended questions, some of which emerged during the interview process. In accordance with this model, I developed a standard list of prepared questions, but the wording, order, and content of questions varied between interviews. The model itself was critical for capturing the diverse experiences and opinions while also allowing for comparisons and generalizations between participants and the different contexts. It also allowed interviewees to speak in depth about difficult subjects without pre-direction from the researcher, and allowed the interviewer to ask for further clarification on complex issues. The conversational dynamic enabled a positive rapport between the interviewer and the interviewee, creating a “safer space” for revealing frustrations, doubts, cynicism and even sometimes hope about their responsibilities, struggles and achievements. The model was particularly important in sensitive circumstances such as interviewing victims’ groups in both countries and, for example, representatives of the Nepali army.

I kept detailed field-notes of my observations and experiences throughout the various research periods, including observations from the interviews and documentation from events, meetings, and conferences that I attended related to the rule of law, security, transitional justice, and security sector reform. My research was also shaped by social interactions I had with former colleagues from Afghanistan who work in transitional justice, rule of law and security in Afghanistan, and in the case of Nepal, notes on conversations with different people in roadside tea-stalls, streets, taxis in and around the city and country. I usually wrote notes in a notebook, and then expanded my notes at the end of each day. I drew from an interpretive understanding of ethnography⁵⁷ in writing my field notes, which acknowledges the role of the researcher's experience in producing written accounts. My notes therefore reflected my observations as well as my own interpretations and responses to those observations.

Finally, being a participant observer provided me with types and sources of data that were distinct from the other methods. For example, my presence at a rally in Kathmandu for a TRC, meetings at the Peace Ministry, conferences in D.C. on Afghanistan and strategy meetings to organize a Victims' Jirga in Afghanistan introduced me to actors, conversations, activism strategies and nuances that I would not have encountered through narrative alone. The legitimacy derived from my past work in Nepal and Afghanistan also served me well in being able to engage with many of the activists.

⁵⁷ See Robert M. Emerson, Rachel I. Fretz, Linda L. Shaw. *Writing Ethnographic Fieldnotes*, (Chicago, IL: University Of Chicago Press, 1995).

Data Analysis

The initial reading of the qualitative data -- in terms of transcribing interviews and rewriting rough field notes -- functioned as the first stage in analysis, in which I wrote short notes to start developing ideas about patterns in the data.⁵⁸ I then used both categorical and holistic approaches⁵⁹ to organize and analyze the data, with categorical analysis exploring themes across narratives and observations; and holistic analysis, or connecting strategies⁶⁰ examining ideas within a single individual's or organization's narrative or observed experience. These approaches allow me to consider patterns both between and within participant responses and observations.

While my level of engagement was usually beneficial to the study, it presented limitations as well. My return to Afghanistan in 2010 heightened my awareness of the level of cynicism and distrust that exists between different stakeholders in the country. In Nepal, given the increasingly politicized nature of victims' groups and civil society organizations and the lack of trust between these actors, I had to walk a very fine line to avoid alienating activists. I also became aware of a high level of "research fatigue" with victims in places like Bardiya,⁶¹ which were seemingly "crowded" by international organizations and researchers trying to capture

⁵⁸ See Joseph A. Maxwell, *Qualitative Research Design: An Interactive Approach of Applied Social Research Methods*, Vol 41, (Thousand Oaks, CA: Sage Publications, 2005). Also see Emerson, Fretz and Shaw. *Writing Ethnographic Fieldnotes*, (Chicago, IL: University of Chicago Press, 1995).

⁵⁹ See Amia Lieblich, Rivka Tuval-Mashiach and Tamar Zilber, *Narrative Research: Reading, Analysis, and Interpretation*, (Thousand Oaks, CA: Sage Publications, 1998).

⁶⁰ Maxwell, *Qualitative Research Design*.

⁶¹ Bardiya saw the highest number of disappearances during the Maoist insurgency.

their stories. I faced instances where my assistance was requested to help victims financially or through my professional networks given that such groups could not generally gain access to the Peace Ministry. The regular exposure to the stories of survivors, the tensions between feelings of empathy, helpless and frustration and the conscious effort of intellectual distancing was a constant source of challenge.

Assumptions and Clarifications

Are Afghanistan and Nepal simply anomalies? What lessons can be drawn about from these countries that have resonance elsewhere? To a great extent, recognizing Afghanistan as an outlier is important. After all, today's conflict is not a contained one it has only deepened and intensified. Three years since the CPA, the Maoists have pulled out of the government, there are frequent changes in the Nepalese governing authority and the new Constitution has yet to be completed. The centrality of this research is precisely this -- that in conducting business as usual, "transitional justice" continues to try fitting "the square peg in a round hole."

This research reflects a fundamental assumption dominant within the "transitional justice" and human rights discourse which is "forgetting is unacceptable."⁶² Not only is this tied to victims' need for vindication but because, as Kritz asserts, it seems [to suggest] "that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the

⁶² Miriam J. Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, *Harvard Human Rights Journal* 15, no. 39 (Spring 2002), 47

seeds of future conflict.”⁶³ In essence, the marginalization of the anomalies which are the defining features of any context best provide an understanding about what “justice” should be about in a given context.

Outline

This dissertation comprises of eight chapters. Chapter 2 is the literature review, locating this research in the scholarly framework of transitional justice. Chapter 3 examines past reconciliation efforts and commissions highlighting the influence of these failed legacies on the legitimacy of the “transitional justice” commitments today. Chapter 4 focuses attention on *de jure* impunity, discussing existing legal mechanisms, the tensions between customary laws and formal laws and the extent to which law is seen to be a site of mobilization in both countries for the struggle against impunity. Chapter 5 looks at the politicization of “transitional justice” projects, continuing to underscore the realities of the “dynamic local” and most importantly, highlighting the hierarchy of local voices that emerged in both cases. Chapter 6 delves even further into the justice question, continuing to bring the local at the center of the “transitional justice” discourse and examines the uncomfortable and pressing questions that continue to be raised by the voices at the margins. Chapter 7 examines the innovation and challenges of the national human rights institutions (NHRIs) as an illustration of the domestic struggle to create

⁶³ See Neil J. Kritz, Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights, *Law and Contemporary Problems* 59, no. 4 (1996), 127.

mechanisms to address questions of justice and accountability in societies trying to emerge from conflict and the tensions they expose within the local contexts respectively. Finally, Chapter 8 provides some issues for reflection recognizing that “transitional justice” continues to remain the domain of the elite, including the local elite. It brings home the assertion that “transitional justice” programming, as it stands today, stops short of delivering on the issue of economic equity, or of impunity, which, in contexts like Afghanistan and Nepal, can be encouraged by the rhetoric of “reconciliation” and constitutes the ultimate act of injustice against survivors.

Contributions of the Study

While the legal literature on transitional justice focuses on the establishment of legal mechanisms and international relations literature on transitional justice considers how these mechanisms shape state claims to sovereignty, political scientists mainly focus on the political nature of transitional justice, examining winners and losers under various transitional justice proposals. *Inconvenient Justice* is a departure from these approaches because it asks challenging questions about justice and locality in the post-9/11 environment, in contexts where *de facto* and *de jure* impunity are not only a consequence of the conflict, but has even preceded it. It raises questions about whether criticisms about the preponderance of international criminal law has urged too much of a retreat to generate an overt-reliance on “reconciliatory” means, such that underlying core concerns of societies emerging from conflict remain largely unaddressed. Central to the problem this study engages with is the urgent and continuous need for scholars and practitioners of transitional justice to continue to

understand the identification and situation of the local and the implications of creating and/or consolidating, in essence, local hierarchies.

The current privileging of the local is based on the recognition that the emerging focus on the local has not yet meant a “shift in the underlying assumptions of the field -- at most it is a shift in emphasis.”⁶⁴ Neither has it meant that there has been sufficient critical engagement with the way existing transitional justice practices engage with, incorporate and, in some ways, limit the understanding of the locality. The consultation of the local particularly to legitimize reconciliatory practices is significant because it deviates from the importance of how local critiques, priorities and practices can demonstrate alternative ways of conceptualizing justice. This limitation, this study argues, is particularly important because thus far there has far greater attention paid to the “static local” in term of culture and traditional practices, but there has been far less attention, if any paid to the “dynamic local” which constitutes historical experiences and changing sociopolitical dynamics within a given society which can also influence how transitional justice programming maybe conceived and operationalized. Furthermore, the local must be understood as an inter-subjective concept, filled only with the meaning of those who interpret it. Therefore, it is of critical significance *whose* interpretation of the local is consulted in transitional justice processes. Who tells us what the local dictates? Is it the warlords? Local elites? International actors? Political strategists? Closely linked to the issue of

⁶⁴ Moses Chrispus Okello, “Afterward: Elevating Transitional Local Justice or Crystallizing Global Governance?” in Rosalind Shaw and Lars Waldorf with Pierre Hazan, eds. *In Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford, CA: University Press, Stanford, 2010), 277.

an inter-subjective local is the question of to what extent and whether transitional justice mechanisms can and should take up the fight against impunity, or whether given its current manifestations as in the commissions of Nepal, recognize that the struggle for accountability requires a different kind of approach, and have a different kind of time-table. As it exists, the manifestations of transitional justice efforts in Afghanistan and Nepal neither have the ability or the scope to engage with deep-rooted fundamental challenges in these societies.

Finally, *Inconvenient Justice* aims to contribute to the literature on transitional justice in Afghanistan and Nepal. The academic literature on this subject is sparse, particularly given the novelty of these processes in these two contexts. By tracing the trajectory of the discussion on transitional justice, identifying the key challenges, domestic demands and responses it begins to expose the complexity of the justice question in these contexts, and creates the platform for further research to understand what is developing and what is being ignored in both contexts. Finally, at a broader level, this research aims to contribute to the growing scholarly work on the nexus between the local and transitional justice, and the nuanced but intricate relationship between what this dissertation calls ordinary justice and transitional justice.

Okello might have been on to something when he said transitional justice has not crystallized as a field of inquiry. This ultimately is a positive observation; it allows for the continual fluidity within the field of transitional justice to absorb the lessons constantly generated in the field and to constantly reconfigure itself. Focusing on the local does not only make transitional justice maneuvers more palatable, but more responsive. It ultimately speaks to sobering reality that transitional justice in its

retraction from accountability to privilege reconciliation, cannot perhaps ultimately address impunity. Perhaps, the contribution of *Inconvenient Justice* is a humbling reminder -- that before trying to do the impossible, and respond to the extraordinary, it is important to focus on the ordinary and the necessary, even if those questions are inopportune at best.

CHAPTER 2

CRAFTING THE LENSES OF INQUIRY: THE LITERATURE REVIEW

Crafting the Lenses of Inquiry locates this research in the extensive scholarly work available on transitional democracies and the debate that confronts them when emerging from conflict -- whether to pursue political expedience for peace, or justice for egregious violations of human rights. It then focuses attention on what has increasingly become a standard practice in “post-conflict” reconstruction -- the “transitional justice” toolkit that establishes the framework for addressing questions of accountability and reconciliation. Finally, it outlines what this dissertation contributes to the existing literature on societies in transition.

Transitional Democracies

Democratic transition, the political process through which a framework is established for bargaining, and compromise between different political forces and pluralist structures are institutionalized, was an area of scholarly examination even prior to what Huntington defined as the third wave of democratization, which began in 1974 and witnessed the change in regimes in about thirty countries in Europe, Asia and Latin America.⁶⁵ Succinctly, a democratic transition generally tends to imply a nation’s shift from recent history of mass atrocity or violent authoritarian rule to that of a liberalizing democratic state. Particularly since the 1990s, such political developments captured the liberal imagination, resulting in extensive scholarly literature on the subject and its affiliated issues, including that of electoral procedures,

⁶⁵ Huntington, *The Third Wave*, 1995.

deliberative democracies, representation, constitution making, the relationship between political and economic transitions, and the role of civil society. However, much of the scholarly work, including Rustow's *Transition to Democracy*⁶⁶ did not deal with transitions to democracy and emerging democracies. On the whole, scholars on democracy seemed to have focused on the attributes of democratic states, comparing them to non-democratic countries, promoting the values of democratic peace, and latter, critiquing their premise, rather than closely studying the process of democratization.

In recent times, the study of democracy has focused on violent transitions of states from war to peace, and a growing realization, that weak transitions to democracy is generally followed by turbulent, fragile political institutions, rather than following the prescription of peaceful negotiations and democratic deliberation. Mansfield and Snyder for example observe that these transitional democracies are more often than not plagued by "limited suffrage, unfair constraints on electoral competition, disorganized political parties, corrupt bureaucracies or partial media monopolies [that] may skew political outcomes."⁶⁷ Even more recently, scholarly examination has gone further, exploring specific mechanisms that assist in democratization processes such as judicial reform, reform of security forces, integration of rebel forces into armed forces, vetting political and armed actors, which

⁶⁶ Dankwart Rustow, Transitions to Democracy: Towards a Dynamic Model, *Comparative Politics* 2, No.3 (1970), 337-363.

⁶⁷ Edward D. Mansfield and Jack Snyder, Democratic Transitions, Institutional Strength, and War, *International Organization* 56, No. 2 (Spring, 2002), 301.

also constitute tools of neoliberal peacebuilding. Succinctly tracing the emergence of the rise in democratization research, Stacey suggests, “today, the study of democratic institutions has become enough of a scholarly industry that it even warrants (or, at least enjoys) its own neologism: ‘transitology.’”⁶⁸

Transitology, in layman’s terms, is the branch of political theory that examines the process of change from one regime to another, mainly from an authoritarian to a democracy. For some, it refers to the body of literature that deals with the study of democratizing regimes in southern Europe and Latin America. Since its inception however, the field itself has been fraught with debates. Critics claim that transitology as an area of study imbues multiple meanings and generates confusion rather than providing clarity to existing scholarship. Some go far enough to draw the conclusion that transitology’s mode of analysis is both flawed and hegemonic.⁶⁹ Other scholars argue that their concern is with the *way* this field examines political, economic, and social change such that they have a pre-determined beginning and an end.⁷⁰ Morse states: “These scholars propose a theory of change based on the notion

⁶⁸ Simon Stacey, Political Theory and Transitional Justice, PhD Dissertation, Department of Politics, Princeton University, Documentation no. 305387486, January 2005, 3. (Accessed January 10, 2011).

⁶⁹ See, for example, Valerie Bunce, Should Transitologists Be Grounded? *Slavic Review*, 54, no.1, (Spring 1995), 111–127; Ken Jowitt, Undemocratic Past, Unnamed Present, Undecided Future, *Demokrati- zatsiya* 4, no.3 (Summer 1996), 409–419; Sarah Meiklejohn, Terry, Thinking About Post-Communist Transitions: How Different Are They? *Slavic Review*, 52, no. 2 (Summer 1993), 333–337; Howard J. Wiarda, Southern Europe, Eastern Europe, and Comparative Politics: Transitology and the Need for New Theory, in *Eastern European Politics and Societies* 15, no. 3 (Fall 2001), 485–501.

⁷⁰ See for example Michael Burawoy and Katherine Verdery, *Uncertain Transition: Ethnographies of Change in the Postsocialist World*, (Lanham, MD: Rowman and Littlefield, 1999); David Stark, From System Identity to Organizational Diversity: Analyzing Social Change in Eastern Europe, *Contemporary Sociology*, 21, no. 3 (May 1992), 299–304.

of overtly open-ended ‘transformation,’ a formulation that highlights their belief that the word ‘transition’ is inherently imbued with teleological qualities.”⁷¹ Carothers further broadens this debate asking whether countries which have moved away from the authoritarian structure yet do not resemble liberal democracies should be categorized as countries in transit, and considers whether such political systems are in fact in a state of constant equilibrium rather than being a mere stage in democratization process.⁷²

For scholars of transitional justice however, the contributions of transitologists are important because they often provide accounts of how actors actually understand those circumstances, and how they respond within them.⁷³ Nevertheless, one critique that may be provided about their work is that they mostly focus on the dynamics of transitions and do not actually examine the period in which questions of transitional justice arises as a main concern. O’Donnell and Schmitter’s observes: “[t]he processes of consolidation, so important, if...transitions are to be meaningful, are barely considered in this volume, and require separate treatment,” perhaps best captures the way in which transitional scholars view their scholarly parameters.⁷⁴

⁷¹ Jordan Gans-Morse, Searching for Transitologists: Contemporary Theories of Post-Communist Transitions and the Myth of a Dominant Paradigm, *Post-Soviet Affairs* 20, no. 4 (2004), 320.

⁷² Thomas Carothers, The End of the Transition Paradigm, *Journal of Democracy*, 13, No. 1 (January 2002), 5– 21.

⁷³ Ibid, 4.

⁷⁴ Guillermo O’Donnell, and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (Baltimore, MD and London, UK: The Johns Hopkins University Press, 1985), x.

Elster's definition of transitology is helpful in beginning to understand the development of the transitional justice query since he considers the complexity and the indistinct nature of transitions and sees the latter as "the study of the disequilibrium phenomena that lie between the pre-transitional and post-transitional equilibria."⁷⁵ Using this definition, transitional justice in turn, then can be seen to emerge in the very constricted period between Elster's two equilibria. Generally speaking however, because questions of transitional justice develop at the consolidation end of the period of transition, the topic is largely ignored by mainstream transitologists.⁷⁶ Furthermore, because transitologists focus on the explanatory and behavioral issues which occur as a consequence of transitions, there is little attention paid to the normative questions that arise in this period. Crocker states: [a]lthough philosophers and other ethicists have not entirely ignored the topic of reckoning with past wrongs, it is legal scholars, social scientists, policy analysts and activists who have made the most helpful contributions. Further, he notes: "it is understandable that much of the work of transitional justice has been of an empirical and strategic nature."⁷⁷ When Przeworski for example asks, "what should we expect to happen to countries that have ventured on the path to democracy and markets?"⁷⁸

⁷⁵ Jon Elster, Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy, *Archives Européennes de Sociologie* 39, no. 1 (1998), 47.

⁷⁶ Stacey, *Political Theory and Transitional Justice*, 4.

⁷⁷ David A. Crocker, Reckoning with Past Wrongs: A Normative Framework, *Ethics and International Affairs* 13, no. 1 (1999), 45.

⁷⁸ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, (Cambridge, UK and New York, NY: Cambridge University Press, 1991), ix.

he is not actually probing the necessity for moral, ethical and philosophical reflection.⁷⁹ In contrast to transitologists who do not ask normative questions, scholars like Huntington, and even Kaufman and Haggard seem to be of the persuasion that social, political, and economic conditions over determine transitions to democracy and their aftermath and leave no space for even making such inquiries.⁸⁰

Nevertheless, democratic transitions demand normative questions because they pose confusion, choices and ethical dilemmas. Such questions capture, but are not limited to concerns about how much to remember? How much to forget? Which institutions best serve the needs and demands of survivors as victims, perpetrators and/bystanders? Who should be punished and who should be set free?⁸¹ Scheper-Hughes best captures the raw and varied tensions that emerge as such moments of competing demands when she writes, “Democratic transitions are best understood as a ‘dangerous hour.’ With the collapse of authoritarian regimes, there emerge new nations full of needs...and full of rage.”⁸² Correspondingly, new democracies must negotiate a treacherous path encompassing difficult and sometimes contradictory

⁷⁹ Stacey, *Political Theory and Transitional Justice*, 6.

⁸⁰ Huntington, *The Third Wave*, 5.

⁸¹ For a discussion of the kind of normative questions that face society see, Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York, NY: Routledge, 2001); Eric Stover and Harvey M. Weinstein, “Introduction: Conflict, Justice and Reclamation,” in Eric Stover and Harvey M. Weinstein, eds. *My Neighbor, My Enemy, Justice And Community In The Aftermath Of Mass Atrocity*, (Cambridge, UK and New York, NY: Cambridge University Press, 2004).

⁸² Nancy Scheper-Hughes, Undoing Social Suffering and the Politics of Remorse in the New South Africa, *Social Justice*, 25 no. 4 (Winter 1998), 116.

ethical, moral, and legal considerations while somehow attempting to achieve some measure of reconciliation and justice. In this debate, realists claim that a retroactive process that deviates from the process of reform (judicial, security-oriented, political, economic) impedes the progress of democratization.⁸³ Others would argue that the realpolitik of reaching political settlements without regard to a post-conflict justice component is no longer acceptable.⁸⁴

This increasing focus on human rights and justice (including retroactive justice) as core constitutive elements of democratization is of particular relevance to this study. Particularly since the 1990s, in the heels of the Bosnian and Rwandan genocides, international law and human rights norms have exhibited an increasing urgency for the moral obligation to punish and prosecute those who commit *jus cogen* crimes and honor the experiences of those who survived. Redressing the wrongs therefore became not only a legal obligation and a moral imperative imposed on governments; it also began to resonate with solid political logic in the transition from the utter chaos of political violence to democracy. Today, the pursuit of retrospective justice has become an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person. Lundy and MacGovern in

⁸³ For example, see Jack Snyder and Leslie Vinjamuri, Trials and Errors: Principles and Pragmatism in Strategies of International Justice, *International Security*, 20 (Winter 2003–2004), 5–44; Patrice C. McMahon and David P. Forsythe, The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics, *Human Rights Quarterly* 30, no. 2 (2008), 412–435.

⁸⁴ See for example, Accountability for International Crime and Serious Violations of Fundamental Human Rights, Law And Contemporary Problems, M. Cherif Bassiouni, Madeline H. Morris, Autumn 1996, Vol. 59, No.4; Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, *The Yale Law Journal* 100, no. 8 (June 1991), 2537–2615.

Whose Justice? Rethinking Transitional Justice from the Bottom Up discuss a concurrent trend by the international community to finance and support a range of legal initiatives to deal with both retroactive justice and build and strengthen the rule of law in transitional contexts.⁸⁵ Correspondingly, it may be cogently argued that the rules of legitimacy in international relations have dramatically changed particularly with the inception of the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), creating the demand for justice as a new form of “realism.” Nevertheless, the realpolitik calculations for stability and “peace” have continued to challenge this new form of realism, insisting that a sequence is necessary in the societies emerging from conflict and authoritarian regimes i.e. a political framework consisting of compromises need to be established prior to meeting questions of accountability and justice claims. In short, pragmatic politics dictates the sequencing of “peace” before “justice.” It is to this discussion that the chapter now turns.

Of Peace Before Justice

In peacebuilding literature, a central discussion regarding the societies emerging out of conflict is the inevitable tensions that exist between moral demands of justice and the political exigencies of peace. Bertram contends, dealing with past atrocities presents challenging dilemmas for peace builders given that their “implications for UN efforts to build democracy and a sustainable peace are

⁸⁵ Patricia Lundy and Mark McGovern, “Whose Justice? Rethinking Transitional Justice from the Bottom Up,” *Journal of Law and Society*, 35, no. 2 (June 2008), 265-292.

ominous.”⁸⁶ Empirical transitional justice literature comprised of those grounded in a tradition of political realism that has assessed strategies based on how they promote political stability and the absence of violence at the national level⁸⁷ argues that justice does not lead, it follows. In other words, before accountability can be sought in a state overcoming human rights violations, it must first establish political order or enhance the strength of the state, by whatever means necessary.⁸⁸ Such pragmatists (also termed as “minimalists”)⁸⁹ further insist that for the establishment of a framework of peace, justice including prosecutorial venues has to wait or at the most extreme, be permanently compromised to enable a future-oriented political formula to develop. Citing the disruptive nature of particularly retributive justice, the prioritization of nation and state building, the realities of a weak, often dysfunctional rule of law, the absence of financial resources to undertake the long-drawn out processes of trials, they particularly eschew prosecutions and instead advocate broad amnesties in times of transition.

⁸⁶ Eva Bertram, “Reinventing Governments: The Promise and Perils of United Nations Peace Building,” *Journal of Conflict Resolution* 39, no. 3 (September 1995), 398.

⁸⁷ See for example, Guillermo O’Donnell, and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (Baltimore, MD and London, UK: Johns Hopkins University Press, 1985; Huntington, *The Third Wave*, 1993; David Pion-Berlin, To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone, *Human Rights Quarterly*, 16 (February, 1994), 105-130; Andreas O’Shea, Pinochet and Beyond: The International Implications of Amnesty, *African Journal of Human Rights* 16 (2000), 653-656; Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge, UK and New York, NY: Cambridge University Press, 2001).

⁸⁸ See Snyder and Vinjamuri, *Trials and Errors*, 5-44.

⁸⁹ See Peter A. Schey, Dinah L. Shelton and Naomi Roht-Arriaza, Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty, *Whittier Law Review* 19 no. 2 (Winter 1997), 325-344.

Amnesties

Amnesties⁹⁰ typically refer to exemptions from criminal liability accorded to classes of individuals before trial.⁹¹ According to Arriaza and Gibson, “amnesties are According to Arriaza and Gibson, “amnesties are usually executed after periods of extreme violence or civil war in some cases when those responsible for the abuses are no longer in power, while in others, they still play a preponderant role in national life, and in still others, they are a part of the “peace process” aimed at ending civil war.”⁹² In certain cases, the offer of amnesty serves as a tactical tool for negotiators trying to persuade human rights violators to relinquish power.⁹³ On the issue of political

⁹⁰ Greenwalt offers seven dimensions along which amnesties have varied historically: “(1) an amnesty may be blanket or limited, extended to all crimes committed within a particular period, or restricted to less serious crimes or to less responsible actors or both; (2) it may be automatic, covering all individuals within the classes named, or require applications by individuals; (3) for amnesties that require individual application, an individual may or may not have to disclose exactly what crimes he or she may have committed. In South Africa, for example, individuals have to make “full disclosure” of their violations of human rights; amnesty covered only crimes that were fully disclosed; (4) an amnesty may affect both criminal as well as civil liability, but (5) an amnesty may be total or partial. A partial amnesty is one that exempts those covered from the full measure of criminal and civil liability but would allow some lesser degree of punishment or liability for damages; (6) an amnesty may or may not protect persons from consequences other than legal liability; (7) an amnesty from civil liability may or may not be accompanied by some alternative scheme to compensate victims.” See Kent Greenwalt, “Amnesty’s Justice” in Robert I. Rotberg and Dennis Thompson, eds. *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, NJ: Princeton University Press, 2000), 189-210.

⁹¹ Ronald C. Slye, “Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process” in Robert I. Rotberg and Dennis Thompson, eds. *Truth v. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press 2000), 170-188.

⁹² Naomi Roht-Arriaza and Lauren Gibson, The Developing Jurisprudence on Amnesty, *Human Rights Quarterly* 20, no. 4 (1998), 843.

⁹³ Michael P. Scharf and Nigel Rodley, “International Law Principles on Accountability,” in Post-Conflict Justice in M. Cherif Bassiouni, ed. *Post-Conflict Justice*, (Ardsley, New York: Transaction Publishers, 2002): 89-96.

imprisonment, “amnesties require politicians to reassess the state’s boundaries of permissible political activity and the means of enforcing those boundaries.”⁹⁴

One of the arguments made for amnesties is the importance of making a clean break with the past, thereby creating a common starting point for all members of society from which a better future may be created. Sriram argues “there may be self normative reasons for amnesty: should accountability be made a top priority by a nascent, fragile, democracy, a rebellious military could easily end the democratic experiment, and democratic stability and the goods it protects may be viewed as moral goods themselves.”⁹⁵ Snyder and Vinjamuri, basing their argument that justice does not lead, but follows, argues in favor of amnesties stating: “...a norm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law.”⁹⁶ They also view the striking of politically expedient bargains and ignoring past abuses as a critical element of atrocity prevention and enforcement of the rule of law through creating political coalitions to contain the power of “spoilers.”⁹⁷ Proponents of amnesties further offer evidence from the field to enforce their effectiveness both in generating conditions of peace and also for curbing human rights violations, including difficult cases such as El Salvador, Mozambique, Namibia, and the most

⁹⁴ John J. Moore, Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador, *Stanford Law Review*, 43, no. 3 (February 1991), 774.

⁹⁵ Chandra L. Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition*, (New York, NY: Frank Cass, 2004), 10.

⁹⁶ Snyder and Vinjamuri, *Trials and Errors*, 6.

⁹⁷ *Ibid*, 5-44.

well known instance of South Africa where political forgiveness was linked to the TRC.

Amnesties are also particularly appealing in circumstances where the sheer number of violators dismiss the feasibility of punitive justice, even truth commissions, and in contexts where there is a history of structural violence, lack of confidence in the judicial system and a systemic pattern of social scape-goating which make such efforts seem like an instrument of vengeance rather than justice. Finally, amnesties remain a fundamental premise for accommodative government, based on the assumption that it serves as a catalyst in *transformational* politics. In the long-run, scholars such as Freeman would argue, using Spain, Brazil and Mozambique as examples, that amnesties with the widest possible scope “have accompanied, rather than impeded—gradual and sustained improvements in democracy, peace, human rights and the rule of law.”⁹⁸ In other words, an inclusive political framework would allow “disreputable” individuals to become insiders (e.g. South Africa and Spain) in the emerging architecture of a new state and thus occupy, in Schaap’s words, the space for politics. According to Schaap, however, political reconciliation must be both retrospective (in coming to terms with the past) and prospective (in bringing about social harmony) and, therefore, must involve striking a balance between the often-contending demands posed by these differing orientations.⁹⁹ Transitional amnesties [therefore] appear to be the precursors to, and coincident with, liberalizing

⁹⁸ Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice*, Cambridge, UK and New York, NY: Cambridge University Press, 2009), 9.

⁹⁹ Andrew Schaap, *Political Reconciliation*, (New York, NY: Routledge, 2005).

political change,¹⁰⁰ advancing the normative project of political transition, encouraging subsequent political reconciliation and establishing the parameters of peace.

Scholars have criticized the fundamental premise of political pardons/amnesties as the panacea for national healing based on a two-tiered argument--first, based on the developments in international law and human rights law, and second, based on rationale and consequence, i.e. the *why* of amnesties and whether they achieve the desired effect. Bell in *The 'New Law' in Transitional Justice* while acknowledging the necessity for certain to facilitate the release, demilitarization, demobilization and reintegration of conflict-related prisoners, points out that the new law of transitional justice prohibits the provision blanket amnesties that cover serious international crimes that, is those violate *jus cogens*.¹⁰¹ Fundamentally though, for those who demand accountability for crimes committed, granting of amnesties constitutes the doing of an injustice. Greenwalt argues, "In the general vocabulary of moral considerations, doing injustice is intrinsically wrong, what is called deontological constraint."¹⁰² Hence, when people remark, "the ends do not justify the means," what is meant is that someone should not do what is intrinsically wrong, even to achieve positive consequences. "This claim reflects a

¹⁰⁰ Ruti G. Teitel, *Transitional Justice*, (New York, NY: Cambridge University Press, 2000), 52.

¹⁰¹ Christine Bell, The 'New Law' of Transitional Justice, Study "Workshop 1 – From Mediation to Sustainable Peace," Crisis Management Institute (CMI), *International Conference, Building a Future on Peace and Justice*, Nuremberg, June 25-27 2007 <http://www.peace-justice-conference.info/download/WS1-Bell%20report.pdf>. (Accessed November 10, 2010).

¹⁰² Greenwalt, *Amnesty's Justice*, 191.

priority of deontological constraints over consequential calculations.”¹⁰³

Consequently, while it is possible to accept that the government maybe unable to prosecute, the formal exoneration constitutes an injustice since political expedience itself is not justice. Moreover, critics question the conventional wisdom of using amnesty for societal healing because of its ability to be an instrument for officials of abusive regimes, or as Cohen argues bluntly: “the slogan for national reconciliation can be bogus and self-serving.”¹⁰⁴ Sriram further states: “locating the normative core of ‘national reconciliation’ defense of amnesty is difficult... ‘the laws of national reconciliation’ are frequently nothing more than final hour self-amnesties by outgoing regimes, padded with rhetoric about a societal need to forgive if not forget.”¹⁰⁵

Orentlicher and other legal thinkers have further contested that while offering amnesties during peace negotiations may be something of value to men and women seeking to escape from a culture of atrocity, the risk that such amnesties will foster a “culture of impunity” and thus allow the continued commission of atrocities or their resumption after a brief hiatus, is so great that no peace is won through the granting of amnesties can be considered valuable -- or, indeed secure. In fact, Slye argues, except for the minimal significance that we can attribute to the desire of an individual for a class of individuals to be granted amnesty, amnesties have traditionally had the

¹⁰³ Ibid.

¹⁰⁴ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering*, (Malden, MA and Cambridge, UK: Polity Press, 2001), 36.

¹⁰⁵ Sriram, *Confronting Past Human Rights Violations*, 11.

effect of preventing inquiry and denying accountability.¹⁰⁶ Further, he states: “Recent history, [and Afghanistan can easily fall under such analysis] has shown that pure amnesties, at least in the case of gross violations of human rights, do not in fact achieve the lofty goals of making a clean break from the past; or of creating a common starting point for all members of society from which a better future may be created.”¹⁰⁷ Blanket amnesties in particular raise a series of questions about possible alternatives: can selective immunity be used effectively to ensure some offenders testify against others? Should prosecutors issue amnesties on a case-by-case basis? Is it possible to at least create venues for some form of minor penalties rather than granting absolute amnesty? Will victims have a legitimate claim against perpetrators despite the amnesty procedure? How and when can such amnesties be revoked? And, can claims against perpetrators be asserted legitimately at some point in the future? Any or all of these questions can engender a level of wariness about the argument that a blanket amnesty, including providing safety from civil liability to offenders, is necessarily the only way to proceed and raise the question of its relationship to impunity.

Impunity

For rights based actors and in the realm of law, impunity’s existence is very clearly explained -- it is brought on by the absence of prosecution. Bassiouni states:

¹⁰⁶ Slye, *Amnesty, Truth and Reconciliation*, 2000.

¹⁰⁷ Ibid, 183.

“impunity, at both the international and national levels, is due to the conflicting goals of realpolitik and justice. In other words, the policies and practices of accommodation in the pursuit of political settlement conflict with legal accountability in the pursuit of retributive and restorative justice.”¹⁰⁸ Succinctly defined then, impunity is the exemption from punishment, culpability or legal sanction for illegal acts.¹⁰⁹ The production of impunity can take place at any stage of politics. Opatow states: “Impunity can occur before, during, or after judicial processes, or entirely independent of them. It occurs when crimes are not investigated; suspected offenders are not brought to trial; verdicts to convict are not reached despite convincing evidence that would establish offenders’ guilt beyond a reasonable doubt; those convicted are not sentenced or, if sentenced, their punishment is so minor that it is completely out of proportion to the gravity of their crimes; or sentences of those convicted are not enforced.”¹¹⁰

The discussion of impunity is important because it is the product of not only actions (e.g. of amnesties) or lack of retributive measures, but it is also embedded in, and results in certain processes. Opatow argues: “Impunity is not an individual

¹⁰⁸ M. Cherif Bassiouni, Combating Impunity for International Crimes, *University of Colorado Law Review* 71, no. 6 (Spring 2000), 409.

¹⁰⁹ See F.M. Afflito, Victimization, survival and the impunity of forced exile: A case study from the Rwandan *Genocide*, *Crime, Law and Social Change* 34, no. 1 (July 2000), 77-97. Also see J. Patrice McSherry and Raul Molina Meija, Confronting the Question of Justice in Guatemala, *Journal of Social Justice* 19, no. 3, (1992), 1-28. Mary Margaret Penrose, Impunity-Inertia, Inaction and Invalidity: A Literature Review, *Boston University International Law Journal* 17, no. 2 (1999), 241-268.

¹¹⁰ Susan Opatow, Reconciliation in Times of Impunity: Challenges for Social Justice, *Social Justice Research* 14, no. 2, (2001), 150.

phenomenon, but a social malaise that insidiously bolsters cooperation and social support among transgressors while undermining the capacity of cooperation and social support among victims that could buffer effects of extreme psychological and physical trauma and material hardship.”¹¹¹ In entrenching impunity, it is the *collective* then that becomes important. At one level it is dependent on cooperation and facilitation between those who execute crimes, and the wider network of lateral and hierarchical support and protection transgressors receive; at another, it requires cooperation from horizontal cross-sections of society who are afraid and resigned because of the consequences they might face because they challenge the status quo.

Opotow also suggests that “atop the impunity hierarchy are its architects and strategists, while those down the lower chain join the impunity hierarchy due to fear and self-preservation.” [Further], “hierarchical collusion can also extend beyond national borders to bystander countries that can benefit economically or strategically from a despotic status quo.”¹¹² Subsequently, impunity is of greatest concern when it is institutionalized and widespread -- when torture, crimes against humanity, mass murder are overtly or tacitly condoned and unpunished as the result of amnesties, pardons, indifference, or “looking the other way.” This institutionalization and commonality of practice in turn generates the “culture of impunity” in which “government officials, the police and military, and ordinary citizens break the law

¹¹¹ Susan Opotow, “Psychology of Impunity and Injustice: Implications for Social Reconciliation,” in M. Cherif Bassiouni, ed. *Post-Conflict Justice*, (Ardsley, NY: Transnational Publishers, 2002), 205.

¹¹² Ibid.

without fear of punishment, for there is a shared understanding that each person will be silent about the other's abuses as long as the favor is returned."¹¹³

McSherry and Meija offer a three-tiered typology of impunity, which looks at its strategic, structural and psychological dimensions.¹¹⁴ [Succinctly], strategic impunity involves a range of activities -- evidence tampering, investigation thwarting, failing to act on reports of disappearances, killings and torture -- basically harnessing procedures to prevent criminal investigation and prosecution. Opatow claims, "structural impunity is the mobilization of official, institutional structures to foster impunity."¹¹⁵ The result of both manifestations of impunity, feed into the third category of impunity, which is defined as psychological impunity, that is, the manipulation of fear, distrust, and isolation amongst citizens to crush aspirations for freedom, equality and justice. In accordance with Eugene Walters' analysis of political terror, McSherry and Molina Mejia describe the goal of psychological impunity as a reign of terror that undermines any form of resistance and silences opposition. While political, strategic and psychological impunity contribute to societal and individual trauma, they further illustrate emphasize that psychological impunity is "the most poignant and tragic of all aspects of impunity...if people believe there can be no justice, they resign themselves to political realities, adapt and

¹¹³ David Crocker quoting Leo Valladares, the Human Rights Commissioner of Honduras in David Crocker, *Transitional Justice And International Civil Society: Toward A Normative Framework*, *Constellations* 5, no. 4 (1998), 506.

¹¹⁴ J. Patrice McSherry and Raul Molina Mejia, *Confronting the Question of Justice in Guatemala*, *Journal of Social Justice* 19, No. 3, (1992), 1-28.

¹¹⁵ Opatow, *Psychology of Impunity and Injustice*, 202.

adjust in order to survive...impunity serves to perpetuate the reign of terror and silence, preempting demands for greater social equality and justice.”¹¹⁶ Using this analysis, it is then possible to understand how violence [both direct and structural] characterizes each level of analysis of impunity from the intrapsychic to state institutions.

This section captured some of the most pressing questions facing a society in transition to democracy -- how to reach the tenuous balance between the moral demands of justice and the political requirements of peace. Through exploring the commonly described peace/justice dichotomy, it brought to the forefront the issue of amnesties, which several scholars argue, have the transformative potential in encouraging a state to make the break between its past and present and move from the context of instability to that of peace. Yet, proponents of amnesties can be critiqued, as the review demonstrated, of encouraging impunity, a dangerous precept because it also has a collective manifestation and operates at multiple levels, including that of the psychological, ensuring that the collective is silenced because of the fear of retributive violence. It is to counter the realities of impunity from the level of the individual to that of the society, legal scholars will particularly argue, that the deployment of “transitional justice” measures is imperative.

The Realm of Transitional Justice: Definition, Scale and Scope

Scholars have long struggled with an attempt to conceptualize the magnitude and depravity of atrocities committed during wartime; practitioners have continued to

¹¹⁶McSherry and Meija, *Confronting the Question of Justice in Guatemala*, 14.

try to seek out ways to eliminate, contain and prevent such acts that defy any established norms of civility. In her works, Hannah Arendt explored Nazi crimes and initially defined them as “radical evil,” borrowing Kant’s use of the same phrase.¹¹⁷ This initial examination of Nazi crimes as acts of “evil” captures a fundamental powerlessness in grappling with the magnitude of such human-made tragedies particularly when she states: “we are unable to forgive what we cannot punish and are unable to punish what has turned out to be unforgivable.”¹¹⁸ Kant’s terminology to capture such acts using the term “radical evil” endures because it captures all those “offenses against humanity that are so widespread, persistent and organized that no normal moral assessment seems appropriate.”¹¹⁹ Consequently, this inadequacy in the moral discourse and social evaluation emphasizes the limitations of existing human systems that seem too mundane and *ordinary* to capture what seems *extraordinary*. Perhaps legal jurisprudence has come closest to creating a useful measure based on a central tenet: extreme evil is cognizable by substantive criminal law and because it is egregious, only special substantive categories of criminality -- genocide, war crimes and crimes against humanity -- needed to be created to capture it.

What sets ordinary crimes apart from what is deemed extraordinary?

Aukerman argues that “ordinary crime -- individual conduct that violates domestic criminal law and is undertaken for non-political purposes -- concerns individual

¹¹⁷ Arendt, *The Human Condition*, 241.

¹¹⁸ Ibid.

¹¹⁹ Carlos Santiago Nino, *Radical Evil on Trial*, (New Haven, CT: Yale University Press, 1996), viii.

criminals; [e]xtraordinary evil -- massive or systematic human rights violations prohibited by international law -- involves individuals committing many of the same actions, such as the unjustified intentional taking of human life, that constitute ordinary crimes.”¹²⁰ In terms of substantive categorization however, Drumbl argues, “extreme evil is no ordinary crime.”¹²¹ Arendt herself noted that extreme “evil” “exploded the limits of the law.”¹²² This did not necessarily imply that evil could not be condemned or better still, constrained using law, but law itself had to develop and mobilize to catch up with its manifestations.¹²³ Further, the qualitative categorization of such acts in a class separate from what constitutes as “ordinary” crimes further emphasizes both its “evil” and “extraordinary” nature. In short, they enter the realm of what is now understood to be *extraordinary international criminality*. Subsequently, perpetrators of extraordinary crimes have become cast, rhetorically as well as legally, as an enemy of all humankind.¹²⁴

The Crimes of War

Legal jurisprudence, which functions from the premise that wartime violations are not beyond the scope of law, addresses “extraordinary” crimes based on three

¹²⁰ Aukerman, *Extraordinary Evil, Ordinary Crime*, 41-42.

¹²¹ Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge, UK and New York, NY: Cambridge University Press, 2007), 3.

¹²² Hannah Arendt, “Letter from Hannah Arendt to Karl Jaspers (August 18, 1946),” in Lotte Kohler and Hans Saner, eds. *Hannah Arendt, Karl Jaspers Correspondence 1926-1969*, (San Diego, CA, New York, NY, and London, UK: Harcourt Brace and Company, 1992), 54.

¹²³ Drumbl, *Atrocity, Punishment and International Law*, 3.

¹²⁴ See David Luban, A Theory of Crimes Against Humanity, *The Yale Journal of International Law* 29, no.1, (2004), 85, 90.

specific characteristics -- scale and scope, intent, and its strategic nature. At the core of the extraordinariness of these acts is conduct -- their planning, systematization and organization -- and their target, selected for annihilation or victimization. In international criminal law, these extraordinary crimes are classified under the categories of war crimes, crimes against humanity and genocide.

Each of the three explicit categories -- war crimes, genocide¹²⁵ and crimes against humanity -- have specific definitions and criteria within international criminal law. Succinctly, war crimes are those that fall outside of the gambit of the ordinary activities undertaken by soldiers during hostilities. Gerwith argues: “in the broader sense, [war crimes] comprises violations both of the *jus ad bellum* [rarely] and the *jus in bello*: that is violations that consist both in resorting to war on wrongful grounds and in using wrongful practices within war. In the narrower sense, only the latter kinds of violations are war crimes.”¹²⁶ Further, he asserts “war crimes have a double

¹²⁵ Genocide, considered by many as the worst kind of violation of international humanitarian law, is defined by the “careful parsing of Articles II and III of the 1948 Convention of the Prevention and Punishment of Genocide.” See Robert I. Rotberg, *Mass Atrocity Crimes: Preventing Future Outrages*, Washington, D.C.: Brookings Institution Press, 2010, 3. Article II describes two elements of what constitutes genocide: “1) the mental element, meaning the ‘intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such’ and 2) the physical element, including killing members of group, causing serious or mental harm to members of a group deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, in whole or part, imposing measures intended to prevent births within a group and forcibly transferring children of one group to another.” See Rotberg, *Mass Atrocity Crimes*, 3. For a war crime to be considered genocide, it must fulfill both these categories; further, for a crime to be classified as genocide, it needs to prove intent and/or commission of the acts. Drumbl states: “The Rome Statute accords states the option of a seven year opt out period to the ICC’s jurisdiction over war crimes but not for genocide and crimes against humanity.” See Drumbl, *Atrocity, Punishment and International Law*, 34. This research does not address the question of genocide since in neither of the two contexts have the crimes committed been classified as genocidal acts.

¹²⁶ Alan Gerwith, “War Crimes and Human Rights,” in Aleksandar Jokic and Anthony Ellis, eds. *War Crimes and Collective Wrongdoing: A Reader*, (Malden, MA: Wiley-Blackwell, 2001), 49.

relation to the morality of human rights since they are at least *prima facie* violations of morality.”¹²⁷ But in contrast to other violations, war crimes have a “criminal status because they transgress restrictions that are designed to protect human rights with regard to the general context of war.”¹²⁸

Ultimately, genocide, crimes against humanity, and war crimes (under conventional and customary regulation of armed conflicts) have risen to the level of *jus cogens*¹²⁹ generating “the obligation to prosecute or extradite; to provide legal assistance; to eliminate statutes of limitations; to eliminate immunities of superiors up to and including heads of states.”¹³⁰ Under the auspices of existing international law, these obligations are then considered as *obligatio ergo omnes*, meaning that in the event of commission of such crimes, there is no possibility for impunity.¹³¹ Further,

¹²⁷ Gerwith, *War Crimes*, 49.

¹²⁸ Ibid, 48.

¹²⁹ See for example, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty To Extradite Or Prosecute In International Law*, (Dordrecht, Germany and Boston, MA: Martinus Nijhoff Publishers, 1995); M. Cherif Bassiouni, *International Criminal Law Conventions And Their Penal Provisions*, (Irvington-on-Hudson, New York: Transaction Publishers, 1997), 451-54; M. Cherif Bassiouni, *Crimes Against Humanity In International Law*, (New York, NY: Springer Publishing, 1992): 499-527; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) In International Law: Historical Development, Criteria, Present Status*, A, 1, (Helsinki, Finland: Finnish Lawyers' Publishing Co., 1988), 713-18; Gordon A. Christenson, “Jus Cogens: Guarding Interests Fundamental to International Society,” *Virginia Journal of International Law*, 28 (1988), 585-648, 1988; Karen Parker and Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, *Hastings International and Comparative Law Review* 12 (1989), 429-35.

¹³⁰ Cristina Pellandini, “National Measures To Repress Violations Of International Humanitarian Law,” Report of the Meeting on Experts, International Committee of the Red Cross (ICRC), Geneva, September 23-25, 1997, http://www.icrc.org/eng/assets/files/other/report-icrc_002_0726.pdf. (Accessed May 12, 2009).

¹³¹ See for example, M. Cherif Bassiouni, International Crimes: “Jus Cogens” and “Obligatio Erga Omnes” *Law And Contemporary Problems* 59, no. 4 (Autumn, 1996), 63-74. Also see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, (Cambridge, UK and New York, NY: Cambridge University Press, 2005).

emerging norms of how to respond to widespread atrocities informed by international legal customs, while accommodating pardons for the purpose of political accommodation, nevertheless do not allow for blanket forgiveness in the instances of crimes against humanity and acts of genocide.¹³²

Transitional Justice Explained

In scholarly and policy circles, responses to questions past violence has come to be known as “transitional justice,” a term coined by Ruti Teitel in her groundbreaking work. Teitel explains transitional justice as “the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive regimes.”¹³³ At present, transitional justice analyses provide important tools in understanding how

¹³² For a discussion on amnesties and war crimes, see Diane Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, *The Yale Law Journal* 100, no. 8 (1991), 2537-2615; Douglass Cassel, Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities, *Law and Contemporary Problems* 59 no.4 (1996), 197-230; Neil J. Kritz, ed, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. I (Washington D.C. United Institute of Peace Press, 1995); Naomi Roht- Arriaza, ed. *Impunity and Human Rights in International Law and Practice*, (Oxford, UK: Oxford University Press, 1995); Ruti Teitel, Transitional Jurisprudence: The Role Of Law In Political Transformation, *Yale Law Journal* 106, no. 7 (1997), 2009-2080; John Dugard, Dealing With Crimes Of A Past Regime. Is Amnesty Still An Option?, *Leiden Journal of International Law* 12, no. 4 (1999), 1001-1015; Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy*, 2nd edition, (Oxford, UK: Oxford University Press, 2001). See also Christine Bell, “The ‘New Law’ of Transitional Justice, Study,” Workshop 1 – From Mediation to Sustainable Peace, Crisis Management Institute (CMI), *International Conference, Building a Future on Peace and Justice*, Nuremberg, June 25-27 2007 <http://www.peace-justice-conference.info/download/WS1-Bell%20report.pdf>. (Accessed January 9, 2011).

¹³³ Ruti Teitel, Theoretical and International Framework: Transitional Justice In A New Era, *Fordham International Law Journal* 26, No. 4 (2003), 893-906.

societies emerge from violent conflict¹³⁴ and encompass the legal, moral and political dilemmas of how an emerging regime should deal with past abuses and how to move forward. Subsequently, it has become a recurring theme in the literature on democratization. However, as Barahona de Brito noted in 2001 “just fifteen years ago, the literature on transitional truth and justice was very limited;”¹³⁵ and it was not a core area of specialization for either social scientists or the wider academic community until the mid-1980s. Now in the twenty-first century, the issue seems to have finally arrived both in terms of scholarly work and has become an active domain of policy, practised by the United Nations (UN) and supported by regional organizations, international financial institutions, bilateral and multilateral donors, and specialized nongovernmental organizations (NGOs) such as the ICTJ in New York. Indeed, as McEvoy observes “transitional justice is a field on an upward trajectory”¹³⁶ emerging from historically exceptionalist origins to become something, which is normal, institutionalized and mainstreamed,¹³⁷ dominating debates on the intersection between democratization, human rights protections and state-reconstruction after conflict. Along with its historical associations with the post-war tribunals in Nuremberg and Tokyo, and the democratization of previously

¹³⁴ Christine Bell, Colm Campbell and Fionnuala Ni Aolain, Justice Discourses In Transition, *Social Legal Studies* 13, no. 3 (2004), 305-328.

¹³⁵ Alexandra Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar, eds. *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford, UK: Oxford University Press, 2001), 315.

¹³⁶ Kieran McEvoy, Letting Go Of Legalism: Developing A “Thicker” Version Of Transitional Justice, *Journal Of Law And Society* 34, No. 4 (December 2007), 412.

¹³⁷ Teitel, *Theoretical And International Framework*, 893-906.

authoritarian regimes in Latin America and the former Soviet Union, the term is now regularly deployed with regard to the Balkans, Rwanda, Sierra Leone, East Timor and elsewhere.¹³⁸

Rosemary Nagy in *Transitional Justice as Global Project: Critical Reflections* notes: “Teitel rightly provides a normative challenge to Schumpeterian notions of successful transition (marked by fair elections), she focuses almost exclusively on (re)establishing the rule of law through legal mechanisms -- prosecutions, historical inquiry, administrative justice, reparation, and constitutional justice.”¹³⁹ She further suggests that while Teitel’s argument for law’s ‘independent potential’¹⁴⁰ to shape political change, while groundbreaking in terms of generating legal theory, does not address customary law, culture, social justice which are far more grounded in real experiences of transitional societies.¹⁴¹ Teitel however has been critiqued for “overvaluing” law and underestimating periods of influx. Roht-Arriaza noted: “a narrow view can be criticized for ignoring root causes and privileging civil and political rights over economic, social and cultural rights, thereby marginalizing the needs of the women and the poor.”¹⁴² Over the years, this minimalist approach of

¹³⁸ See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.

¹³⁹ Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, *Third World Quarterly* 29, No. 2 (2008), 277.

¹⁴⁰ Teitel, *Theoretical And International Framework*, 213.

¹⁴¹ Nagy, *Transitional Justice as Global Project*, 277.

¹⁴² Naomi Roht-Arriaza, “The New Landscape in Transitional Justice,” in Naomi Roht-Arriaza and Javier Mariezcurrena, eds. *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, (Cambridge, UK and New York, NY: Cambridge University Press, 2006), 2.

transitional justice underwent several changes, shifting from a minimalist to a more maximalist framework.

Roht-Arriaza in her introduction to *Transitional Justice in the Twenty-First Century* widens the context of transitional justice by defining it as “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed at directly confronting and dealing with past violations of human rights and humanitarian law.”¹⁴³ This “thickening of its paradigm” has meant the incorporation of other means to deliver justice, including “mechanisms of accountability for past crimes, such as truth commissions and lustration policies; victim-oriented restorative justice mechanisms, including reparations, construction of monuments and public memory projects; and mechanisms of security and peace, including amnesties and pardons, constitutional amendments and institutional reform.”¹⁴⁴ Despite criticizing the traditional narrow scope, Roht-Arriaza acknowledges: “broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.”¹⁴⁵

¹⁴³ Ibid.

¹⁴⁴ Tricia D. Olsen, Payne and Reiter, *Transitional Justice in Balance*, 1.

¹⁴⁵ Naomi Roht-Arriaza, Introduction in Naomi Roht-Arriaza and Javier Mariezcurrena, eds. *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, (New York, NY: Cambridge University Press, 2006), 2.

Rama Mani provides one of the broadest understandings of what she terms “restoring justice within the parameters of peacebuilding.”¹⁴⁶ Focusing on low-income, war-torn societies, she argues that building peace and building a just society are inseparable processes. Drawing on Galtung’s twin objectives of negative peace (cessation of conflict) and positive peace (removal of structural and cultural violence), Mani’s argument is therefore premised on the necessity of a holistic approach. Further, she argues for a three-fold view of “reparative” justice: restoring the rule of law through reforms to prisons, police and judiciary; rectifying human rights violations through trials, truth commissions, reparation and traditional mechanisms; and redressing the inequalities and distributive injustices of war.¹⁴⁷ Mani’s work also prioritizes the importance of drawing on local knowledge and culture for sustainable peace,¹⁴⁸ and compellingly argues, “the prevalent liberal–democratic ideal...tends to favor freedom and liberty over equality.”¹⁴⁹ “This means,” translates Nagy, “there has been a tendency to underrate the gendered and socioeconomic ramifications of violent conflict, which may include HIV/AIDS, widowhood and poverty.”¹⁵⁰ However, her important contribution stops short of

¹⁴⁶ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Malden, MA: Polity Press, 2002), 17.

¹⁴⁷ Mani, *Beyond Retribution*, 2002.

¹⁴⁸ Claire Moon, “Beyond Retribution: Seeking Justice in the Shadows of War [book review],” *International Peacekeeping* 10, no. 4 (2003): 149-151.

¹⁴⁹ Mani, *Beyond Retribution*, 51.

¹⁵⁰ Nagy, *Transitional Justice as Global Project*, 278.

examining the role of western states in conflict¹⁵¹ and draws only from the Western philosophical canon in her conceptualization of justice. Ultimately then, Mani's astute analysis while providing a fundamental lens about questioning the absence of socioeconomic dimensions leaves out the critical analysis of the involvement of western states in conflict and the relevance of gender in transitional justice. Nevertheless, contributions of the works of scholars such as Mani, Nagy and others have been critical in broadening or thickening of the transitional justice paradigm to not only include the concerns of distributive and gender justice, but also generated a push for seeking out the restorative nature of justice, i.e. its reconciliatory dimension. The following section examines reconciliation as a critical component of the broadened transitional justice discourse.

Reconciliation as Transitional Justice

Leebaw argues, "the idea of utilizing transitional justice to promote reconciliation is relatively new."¹⁵² In its broadest terms, it involves: developing a shared vision of an interdependent and fair society that values different opinions and political beliefs; acknowledging and dealing with the past through providing the mechanisms for justice, healing, restitution and reparation; building positive relationships; significant cultural and attitudinal change; and substantial social,

¹⁵¹ Robyn Lui, *Beyond Retribution: Seeking Justice In The Shadows Of War [Book Review]*, *Australian Journal of Political Science* 38, no. 3, (2003), 589 – 590.

¹⁵² Bronwyn Leebaw, "Transitional Justice, Conflict, and Democratic Change: International Interventions and Domestic Reconciliation," prepared for the *APSA Task Force on Difference and Inequality in the Developing World*, University of Virginia, Charlottesville, April 21-23, 2005, 4. <http://www.apsanet.org/imgtest/TaskForceDiffIneqLebaw.pdf>. (Accessed January 10, 2010)

economic and political change. It is both an outcome and a process and requires, in the best circumstances, a cognitive change in beliefs, ideology and emotions.¹⁵³

On the maximalist account, reconciliation implies a transformation of relationships between former adversaries and a need for broad approaches beyond narrow, short-term, time-bound programs that are isolated from one another. Lederach argues that reconciliation “requires looking outside the mainstream of international political traditions and operational modalities [and] comprises of four essential components: truth (acknowledgement of wrong and validation of painful loss); mercy (the need for forgiveness and acceptance); justice (the search for individual and group rights for social restructuring and restitution); and peace (the need for interdependence, well-being and security).”¹⁵⁴ Rigby reiterates the importance of these components, stressing the importance of healing and closure of the trauma for both victims and perpetrators. He further observes the tension between political leaders who, in the quest for social harmony “settle” for an imperfect process through lowering their expectations and the expectation that victims and survivors would forfeit their claim for compensation.¹⁵⁵

Given its multidimensional nature, reconciliation may also be seen as the meeting point between the philosophical-emotional and the practical-material.

¹⁵³ Yaacov Bar-Siman-Tov, “Israel-Egypt Peace: Stable Peace?” in Yaacov Bar-Siman-Tov, Arie M. Kacowicz, Ole Elgström and Magnus Jerneck in *Stable Peace Among Nations*, eds. (Boulder, CO: Rowman Publishers, 2000), 220-238.

¹⁵⁴ See John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, (Washington, D.C.: United States Institute of Peace Press, 1998).

¹⁵⁵ Andrew Rigby, *Justice and Reconciliation: After the Violence*, (Boulder, CO: Lynne Rienner Publishers, 2001).

Gardner-Feldman argues that these components are interwoven since they simultaneously require cooperation and confrontation between the government and societies, involving the tensions between political support and opposition, and including long-term vision and short-term strategy.¹⁵⁶ Less spiritual and holistic in his approach, Kriesberg defines reconciliation as the processes of developing a mutual conciliatory accommodation between antagonistic persons or groups that they find to be minimally acceptable.¹⁵⁷ Ackermann maintains that “reconciliation functions as a postwar reconstruction policy, designed to build peace among peoples with longstanding animosities by creating a political, economic, social and cultural relationship...that is ongoing and continuous.”¹⁵⁸ In the minimalist account, reconciliation is nothing more than “simple coexistence,”¹⁵⁹ which means that former enemies comply with the law instead of killing each other although the goal is that former enemies respect each other as fellow citizens. Osiel calls this kind of reconciliation “liberal social solidarity”¹⁶⁰ while Gutman and Thompson term it

¹⁵⁶ Lily Gardner-Feldman, *The Special Relationship Between West Germany and Israel*, (Boston, MA: Allen and Unwin, 1984).

¹⁵⁷ See Louis Kriesberg, *Constructive Conflicts: From Escalation to Settlement*, (Lanham, MD: Rowman and Littlefield Publishers, 1998): 181-222. See also Louis Kriesberg, “Changing Forms of Coexistence,” in Mohammed Abu-Nimer, ed. *Reconciliation, Justice, and Coexistence: Theory and Practice*, (Lanham MD and Oxford, UK: Lexington Books, 2001), 47-63.

¹⁵⁸ Alice Ackerman, Reconciliation as a Peace-Building Process in Postwar Europe: The Franco-German Case, *Peace & Change*, 19, no. 3 (July 1, 1994), 230.

¹⁵⁹ Charles Villa-Vicencio, A Different Kind Of Justice: the South African Truth and Reconciliation Commission, *Contemporary Justice Review* 1 (1998), 407.

¹⁶⁰ Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, (New Brunswick, NJ: Transaction Books, 1997), 17.

“democratic reciprocity.”¹⁶¹ Under such conditions, former enemies have been offered official pardons, general or individual amnesties.

This premise -- the necessary role of the government and the opposition to establish the parameters of a new relationship -- brings into focus a far more narrowed understanding of reconciliation, defined as “political reconciliation,” which involves processes through which an inclusive platform is created for politics for formerly hostile parties, particularly political institutions and actors. Historically, variations of the form of political reconciliation have included France, Germany, and the United States after World War II. Economic initiatives have played a significant role in transforming some of these formerly antagonistic relationships; offers of amnesties too have played a critical role including in places like Namibia, El Salvador, Nicaragua, Italy, Peru, and Northern Ireland. Nevertheless, there are certain prerequisites that have emerged in the practices of post-conflict relationship building, even for the most narrowed practice of political reconciliation. Grovier and Verwoerd have suggested that building trust is crucial for political reconciliation “because people are unable to cooperate with each other and work together unless their relationships are characterised by trust.”¹⁶² As trust presupposes truth-telling, promise-keeping, and social solidarity, reconciliation in terms of trust provides a

¹⁶¹ Amy Gutmann and Dennis Thompson, “Why Deliberative Democracy is Different,” *Social Philosophy and Policy* 17, no. 1 (2000), 161-180.

¹⁶² Trudy Govier and Wilhelm Verwoerd, Trust and the Problem of National Reconciliation, *Philosophy of the Social Sciences* 32, no. 2 (June 2000), 200.

tangible way of defining political reconciliation.¹⁶³ According to Schapp “political reconciliation must be both retrospective (in coming to terms with the past) and prospective (in bringing about social harmony) and, therefore, must involve striking a balance between the competing demands of these temporal orientations.”¹⁶⁴

Consequently, “in societies divided by a history of political violence, political reconciliation depends on transforming political enmity into a civic friendship.”¹⁶⁵ In such contexts, the discourse of recognition provides a ready frame in terms of which reconciliation might be conceived. However, Schaap also recognises that political reconciliation is related to four issues: confronting polities divided by past wrongs, constitution of political association, the possibility of forgiveness within politics, collective responsibility for wrong doing, and remembrance of a painful past. Each of these components echoes with the more expansive understandings of what constitutes an effective and comprehensive reconciliation process and informs the practices and process of the larger paradigm of transitional justice.

A discussion about reconciliation is inconclusive without recognizing the most common mechanism through which such a process is promoted -- the truth (and reconciliation) commission. Scholars such as Hayner and Minow have promoted such an apparatus, which, as in the South African case, they argue, allowed individuals to

¹⁶³ For a discussion on political reconciliation see for example, Mark R. Amstutz, *Healing of Nations: The Promise and Limits of Political Reconciliation*, (Lanham, MD: Rowmann and Littlefield Publishers, 2005).

¹⁶⁴ Schaap, *Political Reconciliation*, 84.

¹⁶⁵ Ibid, 523.

speak of their roles in politically motivated violence in exchange for amnesty.¹⁶⁶

Minow also points out that the very purpose of truth commissions is healing individuals and societies through restoring dignity to victims.¹⁶⁷ According to her analysis, in addition to catharsis, such truth commissions promote forgiveness.

Further, in contexts of mass violence where there are an innumerable perpetrators and by-standers, truth and reconciliation commissions acknowledge ambiguity, permitting bystanders to take responsibility for inaction and allow the groundwork to be created for reconciliation.¹⁶⁸ Nagy argues that truth commissions are better positioned to expand the field of transitional justice by addressing the different dimensions of conflict, including, importantly the marginalization of women and girls because they focus attention on patterns of violations.¹⁶⁹ Ultimately, she argues, as in the case of the Sierra Leonian TRC, which included recommendations for repealing discriminatory inheritance, marriageable age, and other customary laws, suggested amendments to laws pertaining to domestic and sexual violence, promotion of skills training, education and economic empowerment of women, such commissions can challenge deep-rooted issues of structural inequality.

¹⁶⁶ See Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, London, UK and New York, NY: Routledge, 2001). Also see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (Boston, MA: Beacon Press, 1998).

¹⁶⁷ Minow, *Between Vengeance and Forgiveness*, 1998.

¹⁶⁸ Ibid.

¹⁶⁹ Nagy, *Transitional Justice as Global Project*, 285-286.

Vetting

Finally, a discussion of transitional justice is incomplete without recognizing the process of vetting. States have implemented various forms of vetting after ruptured transitions, that is, coups and transitions in which pacts are created between the members of the former regime and opposition groups. The central purpose of vetting is institutional reform as a means to prevent the recurrence of abuse. It may also be defined as “assessing an individual’s integrity¹⁷⁰ as a means of determining his or her suitability for public employment.”¹⁷¹ Hence, “vetting processes are aimed at screening public employees or candidates for public employment to determine if prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions.”¹⁷² Vetting may be thought primarily as a form of “administrative justice,” as suggested by Teitel, because it involves the application of administrative law, which regulates the operation of administrative agencies and their relations with other branches of governments and public. It may also be seen as a element of

¹⁷⁰ Integrity is used here to refer to a person’s adherence to relevant standards of human rights and professional conduct, including his or her financial property. See “Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,” Development Programme Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform,” United Nations Development Programme (UNDP) Publication II, 2006, 5-37.
<http://www.ictj.org/static/Vetting/UNDPVettingGuidelines.pdf> (Accessed January 10, 2010)

¹⁷¹ Roger Duthie, Introduction, in Alexander Mayer Rieckh and Pablo de Greiff, eds. *Justice as Prevention: Vetting Public Employees in Transitional Societies*, (New York, NY: International Center for Transitional Justice and Social Science Research Council, 2007), 17.

¹⁷² Ibid

institutional reform, in that even the most minor of vetting efforts will be lead to changes in the make-up of the personnel or a public institution.¹⁷³

A variety of terms are used for the vetting process, including lustration, purges, bans and administrative justice but there seems to be disagreement in the literature on what terms such as “vetting,” “lustration,” “screening,” “administrative justice,” and “purging” actually mean, although they are often used synonymously. Elster refers to “administrative justice as purges in the public administration.”¹⁷⁴ Minow states: “the removal of categories of people from public offices or benefits is “sometimes called a purge and sometimes ‘lustration.’”¹⁷⁵ Williams, Fowler and Szczerbiak narrow the understanding of lustration to be “the systematic vetting of public officials for links to the communist-era security services.”¹⁷⁶ Meierhenrich talks about lustrations as the process of the “purification of state institutions from within or without and states that the practice of lustration ordinarily then revolves around, first the screening of candidates from public office; second the barring of candidates from public office; and third, removal of holders from public office.”¹⁷⁷

From the perspective of human rights, argues Duthie, “ the most

¹⁷³ Alexander Mayer-Rieckh, “Vetting to Prevent future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia and Herzegovina,” in Alexander Mayer Rieckh and Pablo de Greiff, eds. *Justice as Prevention: Vetting Public Employees in Transitional Societies*, (New York, NY: International Center for Transitional Justice and Social Science Research Council, 2007), 180-221

¹⁷⁴ Jon Elster, *Closing the Books*, 92

¹⁷⁵ Minow, *Between Vengeance and Forgiveness*, 136

¹⁷⁶ Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, “Explaining Lustration in Central Europe: A ‘Post-communist Politics’ Approach,” *Democratization*, 12, no. 1 (2005), 23

¹⁷⁷ Jens Meierhenrich, The Ethics of Lustration, *Ethics and International Affairs*, 20, no. 1 (Spring 2006), 99.

important institutions to be vetted would be those most responsible for having committed human rights violations, or for allowing them to occur, under the previous regime or during the conflict.”¹⁷⁸ As such, vetting processes have increasingly targeted the police forces, the military and the judiciary. Perhaps the most comprehensive definition which links human rights to the issue of vetting is provided in the vetting guidelines produced by the ICTJ in collaboration with the United Nations Development Program (UNDP), which states:

As a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman and degrading treatment, enforced disappearance and slavery. These are serious crimes, which indicate a lack of integrity at a level that fundamentally affects a person’s credibility to hold public service. If a person were convicted and punished for such crimes—and, in fact, States have an obligation to prosecute these crimes—exclusion from public service would be a normal consequence.¹⁷⁹

Overall, there seems to be consensus that the minimum criteria for vetting can be informed by international standards and norms. Despite this, more often than not, the criteria also depend on what can actually be operationalized. Whatever the degree of influence -- international and/or local constraints -- such determination, Duthie argues, “is often politically contested and controversial; understandably so, because

¹⁷⁸ Duthie, *Introduction*, 21.

¹⁷⁹ “Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,” Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, *United Nations Development Programme (UNDP) Publication II*, 2006, 20.
<http://www.ictj.org/static/Vetting/UNDPVettingGuidelines.pdf>. (Accessed January 10, 2010)

the criteria reflect one way for a society to judge what was morally (if not necessarily criminally) unacceptable behavior in the past, as well as what the minimum standards of integrity in public institutions will be in the future.”¹⁸⁰ Ultimately of course, irrespective of what such processes include and however way they are influenced or constraints, Teitel summarizes that “‘bans,’ ‘purges,’ ‘oaths,’ ‘purifications,’ ‘lustration,’ ‘trials,’ and ‘publications’ all constitute a form of public proclamation that lays the basis and is itself performative of a normative shift.”¹⁸¹ As such, “these ritualized forms are the ways in which law effects change in power relations to reconstruct the political community and individuals are tested and purged to express the new political truth.”¹⁸² In the end, according to the liberal peace model, and indeed in accordance with the study of democratic transitions, each of these specific activities play a role in legitimizing the new [democratic] order that emerges out of the ashes of the old.

The Literature on Transitional Justice in Afghanistan and Nepal

There is limited existing scholarly work on transitional justice in both the case studies selected. The majority of the literature exists in the form of organizational reports. At the international level, developments and challenges to transitional justice has been analyzed by institutions such as the HRW, UN, USIP, ICTJ, the Asian

¹⁸⁰ Duthie, *Introduction*, 23.

¹⁸¹ Ruti G. Teitel, Theoretical And International Framework: Transitional Justice In New Era, *Fordham International Law Journal* 26, no. 4 (2003), 187

¹⁸² *Ibid.*

Center for Human Rights (ACHR), and more recently by the International Crisis Group (ICG) and the Afghanistan Research and Evaluation Unit (AREU). Local organizations such as the Afghanistan Justice Project (AJP), Afghanistan Watch (AW), the AIHRC in Afghanistan and Advocacy Forum (AF), NHRC, Informal Service Sector (INSEC) in Nepal have independently or jointly collaborated in such works.

A few legal scholars, particularly since 2001 have assessed the possibility of seeking justice for the war crimes and crimes against humanity committed in the decades of conflict in Afghanistan. Peter Danchin, for example, in *Transitional Justice in Afghanistan: Confronting Violations of International Humanitarian and Human Rights Law* examined the question of how exactly to confront the country's long history of systemic and widespread violations of international humanitarian and human rights law. His analysis is built on a two-tiered argument -- that while the political environment in the country made the pursuit of accountability and reconciliation extremely problematic, the US 'war on terror' and its military actions simultaneously undermined any efforts for the transition to peace and the rule of law.¹⁸³ Laura Dickinson engages with the discussion of how to proceed in post-Taliban Afghanistan, exploring the emergence of mixed domestic-international tribunals in the efforts to address accountability and fight against terrorism, suggests that such hybrid institutions could allow for an integrated legal system honoring

¹⁸³ Peter G. Danchin, *Transitional Justice in Afghanistan: Confronting Violations of International Humanitarian and Human Rights Law*, *Yearbook of International Humanitarian Law* 4 (2001), 3-51.

Afghanistan's domestic laws and recognizing international legal standards that could address questions of punitive justice in the country.¹⁸⁴ Barnett R. Rubin, however, disagrees with the prioritization of immediate retributive measures. Instead, in *Transitional Justice and Human Rights in Afghanistan*, he issues caution about the focus on the guilt of perpetrators and instead advises that the way forward in Afghanistan should include a methodical and detailed documentation on the scale of the abuses with an emphasis on victims' experiences which can, in the future, support an Afghan-owned and led debate on how to reconcile with its turbulent and brutal history.¹⁸⁵

Rubin's article is particularly gripping because it provides an inside view of the negotiations at the Bonn Agreement including the discussions on transitional justice and the intense politicking that decried the possibility of raising questions about accountability amongst the negotiators. The few scholarly research produced since then has focused on the resultant political configuration in the country since 2001 and argues how it has narrowed the scope of possibility for raising questions of justice, accountability and a victim-centered peace in the country. Nader Nadery, for example, in *Peace or Justice? Transitional Justice in Afghanistan* argues that while Afghanistan has made notable progress in the development of democratic institutions in the country, its failure to deal with the past ultimately threatens both the credibility

¹⁸⁴ Laura A. Dickinson, Transitional Justice in Afghanistan: The Promise of Mixed Tribunals, *Denver Journal of International Law and Policy* 31, no. 23 (2002), 26-39.

¹⁸⁵ Barnett R. Rubin, Transitional Justice and Human Rights in Afghanistan, *International Affairs* 79, no. 3 (May, 2003), 567-581.

and legitimacy of these democratic initiatives.¹⁸⁶ Patricia Gossman's *Truth, Justice and Stability in Afghanistan* not only focuses on an analysis of the debates around and during negotiating the Bonn Agreement, but also examines the emergency and constitutional jirgas held in the country, the presidential elections and the specific issues of the disarmament, demobilization and reintegration program (DDR) which, she argues, have either contributed to the entrenchment of the warlords, or in the least, could not respond effectively to the politicking that ensured that weak institutions and a judiciary could not challenge the emerging power arrangements.¹⁸⁷ In particular, she singles the UN out for squandering opportunities to pursue the justice question and looks at the efforts of the AIHRC to engage with the question of transitional justice. Sajjad's *The Spaces in Between: the Afghanistan Independent Human Rights Commission and its Work on Transitional Justice* examines the role of the AIHRC further, tracing its achievements in engaging with questions of "accounting for the past" in the country, and identifying key challenges the institution faces in navigating its relationships with the Afghan government, the international community and the Afghan population.¹⁸⁸

¹⁸⁶ Nader Nadery, Peace or Justice? Transitional Justice in Afghanistan, *International Journal of Transitional Justice*, Oxford University Press, 1, no. 1 (2007), 173-79.

¹⁸⁷ Patricia Gossman, "Truth, Justice and Stability in Afghanistan" in Naomi Roht-Arriaza and Javier Mariezcurrena, eds. *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, (Cambridge, UK and New York, NY: Cambridge University Press, 2006), 255-277

¹⁸⁸ Tazreena Sajjad, "The Spaces in Between: the Afghanistan Independent Human Rights Commission and its Work on Transitional Justice," *International Journal of Transitional Justice* 3, no. 3 (2009), 424-444

Nora Niland's "Justice Postponed," in *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, reflects Gossman's concerns regarding the place and position of human rights in Afghanistan's history, including in the political developments since 2001 and the expedient politics that consistently marginalized human rights concerns from the beginning.¹⁸⁹ Her article outlines Afghan concerns about the inherent contradictions observed in US policy toward Afghanistan in defeating the Taliban, but placating the warlords. She echoes Gossman's critique of the failure of the UN mission to focus on human rights and justice question, and teases out the tensions with the organization between field personnel who argued for a greater capacity to work on human rights concerns and decision-making at the higher levels within the United Nations Assistance Mission to Afghanistan (UNAMA) which restricted the human rights mandate and reflected its reluctance to challenge the emerging political order dominated by warlords and militia commanders.

Finally, a discussion of Afghanistan's engagement with the transitional justice question is incomplete without an overview of Mark Drumbl's *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*.¹⁹⁰ In bringing in the discussion of redress for human rights abuses against the women in Afghanistan, it is perhaps one of the first and only rigorous discussions of the relationship between law,

¹⁸⁹ Nora Niland, "Justice Postponed" in Antonio Donini, Nora Niland and Karin Wermester, eds. *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, (Hartford, CT: Kumarian Press, 2004), 39-60.

¹⁹⁰ Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, *Columbia Journal of Transnational Law* 42, no. 2 (2004), 349-381

crimes against humanity and the gendered nature and impact of the conflict(s) in the country. Drumbl's article is also singularly important because it deviates from the mainstream discourse of setting up a false dichotomy of choice for Afghan women between international human rights and cultural religious norms to adjudicate over gender-based atrocities. Rather, he persuasively argues such a binary formula runs the danger of either externalizing the justice question or creating the scope for revictimization. Instead, he argues that given the *Pashtunwali*'s politically contingent nature, and its focus on restorative justice, it can be harnessed within transitional justice institutions to promote a democratic platform such that local communities can access the right to be involved in the formulation of customary laws.

If the scholarly literature on transitional justice in Afghanistan is limited, then the scholarly work on the topic in Nepal is even more sparse. The most amount of literature that exists on the topic relates to concerns about the socio-economic dimension of justice for Nepal's victims and survivors. Simon Robins, in *Whose Voices? Understanding Victims' Needs In Transition*, provides a searing critique of the only existing document in Nepal which aimed to capture the demands of survivors of the decade long conflict, arguing that both in terms of methodology and in terms of reach, the report had serious limitations in capturing victims' perspectives.¹⁹¹

Tafadzwa Pasipanodya's *A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal*, builds on the stark absence of the socioeconomic dimension in transitional justice efforts in the country, arguing that given economic

¹⁹¹ Simon Robins, in *Whose Voices? Understanding Victims' Needs In Transition*, *Journal of Human Rights Practice* 1, no. 2 (2009), 320-331

and social injustice's role in generating and sustaining the decade long conflict, these factors should play a crucial role in Nepal's efforts to "close the books."¹⁹² Daniel Aguirre and Irene Pietropaoli in *Gender equality, development and transitional justice: The case of Nepal* echoes this sentiment, builds the argument for socioeconomic considerations further.¹⁹³ They stress on the right to development as a critical component for transitional justice in Nepal to consider, and focuses attention on the gender dimensions of the conflict, arguing that only when social, cultural and economic equities are effectively addressed, would gender equity be achieved in the country.

Tensions and Limitations of Transitional Justice: A Critique

Justice in transitioning societies can be recognized as a function of political power.¹⁹⁴ As such, transitional justice is not without its controversies. For the purpose of this dissertation, three specific criticisms of transitional justice is of relevance: (i) whether conceptualizing the "transitional" in transitional justice provides an accurate understanding of societies trying to emerge from conflict and the timing and sequencing of transitional justice; (ii) to what extent does it reflect the singular philosophy of western neoliberal peacebuilding; (iii) and most importantly for this research, significance and positionality of the local in transitional justice.

¹⁹² Tafadzwa Pasipanodya, A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal, *International Journal of Transitional Justice*, 2, no. 3 (2008), 378-397

¹⁹³ Daniel Aguirre and Irene Pietropaoli, "Gender Equality, Development And Transitional Justice: The Case Of Nepal," *International Journal of Transitional Justice* 2, no. 3 (2008), 356-377

¹⁹⁴ Huntington, *The Third Wave*, 1993.

Locating the “Transitional” in Transitional Justice

The terms “transition/al” and “justice” have come under heavy scrutiny. The term “justice” can be seen to be overtly ambitious and/or inappropriate given that what is demanded from in such contexts is not always as much “justice” as for example, “demands for the truth” “compensation” rather than institutional provisions with which classical transitional justice mechanisms are associated. There are scholars who interrogate the utility of the term “transitional” as a qualifier, arguing that the term “justice” is sufficient and that special terminology is not required to explain how countries respond to past human rights violations.¹⁹⁵ There are others who assert the term “transitional,” in modifying justice, undervalues the latter; further, they suggest a different term is necessary the special kind of justice that is required in the critical moment of state recovery which includes both its retributive as well as its restorative natures. There are other critics who find the term itself to be wrong because it neither in fact brings about transition, nor justice but may “replace justice with mechanisms of unaccountability, hiding, impunity and the continuity of authoritarian regime control behind a thin veil of political transition.”¹⁹⁶ Roht-Arriaza observes that the common perceptions of “transition” insinuate a defined period of influx after which a post-transitional state sets in; in reality, transitions can be long, fragmented and non-linear trajectories.¹⁹⁷ Dudai and Cohen argue that “unpacking the

¹⁹⁵Olsen, Payne and Reiter, *Transitional Justice in Balance*, 9.

¹⁹⁶ Ibid.

¹⁹⁷ Roht-Arriaza, *The New Landscape of Transitional Justice*.

concept of transitional justice in its various components -- such as trials, compensations, truth, release of political prisoners -- reveals that at least some of them have a potential to take place, even if in modest forms, before a transition is completed.”¹⁹⁸ Correspondingly, “the use of the term transitional justice might end up inhibiting discussions on such mechanisms during a conflict, as it implies they can take place only after -- or during -- political transitions.”¹⁹⁹ These criticisms have generated a search for a more “appropriate” term that depicts the kind of activities undertaken in the period after the formal cessation of violence. Today, the phrase “dealing with the past”²⁰⁰ has become an increasingly popular aphorism; and “post conflict justice”²⁰¹ has also gained significant popularity as a maxim that more effectively captures the contexts and processes of this period.

Closely tied to the issue of the “transitional” in transitional justice, the field also raises questions about the *when* of such mechanisms. Nagy argues “the *when* of transitional justice is tied to the very concept of transition itself and has only typically appeared salient only after massive direct violence has been brought to a halt.”²⁰²

¹⁹⁸ Ron Dudai and Hillel Cohen, “Dealing with the Past When the Conflict is Still Present: Civil Society Truth-seeking Initiatives in the Israeli-Palestinian Conflict,” in Rosalind Shaw and Lars Waldorf with Pierre Hazan, eds. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford, CA: Stanford University Press, 2010), 230.

¹⁹⁹ Ibid.

²⁰⁰ For a discussion on the term “dealing with the past” see for example, Christine Campbell, Colm Campbell, and Fionnuala Ní Aoláin, Justice Discourses in Transition, *Social and Legal Studies* 13, No. 3, (2004), 305-328.

²⁰¹ See for example M. Cherif Bassiouni, *Post-Conflict Justice*, Ardsley, New York: Transaction Publishers, 2002.

²⁰² Nagy, *Transitional Justice as Global Project*, 280.

Notions of “breaking with the past” and “never again” generate and mould a definite sense of “now” and “then.” Further, the forms of transitional justice adopted speak practically and symbolically to precisely what kind of a transition (if any) is actually occurring.²⁰³

Yet transitional justice necessarily does not always correlate to an exclusive “moment” in time. Patricia Lundy and Mark McGovern challenge this orthodoxy by addressing a transition from conflict within an ostensible democracy -- Northern Ireland. South Africa too is a credible case study that gives pause given that efforts of the TRC to promote the “new” South Africa met with considerable challenge and resistance in the face of ongoing political violations of human rights, criminal and farm violence, racialized socioeconomic inequalities, de facto apartheid, use of geographic space, general racism and xenophobia.²⁰⁴

More generally, constructing transition as a break with past violence also neglects the continuing problem of domestic violence and violence against women.²⁰⁵ Such illustrations strengthen Lundy and McGovern’s argument that “the framework in which transitional justice is addressed ignores the problem that human rights

²⁰³ Fionnuala Ní Aoálin and Colm Campbell, The Paradox of Transition in Conflicted Democracies, *Human Rights Quarterly* 27, no. 1 (February 2005), 172-213.

²⁰⁴ See for example, Rosemary Nagy, The Ambiguities of Reconciliation and Responsibility in South Africa, *Political Studies* 52 No. 4 (December 2004), 709–727.

²⁰⁵ See, for example, Colleen Duggan and Adila M. Abusharaf, “Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice” in Pablo de Greiff (ed.) *Handbook of Reparations*, (Oxford, UK: Oxford University Press 2006): 623-649; Christine Chinkin and Hilary Charlesworth, “Building Women Into Peace: The International Legal Framework,” *Third World Quarterly* 27, no. 5, (2006): 937 – 957; Fionnuala Ní Aoláin, “Political Violence and Gender During Times of Transition,” *Columbia Journal of Gender and Law* 15, no. 3 (2006): 829–849.

abuses may continue to take place in circumstances where in theory at least, the norms of liberal democratic accountability prevail.”²⁰⁶ In addition, “it is also a radical critique of implicit liberal versions of transition that may otherwise struggle to deal with the subversion of the rule of law, under the guise of law itself in ostensibly liberal states.”²⁰⁷ Finally, Nagy argues that discussing countries like Afghanistan and Iraq as transitional societies “neatly avoids the current matter of foreign military intervention and implies that the transitional justice problem has to do with ‘then’ and not the ‘now’ of occupation, insurgency and the war on terror.”²⁰⁸ Thus, she concludes, “The ‘to’ of transitional justice is insulated from the current reasons for instability”²⁰⁹ and seems to presume a democratic future without real self-governance.²¹⁰

Transitional Justice as a Neoliberal Agenda

The omniscience of western liberal thought in the design and propagation of human rights has led critics to identify “rights” as having [strictly] a western derivative, motivated by western politics, used for furthering foreign policies and

²⁰⁶ Patricia Lundy and Mark McGovern, “Whose Justice? Rethinking Transitional Justice from the Bottom Up,” *Journal Of Law And Society* 35, no. 2 (June 2008), 35.

²⁰⁷ Lundy and McGovern, *Whose Justice?*

²⁰⁸ Nagy, *Transitional Justice as Global Project*, 280.

²⁰⁹ *Ibid*, 281.

²¹⁰ David Chandler, Back To The Future? The Limits Of Neo-Wilsonian Ideals Of Exporting Democracy, *Review of International Studies* 32, no. 3 (2006), 475-494.

globalised through international law.²¹¹ Baxi further argues: “Overall, human rights discursivity was and still remains, according to the narrative of origins, the patrimony of the West.”²¹² In time, these criticisms have also targeted the liberal assumptions underpinning transitional justice philosophy and practices, the equating of western values to that of the universal, and it being purported as a normative good. This kind of analysis has gained greater substance through methodological engagement in specific areas.²¹³

Indeed, as a fixture of human rights, transitional justice’s institutionalization through the UN Peacebuilding Commission and the proliferation of research centers and organizations that subscribe to the “transitional justice formula” indicate that there is a certain proclivity by the international community to impose “one-size-fits-all” technocratic and decontextualized solutions.²¹⁴ Nagy offers that “steeped in

²¹¹ Upendra Baxi, *The Future of Human Rights*, 3rd ed., New York, NY: Oxford University Press, 2008), 24.

²¹² Ibid.

²¹³ See for example, Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge UK and New York, NY: Cambridge University Press, 2001); Lisa J. Laplante and Kimberly Theidon, “Truth with Consequences: The Politics of Reparations in Post-Truth Commission Peru,” *Human Rights Quarterly*, 29, no. 1, (2007), 228-250; Helena Cobban, *Amnesty After Atrocity? Healing Nations After Genocide and War Crimes*, (Boulder, CO: Paradigm Publishers, 2007); Laurel Fletcher and Harvey M. Weinstein, “A World Unto Itself? The Application of International Justice in the Former Yugoslavia,” in Eric Stover and Harvey M. Weinstein, eds. *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge, UK and New York, NY: Cambridge University Press, 2004, 29-48); Eric Stover and Harvey M. Weinstein, eds, *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge, UK and New York, NY: Cambridge University Press, 2004); Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague*, (Philadelphia, PA: University of Pennsylvania Press, 2005); Tim Kelsall, “Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone,” *Human Rights Quarterly* 27, no. 2 (2005), 361-391; Tim Kelsall, “Politics, Anti-Politics, International Justice: Language and Power in the Special Court for Sierra Leone,” *Review of International Studies* 32, no. 4 (2006), 587-602.

²¹⁴ For example, see Mark A. Drumbl, *Pluralizing International Criminal Justice* (Review

western liberalism, [transitional justice] is often located outside the area where conflict occurred, such that [it] may be alien and distant to those who actually have to live together after atrocity.”²¹⁵ Sriram points out: “some tools of transitional justice are explicitly linked to democratic processes such as judicial reform, reform of security forces, inclusion of former rebels and vetted former members of security forces [and] therefore subject to some of the criticisms leveled at neoliberal peacebuilding.”²¹⁶ Okello stresses: “transitional justice’s preoccupation with [such] universalism favors homogenizing jurisdictions and cultures in the guise of developing global governance mechanisms.”²¹⁷

A particular feature of this homogenization is that as part of the liberal peacebuilding agenda, institutions and bodies working in this field have an embedded understanding and privileging legal accountability, often at the expense of local customs and practices. This influence of the “international legalist paradigm,” focuses on generating compliance with international humanitarian norms.²¹⁸ In the international arena, this primacy of the law in regulating moral behavior and

Essay), *Michigan Law Review* 103, no. 6 (May 2005), 1295-1328; Barbara Oomen, Donor-Driven Justice and its Discontents: The Case of Rwanda *Development and Change* 36, no.5, (September 2005), 887-910.

²¹⁵ Nagy, *Transitional Justice as Global Project*, 275.

²¹⁶ Chandra L. Sriram, Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice, *Global Society: Journal of Interdisciplinary International Relations* 21, no. 4 (2007), 580.

²¹⁷ Moses Chrispus Okello, Afterward: Elevating Transitional Local Justice or Crystallizing Global Governance? in Rosalind Shaw and Lars Waldorf with Pierre Hazan, eds. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford, CA: University Press, 2010), 277.

²¹⁸ Snyder and Vinjamuri, *Trials and Errors*, 5-44.

underpinning democratic principles took the shape of ad hoc tribunals for former Yugoslavia (1993), Rwanda (1994), hybrid courts for Sierra Leone (2000), Kosovo (2000), East Timor (2002) and the establishment of the permanent International Criminal Court (2003). The trend for internationally informed continues with special courts in Cambodia (2003) and Lebanon (2009).

Increasingly, together with the neoliberal peacebuilding paradigm, the western retributive model with its crime/punishment, commission/incarceration modality, its emphasis on individual culpability, its promise of deterrence and the deliverance of societal transformation has come under heavy criticism. In general, Lundy and McGovern argue “the agenda being set for transitional justice, as it is currently constituted, tends to marginalize issues, questions, and approaches that might either challenge the forms and norms of Western governance, or implicate dominant global economic relations in the causes of conflict, rather than its solution.”²¹⁹ One of the many specific critiques is that underlying it all, such trials promote considerable homogeneity in their absorption and use of “ordinary methods of prosecution and punishment (i.e. harmonized aspects of Anglo-American common law procedure with tenets of the Continental civil law tradition or in other words, the penological rationales of western domestic criminal law) borrowed heavily from liberal states.”²²⁰ Sriram refers to Paris’ criticism of the neoliberal peacebuilding paradigm to draw the conclusion that transitional justice activities that specially involve juridical solutions

²¹⁹ Lundy and McGovern, *Whose Justice?* 274.

²²⁰ Drumbl, *Atrocity, Punishment and International Law*, 7.

such as domestic, international or hybrid trials, and can re-locate politics from the realm of politics to the realm of institutions, resulting in embedding future power arrangements that have the potential to be particularly destabilizing. Drumbl categorically argues against the unbridled faith in international criminal law, which persuades human rights actors to believe in the transformative potential of criminal trials.²²¹ Akhavan in *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability* asserts that the enthusiasm surrounding the ICC has in some ways obscures the much needed critical discourse on the efficacy of managing massive atrocities within the confines of the international legal process.²²² Klabbers concurs, pointing out how international criminal law's promise has captured our imagination in its promise to end impunity.²²³ Fletcher and Weinstein pushes this discussion further, arguing that "diplomats and human rights advocates conceive of international criminal trials as the centerpiece of social repair" while in reality such mechanisms leave "three categories of people largely untouched: (1) unindicted perpetrators including community members who directly or indirectly profited from the event; (2) states outside the area of conflict that may have contributed to the outbreak of violence by their acts or omissions; and, (3) the bystanders who did not actively participate in violence, but who also did not actively

²²¹ Drumbl, *Atrocity, Punishment and International Law*.

²²² Payam Akhavan, The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability, *American Journal of International Law* 97, no. 3 (July 2003), 712-721.

²²³ Jan Klabbers, Just Revenge? The Deterrence Argument In International Criminal Law, *Finnish Yearbook of International Law* 12 (2001), 249-267.

intervene to stop the horrors.”²²⁴ Each of these critics summarily speak directly or indirectly to the reality on the ground which is far more complex; consequently an overt reliance of international institutions on a predetermined formula of due process falls short of actually delivering the promises of credibility and legitimacy, particularly to survivors of atrocities.

These series of criticisms has demanded a revisiting of the privileging of legal accountability in transitional justice and an effort to look for an expansionist or “thickening” understanding of the process, informed and strengthened by the local context. This is particularly true in the case of Afghanistan where there is effort by organizations such as the USIP through their rule of law and transitional justice programming, to explore Afghanistan’s existing customary laws and traditional practices of settling disputes, conducting arbitration and mediation. This focus on the “local” has particularly peaked since Rwanda’s experimentation with the *gacaca*, which, in response to the remote, clinical and very slow processes surrounding the ad hoc ICTR, involved community-based local courts involving perpetrators’ confessions, survivors’ narratives and elders’ judgments on punishment, forgiveness and reconciliation. William Schabas in observing the importance of such customary courts to fight against impunity and to address all serious crimes, argued that Rwanda adopted a “very decentralized system of justice administered by non-professionals at the local level’ that could ‘stand as an example for others who claim, in the post-

²²⁴ Laurel E. Fletcher and Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, *Human Rights Quarterly*, 24, no. 3 (August 2002), 579.

conflict environment, that large-scale prosecution is impossible.”²²⁵ Since then, the involvement of customary practices have been observed in diverse “post-conflict” societies from northern Uganda’s Acholi *Mato Oput* (drinking the bitter root) and *Nyono Tong Gweno* (stepping on the egg) to the hybrid courts of Sierra Leone, East Timor, Kosovo and Cambodia.

At the level of scholarship, legal scholars such as Jose Alvarez and Drumbl have extolled the virtues of national and local justice in Rwanda, arguing that the Rwandan justice did more than international justice in promoting accountability, reconciliation, victim satisfaction, collective memory, democratic deliberation and the rule of law.²²⁶ As noted earlier, scholars such as Minnow, van der Merwe, Estrada Hollenback, Hayner et al have also discussed in detail the contributions of truth commissions and commission of inquiries which are victim-centered and future oriented;²²⁷ others such as Lederach, Gopin, Hizkias and Rigby have contributed significantly to the understandings of reconciliatory measures in the aftermath of war

²²⁵ William Schabas, Genocide Trials and Gacaca Courts, *Journal of International Criminal Justice* 3, no. 4 (September 2005), 895.

²²⁶ See for example Jose E. Alvarez, “Crimes of Hate/Crimes of State, Lessons from Rwanda” *Yale Journal of International Law* 24, (1999), 365-483. See also Mark A. Drumbl, “Restorative Justice and Collective Responsibility: Lessons for and From the Rwandan Genocide,” *Contemporary Justice Review* 5, no. 1 (2002) 5-22.

²²⁷ See for instance, Minow, *Between Vengeance and Forgiveness*.1998; Minow, Martha “Innovating Responses to the Past: Human Rights Institutions,” in Nigel Biggar (ed), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, (Washington D.C: Georgetown University Press, 2001); Mica Estrada-Hollenback, “The Attainment Of Justice Through Restoration, Not Litigation: The Subjective Road To Reconciliation,” in Mohammed Abu-Nimer (ed) *Reconciliation, Justice, and Coexistence: Theory & Practice*, (Lanham, MD: Lexington Books, 2001), 65-85; Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York, NY: Routledge, 2002).

and through the focus on the role of religion and culture.²²⁸ These efforts, at the level of scholarship and which has percolated into practice, signals the emerging importance of consulting the “local” and growing recognition that “transitional justice mechanisms are the products of a complex set of variables determined by a dialectic process between national and international factors.”²²⁹

“Localizing” Transitional Justice

So, what and who constitutes the local in transitional justice? The rationale for the analysis of the local is both urgent as well as necessary because it endures not as an abstract question but because “concepts of locality have direct consequences for the ways in which organizations, policy-makers and practitioners approach concrete locations.”²³⁰ In recent years, there is a growing recognition, at least in theory that the justice enterprise both conceptually and programmatically required a new orientation regarding the local. The participatory approach promulgated by the 2003 UN

²²⁸ See John Paul Lederach, *Preparing For Peace: Conflict Transformation Across Cultures*, Syracuse, New York: Syracuse University Press, 1995); John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, (Washington, D.C.: United States Institute of Peace Press, 1997); John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace*, (New York, NY: Oxford University Press, 2005). See Marc Gopin, “Forgiveness as an Element of Conflict Resolution in Religious Cultures: Walking the Tightrope of Reconciliation and Justice,” in Mohammed Abu-Nimer, ed. *Reconciliation, Justice, and Coexistence: Theory and Practice*, (Landham, MD: Lexington Books, 2001): 87-100. See also Hizkias Assefa, “Coexistence and Reconciliation in the Northern Region of Ghana, in Reconciliation, Justice, and Coexistence: Theory and Practice,” Mohammed Abu-Nimer (ed), Mohammed Abu-Nimer, ed. *Reconciliation, Justice, and Coexistence: Theory and Practice*, (Landham, MD: Lexington Books, 2001): 165-186. Andrew Rigby, *Justice and Reconciliation: After the Violence*, (Boulder, CO: Lynne Rienner Publications, 2001).

²²⁹ Pierre Hazan, “Transitional Justice After September 11: A New Rapport with Evil,” in Rosalind Shaw and Lars Waldorf with Pierre Hazan, eds. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, (Stanford, CA, Stanford University Press, 2010), 49.

²³⁰ Rosalind Shaw and Lars Waldorf, “Introduction: Localizing Transitional Justice in Localizing Transitional Justice: Interventions and Priorities After Mass Violence,” in Rosalind Shaw and Lars Waldorf with Pierre Hazan ed. (Stanford, CA: Stanford University Press, 2010), 6.

document on gender, equity and peace agreement is mentionable in this regard,²³¹ given its focus to see the local, in this instance, women, as stakeholders in the processes of change.²³² This focus on local ownership is also reflected in the UN Secretary-General's Report on the Rule of Law and Transitional Justice, which advocates “respect and support [for] local ownership, local leadership and a local constituency for reform.”²³³ This discussion of the local also percolates into transitional justice discourse forcing an examination of the fundamental premises of transitional justice.”²³⁴

Nevertheless, the question of who is the local continues to be an underexplored area of scholarship. One can argue that to understand the construction of the local, its placement with the nexus of power and its assumed relationship to culture needs to be first probed. Mark Goodale in *Ethical Theory of Social Practice* offers a critical way of conceptualizing the local which runs contrary to the existing understanding of this notions built upon the premise of a nested set of “levels” from

²³¹ Christine Chinkin, “Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women,” UN Division for the Advancement of Women, Expert Meeting on Peace Agreements as a Means for Promoting Gender, October 31, 2003, EGM/PEACE/2003/BP.1 <http://www.un.org/womenwatch/daw/egm/peace2003/reports/BPChinkin.PDF>. (Accessed March 1, 2011).

²³² Lundy and McGovern, *Whose Justice?*

²³³ See for example, Agnès Hurwitz and Kaysie Studdard, “Rule Of Law Programs In Peace Operations, International Peace Academy,” August 2005, <http://reliefweb.int/sites/reliefweb.int/files/resources/5C6F4179E87387A2852570B2007570CC-rule%20of%20law.pdf>. (Accessed February 1, 2008).

²³⁴ Drumbl, *Atrocity, Punishment and International Law*, 7.

the global to the regional to the national and finally onto the local.²³⁵ This conventional understanding of levels not only imposes a superficial divide between the global and the local, thereby dismissing the “glocal” but also subsequently obfuscates the realities of flows of information horizontally and vertically at any simultaneous period in time within, from and between the different categories. Further, using Appadurai the local becomes a spatial incarceration²³⁶ distinct from the “standard,” a depoliticized entity, separated from the norm as defined by the national and the international and devoid of modernity. Shaw and Waldorf state: “when we construct “the local,” as a level, this predisposes us to marginalize the experiences, understandings and priorities of people within this residual space...[consequently] locality can provide no basis for knowledge beyond that of “culture” or “tradition” local knowledge becomes conflated with “tradition” while knowledge beyond “tradition” must come from outside.”²³⁷ In other words, the position of the local within the transitional justice discourse is automatically compartmentalized as something at the margins, implying remoteness and circumscribed contours.²³⁸

Inextricably linked with the understanding of the local is the placement of culture -- hence, the overt focus on “understanding” the local culture to generate

²³⁵ Mark Goodale, Ethical Theory of Social Practice, *American Anthropologist* 108, no. 1 (2006), 25-37.

²³⁶ Arjun Appadurai, Putting Hierarchy in its Place, *Cultural Anthropology* 3, no. 1 (February 1988), 37.

²³⁷ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 6.

²³⁸ Akhil Gupta and James Ferguson, “Culture, Power, Place: Ethnography At The End Of An Era,” in Akhil Gupta and James Ferguson, eds. *Culture, Power, Place: Explorations in Critical Anthropology*, (Durham, NC: Duke University Press, 1997), 43.

legitimacy. In this sense, culture becomes the “naturally the property of a spatially localized people.”²³⁹ This discussion of the “local” culture understood as “traditional” and hence on a collision course with universal norms holds true in the field of human rights (in the continuous dialectic between universalism and cultural relativism), which resulted in anthropologists of human rights shifting “the terms of the intractable debate between cultural relativism and human rights by recasting ideas of ‘culture’ and examining human rights practice and discourse in particular contexts.”²⁴⁰ Similarly, in transitional justice, a “standard pointed based understanding of the local in a particular locality but not bounded by it” as suggested by Lars and Waldorf, allows for a much greater engagement with, and grounded critique of the normative framework of transitional justice that seems to float above the actual realities on the ground.²⁴¹ More succinctly, bringing the local to the center allows for challenging the teleology of transitional justice, its moral vision and its privileging of certain institutions above others and forcing a need to reconceptualize and reconfigure local engagements.²⁴²

²³⁹ Ibid, 30.

²⁴⁰ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 5; See also Jane K. Cowan, Marie-Benedicte Dembour, Richard A. Wilson, eds. *Culture and Rights: Anthropological Perspectives*, (Cambridge, UK: Cambridge University Press, 2001); Mark Goodale, “Introduction to Anthropology and Human Rights in a New Key,” *American Anthropologist* 108, no. 1 (2006): 1-8; Richard A Wilson, *Human Rights, Culture and Context: Anthropological Perspectives*, (London, UK: Pluto Press, 1997).

²⁴¹ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 6.

²⁴² Tsing, *From the Margins*.

In discussing the question of the “local” in transitional justice, it is constantly important to emphasize who is the “local” to whom international actors respond. Lars and Waldorf point out that while policy makers and scholars have a greater appreciation for the local and adapting mechanisms accordingly, these engagements do not go far enough to challenge the foundational assumptions of transitional justice.²⁴³ Correspondingly, the local at the most generally compromise of local human rights NGOs, which are in turn limited to by “top-down ‘outreach’ or sensitization processes such as workshops and information sessions.”²⁴⁴ Ultimately, caught between the priorities of international actors decisions at higher levels, and the often time limitations imposed on local NGOs by donor policies and funding guidelines, survivors are silenced, particularly if their demands do not correspond to international legal norms or challenge top-level prioritization of transitional justice activities.

Finally, a discussion of the local is incomplete without recognizing how the complexity on the ground has become even more convoluted and problematic in a post 9/11 world. Since September 2001, Lars and Waldorf argues the “war has transformed international norms, reconfigured the power of states, intersected in paradoxical ways with transitional justice and created new frictions with local priorities for dealing with the aftermath of violence.”²⁴⁵ Indeed, a post-9/11 world

²⁴³ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 4.

²⁴⁴ Ibid.

²⁴⁵ Ibid, 7.

transitional justice may be increasingly shaded by “the appropriation of the language of transition and democratization in furtherance of an apparently global project [that has] few effective international legal constraints.”²⁴⁶ Further, Hazan assesses that the emphasis on security in this new world order, “puts an end to the eschatological dimension of transitional justice;” where transition “is no longer a explanatory of political category.”²⁴⁷ The consequent outcome is a realpolitik dominated by hard power which at one level usurped the “optimistic model of political evolution through transitional justice,”²⁴⁸ and in another, making it crumble from above through both being disconnected from the selective use of transitional justice mechanisms and being vulnerable to being used or rendered redundant irrespective of the desire of the population. Finally, Nagy points out “a narrow fixation on judicial mechanisms in [places like] Iraq shields analysts from asking normative questions about the illegitimacy or justifiability of the occupation or about whether justice is even possible in such a context.”²⁴⁹ Going forward, these observations about the post 9/11 world matter since the efforts of trying to address questions of wartime atrocities has to unfold and evolve in a new environment dominated by hard power. To the extent efforts at accounting for the past is and will be successful, their success depends to a great extent on how their ambitions, perceptions and credibility

²⁴⁶ Christine Campbell, Colm Campbell, and Fionnuala Ní Aoláin, Justice Discourses in Transition, *Social and Legal Studies* 13, no. 3 (2004), 307.

²⁴⁷ Hazan, *Transitional Justice After September 11*, 55.

²⁴⁸ Shaw and Waldorf, *Introduction: Localizing Transitional Justice*, 7

²⁴⁹ Nagy, *Transitional Justice as Global Project*, 279.

negotiate for space and relevance within this new kind of order.

Conclusion

This chapter provided the scholarly literature on which this particular study is based. It began with examining the literature on transitions and transitional democracies and extensively engaged with the existing debates and issues surrounding the peace and justice dilemma. It paid special attention to the arguments for and against amnesties, teasing out its potential link between different levels of impunity and also their role in facilitating both political reconciliation, as well as a more comprehensive reconciliatory process. It then discussed in detail the literature on transitional justice, laying out its origins, developments and its components including the literature on trials, truth commissions and vetting and lustration processes. Finally, it laid out three critiques offered for the transitional justice paradigm, which is of fundamental importance to this project -- examining it as a neoliberal project, its limitations in harnessing the term transitional and finally the criticisms surrounding its understanding of, and relationship to the local realm.

CHAPTER 3

THE LEGACY OF FAILED INITIATIVES

The past is not dead. In fact, it's not even past
William Faulkner (1897-1962)

The story is sometimes told of a man who was lost somewhere in Scotland and asked a farmer if he could tell him the way to Edinburgh. 'Oh sir' the farmer replied, 'if I were you, I shouldn't start from here.'
Hedley Bull (1932-1985)

Do current transitional justice efforts acknowledge and/or engage with the legacies of past initiatives undertaken in Afghanistan and Nepal to address questions of wartime atrocities and antagonistic relations between hostile parties? *The Legacy of Failed Initiatives* is an in-depth engagement with this question, highlighting the importance of historical experiences as a critical component of the “dynamic local.” Succinctly, it tells the long and discouraging story of Afghanistan and Nepal’s past efforts to “close the books” and examines current initiatives to “address the past,” piecing together a narrative using interviews, personal accounts, correspondence, newspaper articles, and the handful of reports that have recorded the “transitional justice” discussion. In so doing, it finds that the legacy of failed experiences at times mirror similar flawed

assumptions in current efforts. This looking back to appreciate the present trend reveals the continuous disjuncture between international and/or state-level initiatives to deal with the outcome of conflict, and the more parochial urgencies in the local context in both the societies.

Contemporary Commitments for “Transitional Justice”

Afghanistan’s Bonn Agreement

A few weeks after the United States and its coalition partners toppled the Taliban in late 2001, representatives of various Afghan factions (Afghan military commanders, expatriate Afghans, representatives of the exiled monarch and the country’s different ethnic groups) met in Bonn, Germany under the auspices of the Special Representative of the Secretary-General for Afghanistan Lakhdar Brahimi to map out Afghanistan’s future.²⁵⁰ The first discussion of “transitional justice” arose in these negotiations for the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (henceforth the Bonn Agreement).²⁵¹

The Bonn Agreement laid out the foundations for the general provisions of the interim authority, the special independent commission for the Constitutional Loya Jirga, the interim administration and the general principles of the legal judicial framework, but

²⁵⁰ See Barnett R. Rubin, “Transitional Justice and Human Rights in Afghanistan,” *International Affairs* 79, No. 3 (2003), 567-581. See also generally Patricia Gossman, “Transitional Justice and DDR: The Case of Afghanistan,” Research Brief, International Center for Transitional Justice (ICTJ), June 2009, 1- 4. http://www.ictj.org/static/Publications/Gossman_Af_ResearchBriefDDR_re2009.pdf. (Accessed January 9, 2010). Also see Alexander J. Thier, “The Politics of Peacebuilding, Year One: From Bonn to Kabul,” in Antonio Donini, Norah Niland and Karin Wermester, eds. *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, (Bloomfield, CT: Kumarian Press Inc, 2004), 39-60.

²⁵¹ See Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), http://www.afghan-web.com/politics/bonn_agreement_2001.html. (Accessed January 18, 2008).

questions of accountability for wartimes are missing in the final document. As one of the advisers for the UN Special Representative to Brahimi, Barnett Rubin had suggested pre-Bonn that “no one guilty of war crimes, crimes against humanity or gross violations of human rights should serve as a minister in the interim administration.”²⁵² In his account, he recalls discussions about screening recruits, especially to the officer corps, to prevent the appointment of those who had committed serious abuses during the negotiations, but unfortunately, they did not bear any fruition: “first, because no judicial or similar process was in place to determine who was ineligible, and it would be impossible to obtain an agreement on its mandate and establish a process with sufficient legitimacy in the time they had; and second, because the U.S. led coalition’s policy of arming the Northern Alliance and other commanders had already established a de facto set of new armed forces without any such process.”²⁵³ Ultimately, the representatives of the four anti-Taliban groups, the UN and the major powers chose the ministers the interim administration. Rubin narrates: “they met for ten days under extreme pressure as a dentists’ convention had reserved the same hotel after December 5.”²⁵⁴

The Bonn Agreement is unlike other peace agreements.²⁵⁵ Suhrke, Harpviken and Strand summarily state: “It is merely a statement of general goals and intended power

²⁵² Rubin, *Transitional Justice and Human Rights in Afghanistan*, 571.

²⁵³ Ibid.

²⁵⁴ Ibid, 570.

²⁵⁵ A peace agreement comprises of critical components of negotiated settlements between two formerly antagonistic parties, which include, but are not limited to, the formal designation of geopolitical borders, status or refugees, access to and apportioning resources, settlement of existing debts, new power-sharing arrangements, processes of addressing future disputes, defining and regulating behavior of state parties and opposition, outlining status and role of arms and armies, reapplication of existing treaties, the

sharing among the victors of a conflict in which their erstwhile common enemy, the Taliban, was suddenly deposed by the intervention of a *deus ex machina*.²⁵⁶ First, it was not an arrangement between warring parties to lay down their arms and seek alternative means of conflict settlement. There was no negotiation about the infrastructure of the government, power sharing possibilities or rebuilding mechanisms through which the rule of law would be established. Its final text contains no reference to “transitional justice” or “human rights” except for a reference to the establishment of the AIHRC.²⁵⁷ Initially, the UN drafters had included a paragraph that the interim administration should not grant amnesty for war crimes and crimes against humanity, but this resulted in significant friction. The two members of the United Front delegation from the party of Abd-al-Rabb al-Rasul Sayyaf²⁵⁸ insisted that the paragraph be removed because it defamed the struggle of the mujahideen and its leaders.²⁵⁹ Despite efforts by Brahimi during the drafting session to point out the dangers of an amnesty, the audience continued to be unreceptive

role of an interim administration and increasingly, the question of how to address human rights atrocities committed during the period of conflict.

²⁵⁶ Astri Suhrke, Kristian Berg Harpviken and Arne Strand, After Bonn: Conflictual Peace Building, *Third World Quarterly*, 23, no.5 (October 2002), 876.

²⁵⁷ See Bonn Agreement.

²⁵⁸ In the 1980s, Sayyaf led the Mujahideen faction of the Islamic Union for the Liberation of Afghanistan against PDPA government. In his role, he also allegedly received patronage from Arab sources while mobilizing Arab volunteers to fight on behalf of the Mujahideen. It was Sayyaf who allegedly was the first to invite Osama bin Laden to seek shelter in Afghanistan when the latter was expelled from Sudan in 1996. His crimes against humanity and involvement in war crimes are one of the best-documented in Afghanistan.

²⁵⁹ Rubin notes that there was also considerable conflict because of the paragraph that called for the disarmament and demobilization and reintegration of unofficial armed groups which was perceived to be a dishonorable demand placed on the mujahideen, Annex I on security that asked for an international security force for Kabul and other areas, the role of King Zahir Shah and also the absence of any mention of President Burhanuddin Rabbani who was deposed by the Taliban. See Rubin, *Transitional Justice and Human Rights in Afghanistan*, 572.

to the arguments against political forgiveness.²⁶⁰ Further, as Rubin notes, the phrasing of the term “war crimes” did not translate well into the Afghan context. The actual phrase *janayat-i-jang* translates to mean the crime of waging war, thereby insinuating that the jihadi struggle against the Soviets was illegal and immoral and was immediately interpreted as all those who had taken up arms in the jihad could be put on trial. Rubin recalls, “some time during the all-night negotiations necessary to clear out the hotel for the dentists, the paragraph forbidding an amnesty for war crimes was struck out.”²⁶¹ The resistance to the paragraph prohibiting amnesty became the foundation of the political struggle that ultimately lead to the passage of what has come to be known as the amnesty law.

According to analysts and human rights activists interviewed for this study, a huge window of opportunity for “transitional justice” was also missed in 2001 because Brahimi proposed the long-term strategy for securing justice in Afghanistan through political stabilization of the country and judicial reform, while discouraging the development of a foundation for justice efforts in Afghanistan. President Karzai was initially supportive of the notion of justice for war crimes at a 2002 UN sponsored human rights workshop in Kabul stating: “I believe we must have a truth commission very soon to find out more about the atrocities committed and to address those people who have been violated, whose relatives have been killed, Afghanistan must find a way to cure

²⁶⁰ Tazreena Sajjad, “These Spaces in Between: The AIHRC and its Work on Transitional Justice,” *The International Journal of Transitional Justice* 3, No. 3 (2009), 442.

²⁶¹ Rubin, *Transitional Justice and Human Rights in Afghanistan*, 573.

those wounds.”²⁶² “He cried,” remembers an interviewee, “when talking about the kind of atrocities Afghans have endured over the years. He seemed eager to learn about the South African TRC as a way to heal the wounds in Afghanistan.”²⁶³ Within the same year however, Karzai backpedaled on his position, stating in a 2002 BBC interview, “If we can have justice while we are seeking peace, we will go for that too. So ... justice becomes a luxury for now. We must not lose peace for that.”²⁶⁴

In 2002, at the Emergency Loya Jirga,²⁶⁵ facing the denunciation of warlord and warlordism particularly from those who were concerned about human rights and from women delegates, Sayyaf declared that criticizing the mujahideen amounted to blasphemy. At the same time, international decision to pursue a “cheap, quick peace with a light footprint” further emboldened Karzai’s decision to not tackle warlordism. The result was regional commanders taking up some of the key appointments in the government.

In March 2003, at the annual meeting of the UN Commission on Human Rights in Geneva, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

²⁶² “Afghan Truth Commission Requested,” *Associated Press Online*, March 9, 2002

²⁶³ Interview with Afghan researcher and former civil society actor, Washington D.C., August, 12, 2008

²⁶⁴ “Karzai Sets out Afghanistan Vision,” *BBC World News*, June 14, 2002.

²⁶⁵ Loya Jirga, or Grand Council, is traditionally a gathering of male representatives selected by their local leadership from different tribes and factions in Afghanistan. The Loya Jirga discusses any important political and social issue important to the community. The Emergency Loya Jirga was held between June 10-16 2002 (20th to 26th Jauza 1381) as per the Bonn Agreement to discuss Afghanistan’s future and select members for a 2-year interim government. For a deeper discussion of jirgas, see Ali Wardak, “Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan,” University of Glamorgan, UK: Centre for Criminology, 2003, 1-20. <http://www.institute-for-afghan-studies.org/AFGHAN%20CONFLICT/LOYA%20JIRGA/Jirgabywardak.pdf> (Accessed on June 10, 2006).

floated a proposal based on UN Special Rapporteur on Extrajudicial Executions, Asma Jahangir's report, to set up an international commission of inquiry to look into past war crimes in Afghanistan. Gossman, the then project director of the Afghanistan Justice Project (AJP) states: "The commission of inquiry was cautiously worded, and did not spell out any particular mechanism, judicial or non-judicial. Instead, it advocated an approach that would involve international experts mapping the major incidents of the past."²⁶⁶ In general, there was a consensus among those involved regarding the necessity of some form of analysis of sources and existing documentation on Afghanistan, leading to, at some point in the future, the creation of a national record. However, there were certain actors, particularly the United States, who were vehemently opposed to the question of accountability for human rights atrocities in Afghanistan.²⁶⁷ In the end, due to extreme opposition, the proposal was withdrawn to the bitter disappointment of Afghan human rights activists and the new AIHRC.²⁶⁸ With the formalization of the *Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan* in 2005, the platform seemed to be set for a broader effort for "transitional justice." At around the same time in January 2005, acting within its mandate, the AIHRC, at the completion of the transitional justice consultation, published

²⁶⁶ Patricia Gossman, "The Past As Present: War Crimes, Impunity And The Rule Of Law, Originally presented at State Reconstruction And International Engagement In Afghanistan," Bonn Symposium, May 30- June 1 2003. http://eprints.lse.ac.uk/28365/1/Gossman_LSERO_version.pdf, (Accessed September 15, 2010).

²⁶⁷ "UN Rights Body in Serious Decline," *Human Rights Watch*, April 25, 2003. <http://www.hrw.org/en/news/2003/04/25/un-rights-body-serious-decline>. (Accessed September 1, 2010).

²⁶⁸ Gossman, *The Past As Present*.

the “*Call for Justice*,” which remains, to date the only comprehensive report on what Afghans understand as justice.²⁶⁹

International human rights actors have successfully argued for judicial accountability for war crimes under the doctrine of universal jurisdiction²⁷⁰ against Afghan rights abusers living abroad. In 2005, a UK court convicted Faryadi Zardad, a notorious warlord from the Hizb-i-Islami, of torture and hostage taking of Afghan civilians between 1991 and 1996, and sentenced him to twenty years in prison. Similarly, on October 14, 2005, a Dutch court convicted asylum-seekers Hesamuddin Hesam and Habibullah Jalalzoy, both high level members of Khidamati Ittila’at-i Dawlati (State Information Service, or the KHAD), Afghanistan’s infamous communist-era intelligence service, of engaging in torture and sentenced them to twelve years and nine years in prison, respectively. The first and only war crimes case tried in Afghanistan was that of Assadullah Sarwary, the former intelligence chief and deputy prime minister of the communist government. Sarwary was arrested in 1992 and spent nearly fourteen years in prison without a trial. Amidst allegations that he did not have ongoing legal assistance and that none of the prosecution witnesses presented direct evidence against him, the national security court sentenced him to death in 2006, raising questions about due process.²⁷¹

²⁶⁹ A detailed discussion of the findings of the report appears in Chapter 7.

²⁷⁰ The legal principle of universal jurisdiction in international public law requires that states can claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country.

²⁷¹ As of 2008, his appeal was pending.

The publication of HRW's *Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*²⁷² laid bare some of the tensions between the human rights community and that of certain international actors, particularly the United Nations Assistance Mission in Afghanistan (UNAMA) regarding the question of "transitional justice" and mainly that of culpability. Several of the interviewees pointed out that the original strategy to build momentum around the demand for culpability was based on an agreement that the UNAMA would release a report drawing on the findings of the Human Rights Watch report and emphasizing the findings in AIHRC's *A Call for Justice*. Anecdotes gathered during this research vary on what exactly happened regarding the report,²⁷³ but the final prognosis was that the UN withdrew from the "deal." A long time Afghanistan independent analyst Dr Patricia Gossman noted that the "UN got 'cold feet' regarding potential backlash against its workers... but... a lot of people thought that this was not the case... since all of this was [already] published material... the UN report was going to put out something that was already published."²⁷⁴

The Nail in the Coffin: The Amnesty Law

The approval of the amnesty bill by both houses of parliament in 2007 marked a milestone in obstructing the discussion and action on culpability for war crimes. The 12-point resolution termed "National Stability and Reconciliation Bill" contained four

²⁷² See "Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity," *Human Rights Watch*, July 6, 2005, <http://www.hrw.org/en/reports/2005/07/06/blood-stained-hands><http://www.hrw.org/en/reports/2005/07/06/blood-stained-hands>. (Accessed June 1, 2007).

²⁷³ Some stated that the report was never published and a few others who recollect that the report was made public for a few days on the UN website before being taken down.

²⁷⁴ Interview with Dr Patricia Gossman, Washington D.C. June 8, 2009.

primary clauses dealing with the amnesty issue. First, it called on all opponents to forgive each other and participate in Karzai's national reconciliation process.²⁷⁵ Second, the opponents (a catch-all phrase that includes communists, mujahideen, Taliban and other antagonists) were promised blanket amnesty as long as they accepted the Afghanistan constitution and committed to abide by all laws of the land. Third, the draft bill proscribed that individuals who were involved in the jihad to protect Afghanistan's religion or territorial integrity could not be criticized. Fourth, it rejected the findings of HRW's *Blood Stained Hands*. The bill circumvented several of Afghanistan's international obligations relating to human rights and unleashed criticism internationally and domestically.²⁷⁶ Consequently, Karzai slightly revised the bill, which then recognized the rights of war crimes victims to bring cases against those alleged to have committed war crimes.²⁷⁷ Rights-based groups rightly point out that the lack of security and rule of

²⁷⁵ The national reconciliation process referred to is the Proceay-i Tahkeem-i Sulha (the Strengthening Peace Program, or Peace and Reconciliation Commission), which will be further discussed in the section on Afghanistan's Past Initiatives. It must be noted however as recently as 2010, Karzai has launched a new program called the Afghanistan Peace and Reintegration Programme (APRP) which, in theory, draws on the lessons learned from the former initiatives launched in Afghanistan since 2001 including the PTS to end the war and make a transition to peace. The APRP has a two-pronged approach to the current conflict, aiming to integrate rank and file combatants and reconcile with the senior members of the leadership of insurgent forces. For an in-depth discussion on the APRP see Tazreena Sajjad, "Peace At All Costs? Reintegration and Reconciliation in Afghanistan," Issue Paper Series, Afghanistan Research and Evaluation Unit (AREU), October, 2010. Available at www.areu.org.af (Accessed November 1, 2010)

²⁷⁶ Critics of the amnesty law contend that it is unconstitutional. They argue the amnesty law contradicts Kabul's obligations under international law to prosecute serious crimes such as torture, rape, war crimes, crimes against humanity, and genocide. Chapter 7, Article 6 of the Afghan constitution states: "The Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law." See the Constitution of Afghanistan, 1382, Chapter 7, Article 6, http://www.afghan-web.com/politics/current_constitution.html#chapterseven. (Accessed March 10, 2007)

²⁷⁷ Afghanistan's legislative process requires that a draft law is first signed by the president, and then published in an official gazette before it takes effect. The actual process is sometimes far less transparent and often murky. A constitutional provision however allows any bill to become law within 60 days even without presidential approval.

law in Afghanistan makes it almost impossible for individuals to pursue criminal cases against powerful parties involved in the war. Brad Adams, Director of HRW in a March 10 statement said, “It is fantasy to think that an individual can take on a major war criminal alone,”²⁷⁸ adding that the state should not transfer its obligation to prosecute serious human rights violations to individuals.

In 2009, the National Action Plan expired. Despite requests by both AIHRC and civil society to President Karzai to extend its mandate, thus far he has refused to do so. As of writing of this dissertation, there has been very little progress on the Action Plan itself. President Karzai launched the Action Plan more than a year after its formalization on December 10, 2006 to coincide with International Human Rights Day, a delay indicative of its unpopularity within the Afghan government including with Karzai’s trusted advisors.²⁷⁹ The other requirement met was the establishment of the President Advisory Panel for cabinet appointments. Despite the expiration of its mandate, the Action Plan however has a place in recent key policy documents including being used as benchmark in the 2006 Afghanistan Compact (AC) and the 2008 Afghanistan National Development Strategy (ANDS). A 2010 report issued by AREU states: “...awareness of the plan within the ministries responsible for its implementation and among some members of the international diplomatic community is weak...[and] although the ANDS reemphasized the responsibility of the Ministry of Justice (MoJ) to implement the plan,

²⁷⁸ See “Afghanistan: Repeal Amnesty Law; Measure Brought into Force by Karzai Means Atrocities Will Go Unpunished,” *Human Rights Watch*, March 10, 2010, <http://www.hrw.org/en/news/2010/03/10/afghanistan-repeal-amnesty-law>. (Accessed January 19, 2011).

²⁷⁹ Phone interview with Afghan local civil society actor, Afghanistan, July 10, 2008.

government officials working in the justice field said they were unaware of the plan's existence."²⁸⁰

For almost two years, the actual status of the amnesty bill remained unknown to international actors and Afghan human rights activists. In fact, during the period of research, no interviewee could accurately account for where the bill was -- whether in the possession of Karzai or in Parliament -- and whether it had actually become law. For several of the human rights activists interviewed, the ambiguity of the status of the bill indicated a glimmer of hope; a cautious optimism that "if not too many questions were asked about the bill's status, some progress could be made regarding "transitional justice," very quietly."²⁸¹ This optimism was short-lived. The bill's publication in the Gazette in 2009, dealt a serious blow to the National Action Plan for Peace, Justice and Reconciliation in Afghanistan. Till today, the National Action Plan remains the most significant document that captures the "transitional justice" spectrum for Afghan society. A national civil society actor stated:

There is no other document that exists today in Afghanistan which outlines the government's obligations to transitional justice...it is pretty comprehensive...the commitments of the GoA are relevant, so the Action Plan is still relevant...this is what we have, and we should continue demand that GoA meets its obligations.²⁸² Indeed the relevance of the National Action Plan has not faded from the international platform (perhaps its expiration date either been not noted or been intentionally disregarded). In fact the recent United Nations Security Council Resolution 1868, refers to it when calling on the Afghan government to "ensure

²⁸⁰ Winterbotham, *The State of Transitional Justice in Afghanistan*.

²⁸¹ Interview with Scott Worden, USIP Rule of Law advisor, Washington D.C., June 12, 2008.

²⁸² Follow-up interview with Afghan civil society actor, Afghanistan, April 10, 2010.

the full implementation of the Action Plan on Peace, Justice and Reconciliation in accordance with the Afghanistan Compact.”²⁸³

Nepal’s Promise

If detailed documentation on the actual negotiation process for Afghanistan’s Bonn is limited, then there is even less information available on the discussions and negotiations around Nepal’s CPA. Much of what is available has been detailed in ICG’s exhaustive reports, ICTJ and AF analyses, and the few generated by interested international government agencies covering the period of failed talks and the success of formalizing Nepal’s current peace process. Consequently, most of the discussion on transitional justice and human rights has been extracted from these organizational reports and extensive interviews held in Nepal.

Nepali elites generally seemed to consider the CPA to be a source of pride, largely claiming it as a Nepal-initiated, owned and directed peace process. This claim while true, can be somewhat misleading, given that particularly since 2000, international actors provided critical support and assistance for the ongoing peace negotiations. Of these, the Swiss-based NGO the Centre for Humanitarian Dialogue (CHD) was prominent in promoting dialogues between the different parties along with the UN through the good offices of a UN official and through the Office of the High Commission of Human Rights (OHCHR) and the United Nations Mission in Nepal (UNMIN). Other actors includes the Carter Center’s conflict resolution program, a Swiss government

²⁸³ United Nations Security Council Resolution 1868, Paragraph 30, March 23, 2009 <http://www.unhcr.org/refworld/country,,,RESOLUTION,AFG,,49c9f9992,0.html>. (Accessed September 15, 2010).

appointed special advisor for peacebuilding, Günther Baechler and South African consultant Hannes Siebert contracted by USAID who worked closely with the peace secretariat. Bilateral support was also provided by the United Kingdom (UK), Norway, Denmark and India.

While much of the donor support was withdrawn as a direct response to the 2005 royal coup,²⁸⁴ the US continued to provide support to Nepal particularly through the Transition to Peace (NTTP), an initiative which was aimed at both being a resource to political parties as well as providing a negotiating space for the country's different stakeholders. The prominent role of South African Hannes Siebert and Swiss Günther Baechler, need special acknowledgement here, because of their strategic partnership in creating a task force comprising of national facilitators, representatives of political parties and observers which was affiliated with the peace secretariat and the Nepal government.²⁸⁵ It is this task force, which was instrumental in raising critical issues about the peace process including that of transitional justice.

A main push for the discussion on transitional justice since the beginning of the peace process came inevitably from Nepal's local civil society, which mostly continued to remain at the peripheries of major discussions and negotiations. Their focus was

²⁸⁴ King Gayanendra sacked the Prime Minister, took over power and declared a state of emergency. For an in-depth detailed analysis, see "Nepal's Royal Coup: Making A Bad Situation Worse," Asia Report N°91, *International Crisis Group (ICG)*, February 9 2005, http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/091_nepal_royal_coup_making_a_bad_situation_worse.ashx. (Accessed February 9, 2008).

²⁸⁵ Warisha Farasat and Priscilla Hayner, "Negotiating Peace in Nepal: Implications for Justice," IFP Mediation Cluster: Country Case Study: Nepal, *International Center for Transitional Justice (ICTJ)*, June 2009, http://www.ictj.org/static/Publications/ICTJ-IFP_NPL_Negotiating-Peace-Nepal_pb2009.pdf. (Accessed March 2, 2011)

notably narrow, concerned primarily with questions of impunity and manifest in their demand for prosecution of human rights abusers and the demand for the GoN to ratify the Rome Statute of the ICC.²⁸⁶ As the political talks dragged on however, cleavages became apparent within the local civil society community. Depending on associations and/or affiliations with political parties, the Maoists or the government, organizations and individuals sided with either the question of reconciliation or that of criminal accountability.²⁸⁷ According to a 2009 ICTJ report, in a retrospective glance several civil society members admitted that opportunities were lost on justice issues because of the prioritization of political concerns including questions about the configuration of a republic and the Constituent Assembly.²⁸⁸

The Baluwatar Accord, an 8-point agreement between the Seven Party Alliance (SPA)²⁸⁹ and the Maoists, which was signed roughly two weeks prior to the CPA, is the first official document in Nepal to address the issue of human rights atrocities committed in the country. The Accord makes special reference to “a high-level commission to investigate and publicize the whereabouts of citizens that were alleged to be disappeared by the state and the Maoists’, a Truth and Reconciliation Commission and compensation for victims’ families.”²⁹⁰ But it is the CPA signed on November 21, 2006, which is

²⁸⁶ Interviews with local civil society actors, Kathmandu, Nepal, 2009.

²⁸⁷ Ibid.

²⁸⁸ Farasat and Hayner, *Negotiating Peace in Nepal*.

²⁸⁹ Coalition of seven political parties in Nepal, which lead the Loktontro Andolon and aimed at end the autocratic rule of King Gayendra.

²⁹⁰ Section I clause (2), Section IV states: 1. Provisions will be made for providing proper relief, honor and rehabilitation of the family members of the people who were killed during the conflict and for

accredited as the accord that signaled the official end of a decade long conflict.

The CPA called for three mechanisms to address human rights violations that occurred during the decade long conflict: (a) article 5.2.5 mandated the establishment of a Truth and Reconciliation Commission to “probe about those involved in serious violation of human rights and crime against humanity...and develop an atmosphere for reconciliation in society;” (b) article 5.2.4 calls for a National Peace and Rehabilitation Commission “to carry out works...to normalize the adverse situation arising as a result of the armed conflict, maintain peace in the society and run relief and rehabilitation works for the people victimized and displaced as a result of the conflict;” article 5.2.3 states “both sides also agree to make public within 60 days of signing of the agreement the real name, caste and address of the people ‘disappeared’ or killed during the conflict and inform the family members about it.”²⁹¹ Beyond these broad mandates, however, the CPA contains no detailed guidance for how to form each of these investigative bodies or what should be their specific mandate.

The proposal for three specific and separate commissions for transitional justice

those who have been disabled by injury in this course. 2. Provision for relief to the victimized family members of those who have been disappeared on the basis of the report presented by the investigation commission shall be made. 3. Special programmes to rehabilitate the people who have been displaced in course of the conflict, to provide relief in case of destruction of private and public properties, and to reconstruct the destroyed infrastructures shall be carried out. 4. A high level Truth and Reconciliation Commission shall be formed to conduct investigation about those who have committed serious violation of human rights at the time of the conflict and about those who were involved in crime against humanity during the conflict and to create an environment for social reconciliation. Understanding between the SPA and CPN-M, November 8, 2006, <http://peace.gov.np/admin/doc/Decisions%20of%20Top%20leader%20meeting%20of%208%20Nov,%202006.pdf>. (Accessed February 9, 2008).

²⁹¹ Comprehensive Peace Agreement 2006, <http://www.satp.org/satporgtp/countries/nepal/document/papers/peaceagreement.htm>. (Accessed February 9, 2008).

can be traced back to the task force created and supported by Siebert and Baechler but there is little information about what specific negotiations determined such an outcome. Nevertheless, given the information available on the genesis of each on these mechanisms -- the National Peace and Rehabilitation Commission, Disappearance Commission and the TRC, a more detailed engagement with each is considered necessary.

The National Peace and Rehabilitation Commission

The National Peace and Rehabilitation Commission, for which there has been no momentum thus far, is a direct response to the level of destabilization experienced by the Nepali population in the over decade long conflict. An estimated 350,000 to 400,000 Nepalese were internally displaced and millions fled to India to escape from atrocities. In the hill and mountain regions of Nepal, where members of the Young Communist League (YCL),²⁹² took on a public security role since 2007, there were reports extortion, threats and intimidation, physical assault, ill-treatment sometimes amounting to torture, forced labor, disruption of rallies and meetings, and destruction of property. In the ten years of conflict, Maoist forces were also responsible for killings, abductions, torture, extortion, and the use of children for military purposes.²⁹³ Ideally, the Peace and Rehabilitation Commission would address this level of social and economic disruption, provide adequate relief and rehabilitation to survivors, and in the process address, at least to a

²⁹² The youth wing of the CPN-M

²⁹³ See "Children in the Ranks --The Maoists' Use of Child Soldiers in Nepal," *Human Rights Watch (HRW)*, February 1 2007, <http://hrw.org/reports/2007/nepal0207/>. (Accessed September 2, 2010)

limited extent, the deep socio-economic realities, institutionalized through the caste and patronage system that continues to plague Nepal. Instead, thus far, the interim relief provided by the government has been distributed through the Ministry of Peace and Reconstruction (MoPR). The process has been disorganized, inadequate and the funds have been not equitably distributed to the different victims groups, contributing to tensions between the different survivor entities and generating confusion and criticism from the human rights community in the country.²⁹⁴ According to a civil society actor interviewed: “MoPR does not have a human rights or a conflict resolution specialist; there are a few people who are well-intentioned within it, but it is a new and weak government bureaucracy which is not independent, and which ultimately does not have the same kind of mandate that the National Peace and Rehabilitation Commission was envisioned to have.”²⁹⁵

The Disappearance Commission

The need for a Disappearance Commission was a response to the large numbers of civilians who were victims of enforced disappearances and whose whereabouts remain unknown till today. In both 2003 and 2004 Nepal held the distinction of having the highest yearly number of new cases of “disappearances” reported to the UN Working

²⁹⁴ See “Discrimination and Irregularities: A Painful Tale of Interim Relief in Nepal,” Advocacy Forum, 2010, http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf. (Accessed October 1, 2010). The different victims groups and human rights actors interviewed for this research also repeatedly emphasized this view.

²⁹⁵ Interview, civil society actor, Kathmandu, Nepal, July 7, 2009

Group on Enforced or Involuntary Disappearances (WGEID) in the world,²⁹⁶ particularly due to the incidents involving torture and disappearances in Bardiya²⁹⁷ and in Maharajgunj.²⁹⁸ In total 1,619 disappearances were reported to the Nepal Human Rights Commission (NHRC).²⁹⁹ The vast majority of the disappearances in both instances, as well as in other areas of Nepal, were through abductions, unofficial arrests, secret detentions, torture of political opposition and marginalized groups. Perpetrators included all three branches of the security services -- the Nepalese Police (NP), the Armed Police Force (APF) and the Royal Nepalese Army (RNA) as well as the Maoist People's Army (MPA). As of the writing of this dissertation, approximately 1,000 cases of missing and disappeared have yet to be investigated.

From the beginning, OHCHR, the International Commission of Jurists (ICJ) and the International Committee of the Red Cross (ICRC) supported the demand for a disappearance commission echoing the demands of local civil society actors and victims' families. Interestingly enough, the TRC was initially expected to handle the issue of

²⁹⁶ "Review Of Implementation Of The Recommendations Made By The UN Working Group On Enforced or Involuntary Disappearances After Its Visit To Nepal In December 2004," Occasional Briefing Series, *Advocacy Forum*, Vol I, September 2010. <http://www.advocacyforum.org/downloads/pdf/publications/af-briefing-series-1-disappearance.pdf> (Accessed on October 10, 2010).

²⁹⁷ Between late 2001 to the time of the ceasefire in January 2003, there were reports of widespread torture and at least 200 disappearances carried out by the security forces in Bardiya. The vast majority of victims were from the marginalized and disadvantaged Tharu community, who were particularly vulnerable – to both Maoist intimidation and state abuse – due to their weak links to human rights organizations and existing tensions with high-caste landowners—as well Nepal's security forces.

²⁹⁸ Bhairabnath battalion of the RNA's 10th Brigade is held primarily responsible for the arbitrary arrests, torture of hundreds of people and at least 45 disappearances in Kathmandu alone between late 2003 to 2004. It is alleged that those who were detained and tortured were largely but not all active Maoists, many of them belonging to the party's student wing. The army still denies its role in the Bhairabnath case, despite existing extensive evidence about their role in the arrests, torture and disappearances.

disappearances. According to the 2009 ICTJ report, logistical concerns about the feasibility of 60 days given to publish the names of the disappeared and refer cases to the TRC ultimately led to recognizing the need for a separate commission. Subsequently, the Disappearance Commission appeared as a separate mechanism in the CPA.³⁰⁰

Thus far, the greatest amount of progress has been around the Disappearance Commission. On July 1, 2007 the Supreme Court's ruled to enact a law that would criminalize enforced disappearances in accordance with the International Convention for the Protection of all Persons from Enforced Disappearance. This further consolidated international and national efforts to mobilize around creating drafts for a disappearance bill to ensure that the disappearance commission reaches stringent international standards. As of April 2010, the government has tabled the Bill on Offences and Punishment of Disappearances 2066 at the legislative parliament. However, the current political turmoil, which has included the stark absence of a new constitution, has played a significant role in slowing down the progress of the bill.

The Truth and Reconciliation Commission (TRC)

The TRC is in many ways the most ambitious of the three commissions, and responsibility for conceiving and implementing its framework has been given to the Peace and Reconstruction Ministry. The general principle behind it is find the "truth" about the approximately 13,256 Nepalis were killed in the decade long conflict³⁰¹ and the

³⁰⁰ Farasat and Hayner, *Negotiating Peace in Nepal*.

³⁰¹ See "Ceasefire Report," *National Human Rights Commission (NHRC)*, December 2006, <http://www.internal->

human rights violations committed during the ten year period including illegal detentions, rapes and murders of female civilians. It could also investigate the role of the RNA, which frequently ignored the Supreme Court *habeas corpus* orders and even staged killings to appear as “armed encounters,” threatened witnesses to sign exonerating statements, took staged photographs and publicized false accounts of circumstances of death.³⁰² Despite the army’s protestations, the vast majority of violations were policy-driven, sanctioned through the chain of command in pursuit of military objectives.³⁰³

Several people interviewed in the course of this study expressed surprise at seeing the TRC as a separate mechanism mentioned in the CPA, particularly because most were unaware of what such an institution would actually mean and how it would operate in the Nepali context.³⁰⁴ In general, the support for the TRC seemed to be more from the side of the Nepali Congress (NC) of the government who wanted a mechanism to address past violations and who considered that the Maoists were mainly responsible for human rights atrocities committed during the conflict. The Maoists in turn, were less receptive to the

[displacement.org/8025708F004CE90B/\(httpDocuments\)/944E0E93E66B48EFC125735C00513A04/\\$file/Ceasefire+report+NHRC+Dec06.pdf](http://displacement.org/8025708F004CE90B/(httpDocuments)/944E0E93E66B48EFC125735C00513A04/$file/Ceasefire+report+NHRC+Dec06.pdf). (Accessed May 6, 2009).

³⁰² See “Waiting for Justice: Unpunished Crimes from Nepal’s Armed Conflict,” *Human Rights Watch and Advocacy Forum*, September 11, 2008, 27 <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0>. (Accessed October 1, 2008). See also “Conflict-related Disappearances in Bardiya District,” *United Nations Office of the High Commissioner for Human Rights (OHCHR-Nepal)*, December 2008, 46-50. http://www.swisspeace.ch/typo3/fileadmin/user_upload/Media/Countries/Nepal/OHCHR_ConflictRelated_Disappearances.pdf. (Accessed November 1, 2010)

³⁰³ See “Practice of Torture Systematic in Nepal,” Press Release, *United Nations (UN)*, September 16 2005. http://www.un.org.np/sites/default/files/press_releases/tid_188/20050919034616.pdf. (Accessed November 1, 2010).

³⁰⁴ Interviews held in Kathmandu, Nepal, 2009. For a more detailed discussion of how the TRC appeared in the CPA, see Chapter 5

idea, focusing their attention on the need for prioritizing the publication of the names of the disappeared. Interestingly enough, according to the 2009 ICTJ report, while one of the earlier versions of the CPA draft had referred to a Truth, Justice and Reconciliation Commission, due to pressure from political parties, the term justice was ultimately omitted.³⁰⁵

The discussion in this section laid out in detail what is essentially is the back-story of the current discussions and platform for transitional justice in Afghanistan and Nepal. In Afghanistan, warlords refused to engage with any issue regarding human rights violations committed in the country for almost three decades ultimately overpowered the discussion of transitional justice. Subsequently, despite the promise of the National Action Plan, the developments around the amnesty law and the broader political environment sabotaged any traction on the transitional justice question. In Nepal, while the CPA recognized the importance of the transitional justice question, the direction, scope and efficacy of the mechanisms were directed and determined by local political elite and international actors who had specific agendas in Nepal's peace negotiations. The processes and events surrounding the CPA and the Bonn Agreement need to be placed in the broader context of the two countries' past legacies of attempting to broker peace, a discussion to which the chapter now turns.

Confronting the Past: Of Reconciliation and Commissions

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of Hope, it was the winter of Despair.

³⁰⁵ Farasat and Hayner, *Negotiating Peace in Nepal*.

Charles Dickens, A Tale of Two Cities (1859)

Afghanistan's Past Initiatives

Afghanistan has been in conflict for the last thirty-two years, although some might argue that its descent into chaos³⁰⁶ began with the overthrow of King Zahir Shah in 1973. Afghanistan's continuing conflict can be divided into four specific phases: the 1978 Saur Revolution and the subsequent Soviet occupation (1979-1989); the Mujahideen civil wars (1992-1996); the period of the Taliban (1996-2001); and the current conflict which arose after the ousting of the Taliban regime in 2001. Despite the widespread destruction and the heavy loss of civilian lives in almost three decades, there has never been a formal effort to address questions about war crimes. Neither is there any documented evidence of a robust state or civil society initiative to bring to the books any individual who committed crimes against humanity; or a comprehensive documentation of survivors' claims on the state and the perpetrators for the violations they have experienced. Nevertheless, in its different periods of history, Afghanistan has, experienced a range of initiatives, termed "reconciliation" within mainstream discourse and national and international policy circles for the country. In reality, these initiatives have mounted to different forms of deal making for political expedience. This formula has continued to be the only point of reference for what "reconciliation" means in the Afghan experience: attempted negotiated settlements with political overtures, amnesties and acknowledgement of the political bases of different actors to ensure belligerent actors have loyalty to a new power. In short, these measures reflect the continuum of

³⁰⁶ Term borrowed from Ahmed Rashid's *Descent into Chaos The United States and the Failure of Nation Building in Pakistan, Afghanistan, and Central Asia*, (New York, NY: Viking Press, 2008), 544.

subjugation, accommodation, appeasement³⁰⁷ and capitulation³⁰⁸ rather than what is understood in peacebuilding literature as “reconciliation”-- a complex set of long-term holistic measures designed to be responsive to the multivaried demands of a surviving population--or even “political reconciliation” premised on fundamental compromises between parties, and the establishment of trust between two (or more) opposing sides.

“Reconciliation” in the Aftermath of the PDPA and the Soviet Union

During the People’s Democratic Party (PDPA) rule,³⁰⁹ which overthrew President Zahir Shah and which lasted between 1978 and 1992, severe repression targeted authorities, opposition and civilians sparked mutinies within the Afghan army in the provinces of Kunar, Herat, Kabul and Hazarajat that threatened to destabilize its regime. Its ultimate collapse led to several attempts to reach political agreements between

³⁰⁷ Appeasement may be defined as “a policy of granting concessions in response to aggressive or hostile demands with the intent of gaining some a greater good or asset. [it] is usually portrayed as a willingness to accede to an immoral actor or entity. In extreme cases, practitioners may even be accused of cowardice.” As defined by Christopher E. Miller, “A Glossary of Terms and Concepts in Peace and Conflict Studies,” Mary E. King, ed. 2nd edition, (Geneva, Switzerland: University for Peace, 2005), 15 <http://www.africa.ucepeace.org/documents/glossaryv2.pdf>. (Accessed October 1, 2010).

³⁰⁸ A conditional surrender or yielding of rights by a party engaged in a conflict, *ibid*.

³⁰⁹ PDPA comprising of the Khalq and Parcham parties, was a small, Marxist-Leninist Party, strongly supported by the Soviet Union. On April 27, 1978, it instigated the coup d’état, which resulted in the overthrow and killing of the President Muhammed Daoud Khan and most of his family members. The party then mobilized around what has come to be recognized as an ambitious and brutally ruthless campaign with the singular goal to transform Afghanistan into a modern socialist state. Soon after its take over, however the PDPA split along internal lines, with the dominant Khalq faction purging leading members of the Parcham faction through an extensive campaign of arrests and executions of known opponents and targeted authorities, which also included former government officials, religious and tribal leaders and political activists. The Khalq-dominated PDPA also indiscriminately bombed pockets of resistance resulting in millions of Afghans pouring out of the country’s borders. This was the largest outflow of refugees to Europe, the United States, Iran and Pakistan. For a detailed discussion of the PDPA rule, see Martin Ewans, *Afghanistan: A Short History of its People and Politics*, (New York, NY: Harper Perennial, 2002). Also see Peter Hokirk, *The Great Game: The Struggle for Empire in Central Asia*, (New York, NY: Kodansha International, 1992).

different factions who were opposed to the regime. In 1984 a protocol was signed between Ahmad Shah Masood's³¹⁰ Shura-y-Nazar and the GoA, which resulted in the truce for the Panjishir Valley.³¹¹ The agreement was at best a temporary respite, given that Masood used it to "shift his focus to the northeast and build up his Shura-y-Nazar structure"³¹² and the "Afghan government and Soviets derived some benefits in terms of deflecting Masood away from the capital and protecting their supply line through the Salang Pass."³¹³ In 1985, the Soviet-backed third president of the Democratic Republic of Afghanistan (DRA) Babrak Kamal launched his ten-point reconciliation program, which included provisions for dialogue, compromise between oppositional groups as well as an intention to broaden the regime's base. However, the plan was not effective given the unpopularity of the Soviet regime that brought him to power. Within six months of laying out the plan, Kamal himself was deposed, succeeded by Najibullah.

It is Najibullah who is credited with perhaps the most well-known initiative for "reconciliation" in Afghanistan and which has had the most enduring legacy -- *Aasht-i-Milli* (national reconciliation) launched in January 1987. The plan included a power-sharing agreement among political parties in the resistance, the offer to change

³¹⁰ The "Lion of Panjishir," Ahmed Shah Masood was a Tajik military commander and a leader of the anti-Soviet resistance. He was called Āmir Sāhib-e Shahīd (Our Martyred Commander) by his loyal followers. Following the withdrawal of Soviet troops from Afghanistan and collapse of the Soviet-backed Najibullah government, Masood served as the Defense Minister for President Rabbani's government. Masood also served as the military commander of the United Islamic Front for the Salvation of Afghanistan (UISFA), better known as the Northern Alliance against the Taliban since their rise to prominence in 1996.

³¹¹ Semple, *Reconciliation in Afghanistan*, 17.

³¹² Ibid.

³¹³ Ibid.

Afghanistan's status as an Islamic non-aligned state and provisions of amnesty for some political prisoners and a cease-fire. Najibullah's strategy of accommodation, which maybe defined as negotiated concessions for the cessation of hostilities and engender a platform of cooperation, was a distinct shift away from his earlier subjugation co-option model. The latter involved a system where a party could reconcile without being given access to any privileges, namely by supporting expansion of militias into regular armed forces, which in turn constituted a respectable way of renouncing opposition to the existing regime. Semple argues that the relative success of Najibullah's experimentation compared to previous attempts was largely due to the Soviet withdrawal and the effectiveness of the government forces, which undermined the ability of the mujahideens to continue to fight.³¹⁴ Nevertheless, while the "reconciliation" program staved off defeat temporarily, the absence of international support and dwindling domestic legitimacy of the PDPA regime itself led to its ultimate demise.

The ensuing conflict during this period witnessed several efforts by national, regional and international actors to resolve it, mainly through offering different kinds of political compromises to the hostile parties. On April 14, 1988, nine years after the invasion, the Soviets finally withdraw from Afghanistan. During this period, they had introduced more selected targets of repression using a secret police, the KhAD, modeled on the Soviet KGB, which engaged in widespread summary executions, detentions and torture of suspected *mujahideen* supporters, who were the heart of the resistance.³¹⁵ In

³¹⁴ Semple, *Reconciliation in Afghanistan*, 2009.

³¹⁵ This repression also resulted in the mujahideen growing in number in this period, supported by the United States and Saudi Arabia. Included in the resistance forces were thousands of Muslim

addition, they engaged in extensive aerial bombardment, which killed approximately one million Afghans and initiated a refugee outflow that reached five million.³¹⁶ The Soviet withdrawal was marked by the Geneva Accords,³¹⁷ signed between Afghanistan, Pakistan, United States and the USSR. It comprised of several instruments, including a bilateral agreement between Afghanistan and Pakistan on the question of non-interference and non-intervention, the voluntary return of Afghan refugees who fled the indiscriminate rocket launches and bombings that marked the conflict, and an agreement on international guarantees by the USSR and the US. The agreements also contained provisions for the timetable of the withdrawal of Soviet troops from Afghanistan. The Geneva Accords finally broke down because it failed to address the power-struggle between various groups in the conflict.

Peshawar and Islamabad Accords: “Reconciliation” During the Taliban Period

Between 1992 and 2001, national and international actors undertook other “reconciliatory” measures to bring an end to the ongoing political turmoil. On April 26 1992, leaders in Pakistan signed the Peshawar Accords, which established a transitional government and a timetable for elections and which was an agreement for the mujahideen

radicals from the Middle East, North Africa and other Muslim countries joining with Pashtun factions including the Hizb- i Islami of Gulbuddin Hekmatyar and Osama bin Laden.

³¹⁶ “Afghanistan: The Forgotten War: Human Rights Abuses and Violations of the Laws of War Since the Soviet Withdrawal,” *Human Rights Watch (HRW)*, February 1, 1991, 810, available at: <http://www.unhcr.org/refworld/docid/45c9a5d12.html>. (Accessed March 5, 2011).

³¹⁷ For a more detailed discussion, see Barnett R. Rubin, *The Search For Peace in Afghanistan: From Buffer State to Failed State*, (New Haven, CT: Yale University Press, 1995).

government to be first led by Mojaddedi³¹⁸ and then Rabbani.³¹⁹ However, the power of the new Islamic State of Afghanistan (ISA) was limited; by the time most of the mujahideen parties had agreed to the Accords (the Iran-backed Shi'ite parties were excluded, setting the stage for some of the conflict that followed), rival factions had already established a hold on different parts of the capital and its environs.³²⁰

The UN attempted a third round of negotiations in December 1993 to broker a cease-fire, but the political turmoil within the country, increasing poverty levels and the regional dynamics of the conflict made the efforts unsustainable. The Organization of Islamic Countries (OIC) tried its hand to make the different parties come to an agreement but its mission was severely restricted by its own institutional weaknesses, limited financial capacity and the general absence of political will. The 1993 Islamabad Accord also resulted in a power-sharing agreement between Rabbani and Hekmatyar³²¹ with the former taking on the position of prime minister, with an oath in Mecca by the leaders “to adhere to the agreement.”³²² However, this too failed because of a number of reasons,

³¹⁸ Afghanistan's first President.

³¹⁹ Rabbani serves as Afghanistan's president between 1992 and 1996. He was also the leader of Jamiat-e Islami Afghanistan (Islamic Society of Afghanistan) as well as the political head of the Northern Alliance.

³²⁰ The factionalization inside Kabul was mirrored outside the capital with commanders capturing territories, setting up ad hoc checkpoints, and operating by their own laws. See “Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001: Documentation And Analysis Of Major Patterns Of Abuse In The War In Afghanistan,” *Afghanistan Justice Project*, Kabul, Afghanistan 2005, 62, <http://www.afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf>. (Accessed May 21, 2007).

³²¹ One of the most controversial rebel commanders in Afghanistan who allegedly committing some of the worst atrocities during the mujahideen wars. He is the founder and leader of the political party and paramilitary group, the Hizb-i-Islami and served as Prime Minister between 1993 and 1994.

³²² Rubin, *The Search For Peace in Afghanistan*, 143.

including the fact that Masood, Hekmatyar's main rival, was not a signatory to the agreement, there was no specific economic or political roadmap for the country's reconstruction and governance, no provisions for implementation of the operational aspects of the agreement, and due to an absence of regional powers that had a history of intervening in Afghanistan's internal affairs. The Ningarhar Shura in 1993 was yet another major undertaking, which invited all parties to Jalalabad city for political negotiations, but it too collapsed because it did not have the backing of foreign supporters and because of the distrust between Rabbani's forces and the Pushtun shura.

It was during the chaotic post-1992 period that disillusioned former mujahideen calling themselves the Taliban emerged under Mullah Mohammad Omar, a former mujahed from Qandahar province, to challenge the constant infighting between the different mujahideen factions.³²³ The Taliban also consisted of madrassah-schooled students, group commanders in other predominantly Pashtun parties, as well as former Khalqi PDPA members.³²⁴ Their stated aims were to restore stability and enforce *Shari'a* (Islamic law) throughout Afghanistan. The Taliban began their conquest from Qandahar, driving out the feuding commanders who had divided it among themselves. By October 1994, Pakistan began supporting the movement because it saw the Taliban as a means of

³²³ See William Maley, *The Afghanistan Wars*, 2nd edition, (New York, NY: Palgrave Macmillan, 2002); Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2nd edition, (New Haven, CT: Yale University Press, 2002); Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, (New Haven, CT: Yale Nota Bene Books, 2001); Oliver Roy, *Islam and Resistance in Afghanistan*, 2nd edition, (New York, NY: Cambridge University Press, 1990). Also see Patricia Gossman, "Afghanistan in the Balance," *Middle East Research and Information Project (MERIP)*, Winter 2001, 14. <http://www.merip.org/mer/mer221/afghanistan-balance>. (Accessed October 1, 2010).

³²⁴ Ibid.

securing trade routes to Central Asia and establishing a Pakistani- friendly government in Kabul.³²⁵ By 1995, the Taliban controlled Helmand, Ghazni, and Herat and by 1996 they conquered Jalalabad and then Kabul. In October 1997, Mullah Omar renamed the ISA and assumed the title *amir-ul momineen* (commander of the faithful).³²⁶

In their campaign to win the east, the Taliban signed an agreement with the leadership of Laghman province's Gonapal Valley, which resulted in valley leaders being allowed to have control of local security in return for declared loyalty to the Islamic Emirate of Afghanistan.³²⁷ In Hazarajat, the Taliban approached Ustad Akbari, the local leader, to assist them in successfully establishing their administration in that area. Between 1989 and 1999, the Taliban again using Ustad Akbari sought a negotiated outcome with the mujahideen in Shahrستان, where the former received both acknowledgement of the Emirate of Afghanistan as well as a hundred conscripts while the latter were allowed to run an autonomous administration without the compulsion of the Taliban's highly rigid policies.³²⁸

³²⁵ Anthony Davis, How the Taliban Became a Military Force, in *Fundamentalism Reborn? Fundamentalism and the Taliban* in William Maley, ed. (New York, NY: New York University Press, 1998), 43; and Rashid, *Taliban*, 24-25.

³²⁶ See "Taliban Propaganda: Winning The War Of Words?" Report N°158, *International Crisis Group (ICG)*, July 24, 2008, http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/158_taliban_propaganda___winning_the_war_of_words.ashx. (Accessed September 10, 2010)

³²⁷ Ibid, p. 23

³²⁸ Semple, *Reconciliation in Afghanistan*, 24

Reconciliatory Measures Since 2001

In the aftermath of the initial military successes of Operation Enduring Freedom (OEF)³²⁹ launched in 2001, several Afghan ministries, departments and provincial governors' offices undertook initiatives to accommodate what became termed as the “moderate”³³⁰ Taliban. Amongst these, the most notable were President Karzai's announcement of an amnesty for the Taliban on 6 December 2001, his plea on January 6, 2007 to Mullah Omar and Gulbuddin Hekmatyar to end the insurgency, the National Security Council's (NSC) below-the-radar diplomacy, and several provincial governors' political outreach efforts.³³¹ Karzai's efforts for accommodating antagonistic parties were not necessarily new; his interest in some form of compromise was noted even before the first presidential elections. Perhaps a significant part of this could be attributed to his “close relationship with many Taliban figures during the 1990s; [and] in the aftermath of his election in 2002, his interest in reaching out to the disaffected Pashtuns, who provided the manpower for the defeated Taliban regime, only became more evident.”³³² In reality, the dynamics did not change regarding the hostile military action taken by largely international and national forces which included “harassment of Afghans and their

³²⁹ OEF is the official name used by the U.S. Government for the Afghanistan War together with three smaller military actions, under the umbrella of what President Bush declared as the “Global War on Terror.”

³³⁰ According to Thomas Ruttig, senior analyst of the Afghanistan Analyst Network (AAN) there were also suggestions how to define these Taliban more precisely using terms such as “pragmatic” or “politically thinking,” comments on the draft of *Peace at All Costs?*

³³¹ Excerpts in this following section appear in the author's own report, *Peace at All Costs?*

³³² Ashley J. Tellis, “Reconciling with the Taliban? Toward an Alternative Grand Strategy in Afghanistan,” *Carnegie Endowment for Peace*, April 2009, http://carnegieendowment.org/files/reconciling_with_taliban.pdf. (Accessed July 2, 2010).

families for their alleged connections to the Taliban or al-Qaeda, and the hunt for, attacks against, and arrests of former Talibs by international military forces and by government armed forces, indicate little concerted effort to create an environment conducive to generating trust amongst the insurgent groups toward the GoA and the international military forces (IMF).

In April 2003, at a gathering of the National Ulema Council in Kabul, Karzai said a “clear line” had to be drawn between “the ordinary Taliban who are real and honest sons of [Afghanistan]” and those “who still use the Taliban cover to disturb peace and security in the country.”³³³ Further, he underscored that “no one had the right...to harass or persecute anyone ‘under the name Talib/Taliban’ from that time onward.”³³⁴ This speech could be assessed an announcement, albeit an informal one, of the launch of what has come to be known as his “reconciliation” policy toward the Taliban and an effort to classify them as either “good” or “bad” Talibs.”³³⁵ Since the announcement, Karzai articulated the issue of “reconciliation” further, essentially stating that “other than between 100 to 150 former members of the Taliban regime who are known to have committed crimes against the Afghan people; all others, whether dormant or active within the ranks of the neo-Taliban, can begin living as normal citizens of Afghanistan by denouncing violence and renouncing their opposition to the central Afghan

³³³ Amin Tarzi, “Recalibrating the Afghan Reconciliation Program,” *Prism*, 1, No. 4, September 2010, 68. http://www.ndu.edu/press/lib/images/prism1-4/Prism_67-78_Tarzi.pdf. (Accessed July 2, 2010).

³³⁴ Ibid.

³³⁵ Sajjad, *Peace At All Costs?* 7.

government.”³³⁶ Despite long-standing requests by the Afghan media and politicians to publicise the specific list of the unpardonable former Taliban members, this list was only recently made public. Furthermore, observations of the former President of Afghanistan and head of the PTS initiative, Sibghatullah Mojaddedi -- which were initially supported by Karzai -- transformed the issue of who cannot be pardoned into a contentious political problem.³³⁷ According to Mojaddedi, the amnesty would extend to all Taliban leaders, including the head of the regime, Mullah Mohammad Omar.³³⁸ Both Mojaddedi and Karzai have since backed off of those statements, and the issue of “reconciliation” was overshadowed by the international focus on the developments in the Iraq war and a string of endeavours to disarm the insurgency and bring insurgents back to civilian life.

In May 2005, *Proceay-i Tahkeem-i Sulha* (the Strengthening Peace Program, or Peace and Reconciliation Commission), known as PTS, was established by a presidential decree and headed by Mojaddedi. The objective was to reopen reconciliation talks with the opposition, including the Taliban and the Hizb-i-Islami. Its primary goal was to provide former enemy combatants with an opportunity to recognize the GoA as legitimate, to accept the Constitution, and to lead normal lives as part of wider society.³³⁹

³³⁶ Tarzi, *Afghanistan: Is Reconciliation With The Neo-Taliban Working?*

³³⁷ Ibid.

³³⁸ See, for example, “Kabul Distances Itself From Claim of Amnesty for Mullah Omar,” *Radio Free Europe / Radio Liberty*, May 10, 2005, <http://www.afghanistannewscenter.com/news/2005/may/may102005.html>. (Accessed July 3, 2010).

³³⁹ According to Michael Semple, the PTS aimed to serve three important functions: (i) be a symbol of an official commitment to the president’s public gestures and consistently stress on encouraging insurgents to lay down their arms and reintegrate; (ii) provide a vehicle for accommodating within the system and dispensing patronage to those directly associated with the leadership of the commission; and

However, from the start, the PTS suffered from weak management, insufficient resources, lack of monitoring and follow-through as well as an overall absence of political will.³⁴⁰ There were issues with lack of coordination between local implementers and the International Security Assistance Forces (ISAF) as well as with the disarmament programs, Disarmament Demobilization and Reintegration (DDR) and Disbandment of Illegal Groups (DIAG). It has also been alleged that the PTS has been plagued by corruption, through which Mojaddedi provides patronage to his political and tribal followers.³⁴¹ Few believe that those who had been reconciled had been high-ranking or

(iii) provide a public forum for welcoming back significant figures who have been reconciled through other channels, such as the National Security Council (NSC). See Semple, *Reconciliation in Afghanistan*.

³⁴⁰ Matt Waldman, "Golden Surrender: The Risks, Challenges, and Implications of Reintegration in Afghanistan," Afghanistan Analyst Network (AAN) April 22, 2010, http://aan-afghanistan.com/uploads/2010_AAN_Golden_Surrender.pdf. (Accessed April 22, 2010)

³⁴¹ This view was expressed in several interviews with various stakeholders and civil society actors in Kabul, Afghanistan, April 2010

influential³⁴² while many were never “genuine” insurgents.³⁴³ Such weaknesses led the UK, in concert with the Dutch and US, to end their support for the PTS in March 2008.³⁴⁴

In February 2003, Afghanistan ratified the Rome Statute for the International Criminal Court (ICC). On September 9, 2009, the Prosecutor of the ICC said he was collecting information on possible war crimes by North Atlantic Treaty Organization (NATO) forces and the Taliban in Afghanistan.³⁴⁵ However, given that the ICC has prospective jurisdiction,³⁴⁶ there is no possibility of a legal course of action by the ICC for crimes committed in Afghanistan prior to 2002.

Afghanistan’s efforts to make peace at different periods of its long protracted conflicts have a long history. They have included at times international actors, such as the UN, the Soviet Union, the USA and Pakistan to draw up official agreements (e.g. the

³⁴² See the defection of Mullah Salam, a low-ranking commander in Musa Qala in Helmand Province in late 2007 in Kenneth Katzman, “Afghanistan: Post-War Governance, Security, and U.S. Policy,” US Congressional Research Service (CRS), September 29, 2008, <http://www.fas.org/srg/crs/row/RL30588.pdf> (Accessed July 3, 2010). It is notable that although some former high-ranking Taliban figures have been “reconciled,” such as Mullah Zaeef or Mawlawi Wakil Ahamad Mutawakel, this was a condition of release from US or Afghan custody. See also Joanna Nathan, “A Review of Reconciliation Efforts in Afghanistan,” *CTC Sentinel*, 2, no. 8, August 2009. 11-13 <http://www.ctc.usma.edu/sentinel/CTCSentinel-Vol2Iss8.pdf>. (Accessed July 3, 2010).

³⁴³ See “Information relating to British financial help to Afghan Government in negotiations with the Taliban,” *UK Foreign and Commonwealth Office*, (released under Freedom of Information Act), July 8, 2008, <http://www.fco.gov.uk/resources/en/pdf/foi-releases/2008a/1.1-digest>. (Accessed July 3, 2010). A representative of PTS interviewed for this research claimed that their meeting with the son-in-law of Hekmatyar jumpstarted the conversation for reintegration and approaching the government to develop a strategy to bring them to the table. Another example offered is that of Arshala Khan, who currently serves as a senator and who, in the past, used to work as the Ministry of Pilgrimage and during the Taliban worked as the vice president. Interview with PTS representative, Kabul, Afghanistan, April 29, 2010.

³⁴⁴ Sajjad, *Peace At All Costs?* 8

³⁴⁵ Edith M. Lederer, “International Criminal Court Prosecutor Eyeing War Crimes In Afghanistan,” *IJ Central*, Sept 9, 2009, http://ijcentral.org/article/international_criminal_court_prosecutor_eyeing_war_crimes_in_afghanistan/. (Accessed September 2, 2010)

³⁴⁶ The ICC is not mandated to investigate and prosecute cases prior to its establishment.

Geneva, Islamabad and Peshawar Accords), efforts within regimes to broker lines of control and political arrangement (such as the Taliban), efforts by the post-2001 government to end the ongoing conflict, and integrate combatants into society. Despite their range and variety, a common current underlying all of these efforts is that they singularly identified and accepted as “reconciliation,” although most have exhibited forms deal-making and political arrangements and at times even capitulation. In almost every one of these measures, as the discussion above captured, the rights of survivors were consistently absent.

Nepal’s Past Commissions

In April 1990, democracy protests reverberated through Kathmandu as part of a “people’s movement” (*gono andalon I*), resulting in violence and the acquiescence of King Birendra to dissolve the *panchayat*,³⁴⁷ dismiss the royal cabinet and establish a constitutional monarchy. Despite the parliamentary elections of May 1991, Nepal began a downward spiral with successive governments marred by no-confidence votes, changes in governments, Supreme Court disputes and coalition hopping. Emerging from this constant state of chaos, was the CPN-M, one of the many feuding far left factions whose central aim was to capture state power and establish “new people's democracy” (*naulo*

³⁴⁷ The Panchayat is a South Asian political system, which literally translates to assembly (yat) of five (panch) wise and respected elders chosen and accepted by the village community. Traditionally, these assemblies settled disputes between individuals and villages. In Nepal, each caste group system forms its own *panchayat*, or council of elders that can expand to include neighboring districts, or even function on a zonal basis. See “Nepal-The Panchayat System,” http://www.mongabay.com/reference/country_studies/nepal/GOVERNMENT.html. (Accessed October 1, 2010).

janabad).³⁴⁸ In the beginning of the 1990s, practically all of Nepal's communist factions believed in the concept of *naulo janabad* and the idea that it could be attained through a multiparty democracy.³⁴⁹ Where they differed was about the means to develop such a political formula and how pluralistic the political institutions needed to be to reflect such an objective.³⁵⁰ On one hand, the moderate Communist Party of Nepal (Unified Marxist-Leninist), the UML, mobilized around *bahudaliya janabad* (multiparty people's democracy).³⁵¹ In contrast, the Maoists were vehemently opposed to the multiparty system towards which Nepal was moving. By 1995, they began a violent insurrection in the rural areas to establish a "people's republic" that would last over a decade. What followed were years of unstable government with frequent exchange of governance authority, dissolutions of parliament, assumption of direct power by a new king,³⁵² failed ceasefires, collapsed peace talks and declaration of several states of emergency. The government at that time also introduced the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), granting wide powers to the security forces to arrest people involved in "terrorist activities. Under the ordinance, the CPN-M was declared to be a "terrorist

³⁴⁸ The concept of "new democracy" can be traced to the writings of Mao Zedong, who in turn built his political philosophy borrowing heavily from the views of Lenin, Trotsky and Stalin.

³⁴⁹ See "Nepal's Maoists: Their Aims, Structure and Strategy," Asia Report No 104, *International Crisis Group (ICG)*, October 27, 2005, 3 http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/104_nepal_s_maoists_their_aims_structure_and_strategy.ashx. (Accessed on October 5, 2010).

³⁵⁰ Ibid

³⁵¹ Ibid.

³⁵² King Birendra and his family were massacred in 2001. His brother, Gayendra took over the throne after the death of the de jure king, Dipendra, son of Birendra who allegedly was responsible for the killings.

organization.”³⁵³ The deployment of the Nepali Army in particular, made the civil war increasingly lethal for civilians. In response, the Maoists increased their directed strikes on infrastructure including bridges, clinics, dams, electrical supplies and drinking water facilities, all of which they declared to be part of aid projects backed by “international imperialists.”³⁵⁴

At the height of its power, the Maoists controlled over ninety per cent of Nepal, setting up their parallel structures of governance, military and judiciary, terrorizing Nepali citizens with kidnappings, killings and extortion. In response, the King unleashed a reign of terror across the countryside, using the RNA, the police and militia groups resulting in thousands of deaths, disappearances, arrests, acts of torture and sexual violence. In 2005, the Maoist and main opposition parties began the second people’s movement (*gono andolon II*) opposing the king’s direct rule and to restore democracy. In November 2006, the government and Maoists signed the CPA, declaring a formal end to a 10-year rebel insurgency. In April 2008, former Maoist rebels won the largest bloc of seats in elections to the new constituent assembly and in May, Nepal became a republic, thereby abolishing monarchy.

While not termed “transitional justice,” since 1990, various governments in Nepal have set up commissions of inquiry to investigate specific human rights abuses committed in the years of people’s movement I and II and the ten-year insurgency in

³⁵³ In August 2002, the state of emergency elapsed. The same year however, the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) was adopted into law by the Parliament. When TADO elapsed, in the absence of Parliament, it was re-promulgated repeatedly by royal decree. However, the ordinance was not renewed after it lapsed in September 2006 and is no longer in force.

³⁵⁴ See *Nepal’s Maoists*..

between. However, such institutions have yielded little results in terms of bringing forth a change in the climate of impunity. The discussion of the current commissions needs to be understood with these parameters.

In 1990, the first post-Panchayat Prime Minister, Krishna Prasad Bhattarai issued an executive order as per the decision of the Council of Ministers to establish to a Commission of Inquiry to locate the Persons Disappeared.³⁵⁵ The Commission was mandated to examine allegations of human rights violations during the autocratic Panchayat system from 1961 to 1990, to investigate and identify the final places of detention of those who had disappeared and it identify additional victims. Named the Mallik Commission after the judge who headed it and comprising of four commissioners it was quickly embroiled in a series of controversies. As a result, two of the commissioners who were representatives of Nepalese human rights groups, resigned. According to the report, which was completed in 1991, forty-five people were killed during the *Jana Andolon* but the Home Ministry contradicted this estimate, putting the death toll at sixty-three people.³⁵⁶ Human rights organizations disputed both the numbers and insisted that the numbers were far higher.³⁵⁷ The Mallik Commission also acknowledged that there had been gross infringement of human rights but declined to reveal the identity of those thought to be guilty, on the ground that it would hamper legal

³⁵⁵ Cabinet decisions are not usually made public and therefore it is not publicly available. See also Truth Commissions Digital Collection, *United States Institute of Peace (USIP)* <http://www.usip.org/publications/commission-inquiry-nepal-90>. (Accessed on October 20, 2010).

³⁵⁶ Interviews with civil society actors, Kathmandu, Nepal, April, 2009.

³⁵⁷ T. Louise Brown, *The Challenge to Democracy in Nepal*, 2nd edition (New York, NY: Routledge, 2006), 148.

actions against them.³⁵⁸ It suggested that action be taken against the police, administrators, ministers and members of committees responsible for suppressing the *Jana Andolon*. However, no action was taken upon the report's recommendations. Instead, the Attorney General maintained, rather perplexingly, that he "was not able to identify the laws under which action should be taken."³⁵⁹ The Mallik Commission was dissolved fairly quickly, but it was not till 1994, due to immense pressure by civil society groups, that its report was made public. Today, the report is only available through the parliamentary secretariat and Nepal's national library. Further, in January 1999, some bereaved families and 121 lawyers and law students from 38 of Nepal's 75 districts filed a petition in the Supreme Court, demanding action for the killings and injuries during the 1990 Jana Andolon based on the recommendations of the Mallik Commission report. The Court's registrar straight away dismissed the petition.

According to the 2008 HRW report, "*Waiting for Justice*" in the face of rising criticism about their activities, the three arms of the security forces (the NP, the APF, and the NA) established "Human Rights Cells" as internal bodies to investigate complaints about human rights violations. It notes however, "these appear largely cosmetic, although departmental or disciplinary action has been taken against alleged perpetrators in some cases."³⁶⁰ As of the writing of this dissertation, no independent investigative mechanisms

³⁵⁸ For a brief discussion of the Mallik Commission see Binod Bhattarai, Mohan Mainali, Jogendra Ghimire and Akhilesh Upadhyay, "Impunity In Nepal: An Exploratory Study," The Asia Foundation, Nepal, September 1999, http://asiafoundation.org/pdf/nepal_impunity.pdf. (Accessed November 1, 2010).

³⁵⁹ Brown, *The Challenge to Democracy in Nepal*, 148.

³⁶⁰ "Nepal-Country Summary," *Human Rights Watch (HRW)*, January 2006, <http://www.hrw.org/english/docs/2006/01/18/nepal12256.htm>. (Accessed October 12, 2010).

or prosecutorial measures have been established to look into any complaints of human rights abuses, and the army, save a few instances (for example the Doramba case, discussed below), have generally failed to work with the police to investigate allegations of atrocities committed. Further, the recommendations of the Working Group for Enforced and Involuntary Disappearances (WGEID) for the prevention of and proper investigation of disappearances³⁶¹ have yet to be implemented.

In response to civil society criticisms, several commissions have also been established in Nepal to deal with questions of human rights abuses. Under increasing international pressure, on July 1, 2004, Prime Minister Sher Bahadur Deuba finally established an Investigative Committee on Disappearances to determine the status of reported “disappearances.”³⁶² Known as the Malego Committee, it issued four reports with information about the status of 320 persons in 2004 but its work barely went beyond consolidating lists of the “disappeared.” It also did not possess the necessary powers to compel the security forces to cooperate further accentuated its inefficacy.³⁶³ In May 2006, OHCHR-Nepal issued a report “documenting the disappearance, illegal detention, ill-treatment, and, in several instances of torture, of 49 individuals confirmed by OHCHR to be in the custody of the Bhairabnath Battalion of the NA at Maharajgunj, Kathmandu,

³⁶¹ “Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of her Office Including Technical Cooperation in Nepal,” UN Human Rights Council, January 17, 2007, para 46, A/HRC/4/97, <http://www.unhcr.org/refworld/docid/461e448c2.html>. (Accessed November 1, 2010).

³⁶² “Waiting for Justice: Unpunished Crimes from Nepal’s Armed Conflict,” *Human Rights Watch and Advocacy Forum*, September 11, 2008, <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0>. (Accessed October 1, 2008).

³⁶³ Ibid

and urged the government to set up an independent commission of inquiry to determine their fate or whereabouts.”³⁶⁴ The government never provided a detailed response to the OHCHR. Further, the NA did not acknowledge responsibility for any of the documented cases and nor did it take any steps to investigate the 49 cases to UNOHCHR.³⁶⁵

Under pressure for the killings in Doramba, the RNA reluctantly reopened its investigation and on January 31 2005, announced that the major in charge of the operation would be removed from the army and imprisoned for two years for the excessive use of force.³⁶⁶ While this was a historic decision -- the first clear case of an RNA officer punished for a human rights violation -- the inadequate sentence, lack of transparency of the military trial and timing make the process very unsatisfactory. In 2006, after the fall of King Gayanendra’s fifteen-month rule, Nepal created a second commission, known as the Rayamajhi commission, headed by former Supreme Court judge Krishna Jung Rayamajhi to investigate the violent crackdown during the *lokotontro andolon*. It interrogated some of the most senior members of the Nepali government and even sent questions to the King to clarify his role in the state-sponsored abuses that took place during the pro-democracy movement. The report, which was tabled in the parliament by Home Minister Krishna Sitoula, recommended action against 202 people for the deaths of 25 people and injuries to approximately 9,000 civilians. The names of three ministers who were in the

³⁶⁴ Ibid.

³⁶⁵ See *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation and the Activities of her Office....*

³⁶⁶ The dismissal was confirmed on 13 February 2005. See “Army Major Sacked Over Doramba Case,” *The Rising Nepal*, February 14, 2005, <http://www.gorkhapatra.org.np/pageloader.php?file=2005/02/14/topstories/main7>. (Accessed June 10, 2005).

Royal government were also included in the list.³⁶⁷ While King Gayenendra was identified in the report, it did not specify any action against him given that in the Nepalese constitution, there is no provision to take action against the Monarch.³⁶⁸ The report was finally made public six months after its submission after extensive pressure from lawmakers and the general public. A 2009 ICTJ report noted that even as late as September 2006, when a delegation of notable human rights activists met with the prime minister to voice their ongoing concern about Nepal's prevailing culture of impunity, they were told no action would be taken against individuals accused of serious human rights violations.³⁶⁹ None of the recommendations of the Mallik or Rayamajhi commissions were ever implemented.

A fundamental argument of this chapter was that past institutions and their shortcomings cast long shadows in the efficacy and legitimacy of existing and proposed programs regarding transitional justice. The criticisms and failures of Nepal's past commissions i.e. the Mallik and Rayamajhi commissions and the overall reluctance and lack of political will of the past GoN ascertain the validity of this argument and demonstrate that valid concerns human rights actors and generally, the Nepali population have about the promise of the three specific commissions mentioned in the CPA. Going forward, the burden of proof, in a matter of speaking, then lies on how, and to what

³⁶⁷ Departmental action was recommended against Home Minister Kamal Thapa and Information and Communication Ministers Shrish Shumsher Rana and Tanka Dhakal, incumbent Army chief Rukmangad Katuwal and the Armed Police Force chief.

³⁶⁸ See "Nepal King Blamed For Crackdown," *BBC World News*, November 20, 2006, http://news.bbc.co.uk/2/hi/south_asia/6164298.stm. (Accessed August 3, 2008).

³⁶⁹ Farasat and Hayner, *Negotiating Peace in Nepal*.

extent efforts around the establishment of these commissions and the outcome of these commissions can challenge the legacy of the past initiatives.

Conclusion

This chapter had twin purposes. First, it traced the contours of the current “transitional justice” narratives in Afghanistan and Nepal. Second, it provided a succinct overview of each of the countries’ past experiments with addressing contentious relationships between hostile parties in Afghanistan and efforts to address egregious human rights violations committed in Nepal. What emerges consequently is a singular narrative of striking similarity -- that of consistent failure in both contexts to deliver either in the fronts of sustainable “reconciliation” or on the questions of culpability. Correspondingly, these legacies have created a historical framework of *unaccountability* and generated little confidence in the contemporary “transitional justice” discourse and efforts. In such contexts, the question that arises is how, and whether existing legal infrastructures in both contexts grapple with the question of justice. The following section grapples with the respective legal frameworks and their challenges in both contexts.

CHAPTER 4

ORDINARY LAWS

The sun was beating down fiercely as we assembled in large numbers on a hot day in July 2009 – lawyers, human rights activists, civil society members, students, and youth groups – at the heart of one of the politically symbolic sites in Kathmandu armed with banners, placards, and microphones. The NA and NP were on alert, watching the growing crowd with almost lazy curiosity. A few of them gathered to read the pamphlets we were handing out. “They are used to us rallying” smiled a human rights lawyer. We were in Ratna Pak to demand the establishment of the promised TRC. As we waited, more people joined in with their banners, and prominent human rights lawyers and civil society members make statements in front of a growing number of press people. “This is how it begins,” I was reminded by a lawyer from Human Rights and Democratic Forum (FOHRID), one of the main organizations working on anti-torture legislation and impunity-related issues. “Ratna Pak is historically the place we begin our rallies to express our political demands -- so many major political events starts here -- this is the place to demand legislation for the TRC.”³⁷⁰ While atrocities committed during conflict are considered extraordinary by their very intent, scope and magnitude, the societies within which they have been committed only have the ordinary modality of punishment to respond to such crimes. In other words, not only does international criminal law continue to grapple with the enormity of these atrocities, but fledgling legal institutions in

³⁷⁰ Conversation with a FOHRID representative at the TRC rally, Ratna Pak, Kathmandu, Nepal July 2009

transitional contexts also have to face their limitations when grappling with such crimes. International lawyers assert normative differences between extraordinary crimes (violations against the world community) and ordinary common crimes, distinctions underscored by the proliferation of new legal institutions to adjudicate mass violence.³⁷¹ In response to these realities -- weak rule of law at the national level and a moral necessity to announce legal opprobrium -- the last half of the twentieth century and the early years of the twenty-first century witnessed a rise in international legal mechanisms including the ad hoc criminal tribunals in former Yugoslavia and Rwanda, the hybrid courts of Sierra Leone, East Timor and Kosovo, the current Extraordinary Chambers in the courts of Cambodia (ECCC) and the permanent ICC in the Hague.

A new regime of scholarship has recently emerged which critiques these institutions for their reliance on the Western penological rationale of domestic criminal law, and subsequently overriding local legal codes and interpretations of justice.³⁷² Furthermore, their focus on a few key cases and their own pace and dynamics of trial, is a far cry from (sometimes) simultaneous local struggles to develop (or revive) a system of criminal adjudication to grapple with questions of justice deliverance. Consequently, on

³⁷¹ See for example, Aukerman, *Extraordinary Evil, Ordinary Crime*; Drumbl, *Atrocity Punishment and International Law*; Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes," *Journal of International Criminal Justice* 5, no. 3 (2007), 683-712.

³⁷² See for example, Drumbl, *Atrocity Punishment and International Law*, 2007. Payam Akhavan, "The International Criminal Court in Context: Mediating the Global and the Local in the Age of Accountability," *The American Journal of International Law* 97, no. 3 (2003), 712-721. Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95, No. 1 (January 2001): 7-31, Jan Klabbers, "Just Revenge? The Deterrence Argument in International Criminal Law," *Finnish Yearbook of International Law* 12 (2001), 249-267. See also generally Antonio Cassese, "Reflections on International Criminal Justice," *Modern Law Review*, 61, no. 1, (January 1998), 1-10

one level, a paradox emerges given the juxtaposition of the “ordinariness” of the legal codes and the “extraordinariness” of the transitional period. On another level, tensions emerge between the Western derived legal norms and local laws. In both case studies, what materializes is a tension between the need for *retroactive* justice for large-scale atrocities and *proactive* justice that would address the commission of ordinary crimes; and second, a struggle to create a legal framework that merges, or at least pulls together, multiple legal codes to adjudicate over matters of criminality.

A discussion about justice is inconclusive without examining the question of law, although law neither limits nor confines the understanding of justice. Following this logic, this chapter humbly takes on the highly ambitious project of examining the juridical states of Afghanistan and Nepal. It asks: Considering the role and position of law in transitional justice processes, what constitutes the local legal infrastructure in both contexts? And, how do their existing legal provisions provide opportunities and/or obstacles for mobilization on transitional justice? This chapter is by no means an exhaustive exploration of the extremely complex legal landscapes in both countries, made more so by the contradictions, tensions and intersections of the respective myriad of customary laws and practices, religious doctrines and interpretations, political developments and commitments to international legal standards. Rather, it aims to provide, at best, a snapshot of the complexity of the local laws in both contexts, to what extent they promote understandings of justice (and transitional justice), provide opportunities for challenging *de facto* impunity, has openings for mobilization around *de jure* impunity, and privilege or undermine local demands.

A common finding for the case studies under observation is that both are plagued by the simultaneous *lack* of a rule of law, and a lack of equality *before* the law (both in customary and formal/official systems). Further, in both instances, what emerges is a disregard for existing legal norms as a pattern *apriori* and after the official conclusion of hostilities. Consequently, crimes of the present, from the mundane to the extraordinary, continue to go unpunished or remain outside of the boundaries of *nullen crimen sine lege* – the principle of legality. Nevertheless, in both contexts, the law remains a fundamental site for mobilization for human rights actors in their struggle against impunity. This research also finds some fundamental distinctions -- while Afghanistan continues to grapple with how best to merge customary and the Islamic *Shari'a* with international legal norms, Nepal's challenge is how to use the transitional period to harness international legal norms to strengthen and expand on its existing legal framework. Finally in both contexts the role of law in checking impunity and preventing further violations means that the line between *retroactive* justice, *proactive*, or *successive* justice continues to be blurred.

Locating Law in the State

The concept of the rule of law has at once been seen as a distant aspiration or ideal, while simultaneously being a concrete objective; it serves both as a political goal and a legal institution.³⁷³ Yu and Guernsey state: “the rule of law does not have a precise

³⁷³ Allan Hutchinson provides various definitions in his book, *The Rule of Law: Ideal or Ideology?* (Piscataway, NJ: Transaction Publishers, Piscataway, 1987)

definition, and its meaning can vary between different nations and legal traditions.”³⁷⁴

Generally, however, the rule of law can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. From a minimalist or procedural perspective, the rule of law is stripped of its moral and substantive content; it is restricted only as a means of protection from the arbitrariness of “rule by man” and an excess abuse of state authority.³⁷⁵ Thus, it is primarily a rudimentary framework restraining the government while simultaneously delineating specific rules for its constituents. Friedrich von Hayek’s definition³⁷⁶ effectively captures these multiple identities:

[S]tripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of that knowledge.

The maximalist perspective on the rule of law, which maybe understood as the “substantive conception of rule of law that posits that laws should contain normative content,”³⁷⁷ is closer to the natural law position comprising of an umbrella that

³⁷⁴ Helen Yu and Alison Guernsey, “What is the Rule of Law?” *University of Iowa Center for International Finance and Development*, (undated), http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml. (Accessed on March 1, 2011)

³⁷⁵ Rama Mani, “Exploring the Rule of Law in Theory and Practice,” in Agnes Hurwitz and Reyko Huang, eds. *Civil War and the Rule of Law: Security, Development and Human Rights*, (Boulder, CO: Lynne Rienner Publishers, 2008): 21-46

³⁷⁶ Friedrich von Hayek, *The Road to Serfdom*, 5th edition, (Chicago, IL: University of Chicago Press, 1994), 10.

³⁷⁷ “Defining Rule of Law, Introduction: Definitions & Conceptual Issues,” *Peacebuilding Initiative*, <http://www.peacebuildinginitiative.org/index.cfm?pageId=1843>. (Accessed March 1, 2011).

encompasses structural, procedural as well as substantive elements.³⁷⁸ Mani further claims, “definitions within the maximalist perspective would not find it possible to separate substantive justice from formal justice: law *is* about justice.”³⁷⁹ The Organization for Security and Cooperation in Europe (OSCE) captures the importance attached to this maximalist position of the rule of law when it states:

[The participating states] consider the rule of law does not merely mean formal legality, which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.³⁸⁰

The UN definition of the rule of law, which serves as a guideline for all its programs recognizes it as

a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well measures to ensure adherence to principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal uncertainty, avoidance of arbitrariness and procedural and legal transparency.³⁸¹

³⁷⁸Mani, *Exploring the Rule of Law*, 24

³⁷⁹ Ibid, 25

³⁸⁰ “Document Of The Copenhagen Meeting Of The Conference On The Human Dimension Of The CSCE,” OSCE, June 5-29, 1990. <http://Www.Minelres.Lv/Osce/Cope90e.Htm>. (Accessed February 1, 2008).

³⁸¹ “The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies: Report of the Secretary-General,” United Nations Security Council (UNSC), S/2004/616, August 23, 2004, para 6 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>. (Accessed March 12, 2008).

This definition highlights two aspects of the rule of law. First, it supports the typically minimalist insistence, outlined by Hayek, on subjecting government and all its institutions to law. It goes further, however, by also extending accountability to individuals and entities along institutions. Moreover, “it emphasizes that accountability is equally applicable to ‘public and private’ actors and organizations.”³⁸² Second, it adopts the maximalist leaning toward the rule of law, by stipulating “consistency” with human rights norms and standards. Nevertheless, Mani argues, “this definition falls short of actually making the causal and inseparable association between justice, morality and the law that the maximalist view defends.”³⁸³

Rule of law is now considered a critical institutional component of the state building process because it represents both constitutional and development programs for state design in the modern world. It initially entered the international political sphere when the Washington consensus began to build on an argument for the necessity of a culture of law for economic modernization. Since the late 1990s, the use of the term rule of law has resurged in policy circles that highlight the importance of correctly formed state institutions for democracy, law and order and the creation of enforceable contracts.³⁸⁴

³⁸² See Mani, *Exploring the Rule of Law*. See also *The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies*.

³⁸³ Mani, *Exploring the Rule of Law*, 25.

³⁸⁴ Thomas Carothers refers to this resurgence as a rule of law “revival.” See Thomas Carothers, “The Rule Of Law Revival,” *Foreign Affairs*; 77, no. 2 (Mar. - Apr., 1998), 95-106; Also see Frank Upham, “Mythmaking in the Rule of Law Orthodoxy,” *Democracy and Rule of Law Project*, Carnegie Endowment for International Peace, No. 30, September 2002. <http://www.carnegieendowment.org/files/wp30.pdf>, (Accessed February 28, 2008)

For transitional practitioners, rule of law's position in reconstruction has attained the status of orthodoxy³⁸⁵ and the world is now host to a global rule of law movement.³⁸⁶ After all, the rule of law has become a central component of the discourse of state-building practitioners because it is viewed as the crucial ingredient for an orderly, liberal and economically developed state. The most recent linkage in terms of policy and practice is that between the rule of law and security, where the former is seen "as a panacea for all troubles -- development experts prescribe it as the surest short cut to market-led growth; human rights groups advocate the rule of law as the best defense against human rights abuses; and in the area of peace and security, the rule of law is seen as the surest guarantee against the (re)emergence of conflicts and the basis for rebuilding post conflict societies."³⁸⁷ Lord Ashdown, the High Representative for the Bosnia-Herzegovina succinctly summarized rule of law's permanent status within development and post-conflict reconstruction framework when he reflected: "In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the policy and the courts."³⁸⁸

³⁸⁵ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge, UK and New York, NY; Cambridge University Press, 2004).

³⁸⁶ See Katharina Pistor, Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Association November 9-10, 2005, *Berkeley Journal of International Law* 25, No. 1 (May 2007), 7-43.

³⁸⁷ Balakrishnan Rajagopal, Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination, *William and Mary Law Review* 49, no. 4 (2008), 1348

³⁸⁸ "What I learned in Bosnia," *The New York Times*, October 28, 2002.

Despite the burgeoning business of the rule of law in post conflict and transitional societies, led by the UN, but including, amongst others, institutions such as the World Bank (WB), the operationalization of such a program confronts a host of challenges, stemming from its institutional practice, problems with its conceptual and theoretical development and its normative underpinnings. First, at the implementation level, rule of law projects are plagued by the realities of ill-conceived training of judges, measures to protect witnesses, poor use of international judges and prosecutors for a coherent approach to criminal justice reform, a lack of coherent strategies and, insufficient knowledge of local conditions, which has sometimes led to overwhelming reliance on adopting the “cookie-cutter” approach. Then too is the criticism leveled at the “parachuting” of international experts into a “post conflict” zone who may have little knowledge of local languages and customs but play a critical role in designing governing infrastructure. Ultimately, sustainability of many of these projects comes into question given the lack of local ownership of such projects.

Experience has shown that fundamental approaches to legal reform should be approached warily, particularly in cases such as new procedural law needs to be learned.³⁸⁹ Tolbert and Solomon suggest that while a reform process will include the reform of laws, “it should not necessarily change the underlying approach in that system.”³⁹⁰ Last, perhaps not the least, rule of law programs often do not acknowledge

³⁸⁹ David Tolbert and Andrew Solomon, United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies, *Harvard Human Rights Journal* 19 (Spring 2006), 33.

³⁹⁰ Ibid.

the actual challenges of non-existing or under-resourced and ill-trained supporting structures such as the military and the police. Finally, with its overwhelming focus on developing institutional provisions, it stops short of recognizing the context within which the legal norms need to be entrenched and how it would be incorporated into social practices and cultural norms.³⁹¹

Reinstitution of the rule of law also comes with conceptual challenges.

Democracy specialist Thomas Carothers notes: "...rule of law promoters tend to translate the rule of law into an institutional checklist with primary emphasis on the judiciary."³⁹²

There are several problems with this overtly simplistic formula. First, it amounts to equating rule of law with the mere presence of certain institutions within a state. The realities in Afghanistan and Nepal, where the presence of legal institutions do not directly corresponding to exponential development toward a rule of law state, underscore the limitations of this premise. In other words, having a ratified constitution and parchment guarantees, means that an assumed independent judiciary is, *ipso facto*, rule of law.

Second, following a functionalist logic, there is a flawed assumption that those institutions similar in design produce the same product. The result of this functionalism, as opposed to substantive treatment, is a conceptualization that is too thin and divorced from what is happening on the ground.³⁹³

³⁹¹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Malden, MA: Polity Press, 2002), 71.

³⁹² Thomas Carothers, "Promoting The Rule Of Law Abroad: The Problem of Knowledge," Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, No. 34, January 8, 2003. <http://www.carnegieendowment.org/files/wp34.pdf>. (Accessed April 10, 2008)

³⁹³ Comparative scholars have taken to task the functionalist view that formally independent judiciaries always support the rule of law. See generally José María Maravall and Adam Przeworski (eds),

Some observers have noted that today's world may be characterized by a cross national formal legal isomorphism as a result of widespread judicial reform [but in reality] rule of law does not exist everywhere because on-the-books reforms have not been translated to reality.³⁹⁴ Finally, there is an increasing link between the rule of law and transitional justice. It is possible however to question whether a thin conception of rule of law is suitable for the study of "transitional justice" mechanisms and whether they truly bring about changes in *de jure* political configurations.

The Rule of Law and Transitional Justice: A Nexus

Campbell and Bell suggest that the complex relationship between law and contemporary transitions is tied to four important global realities, three of which have direct relevance in this discussion.³⁹⁵ First, there is an increase in negotiated settlements

Democracy And The Rule Of Law, 13, no 11 (Cambridge, UK and New York, NY: Cambridge University Press, 2003); Ran Hirschl, "Juristocracy -- Political, not Juridical," *The Good Society*, 13, no. 3 (2004), 6-11

³⁹⁴ See for example Elizabeth Heger Boyle and John W. Meyer, "Modern Law as a Secularized and Global Model: Implications for the Sociology of Law," in Yves Dezalay & Bryant G. Garth, eds. *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor, MI: University of Michigan Press, 2002), 65-95

³⁹⁵ See for example, Christine Bell, *Peace Agreements and Human Rights*, (Oxford, UK: Oxford University Press, 2000); Christine Bell, "Dealing with the Past in Northern Ireland," *Fordham International Law Journal*, 26 (2003), 1095-147; Christine Bell, "Negotiating Justice: Conflict Resolution and Human Rights," in Jeffrey Helsing and Julie Mertus, eds. *Human Rights and Conflict: Exploring the Links between Rights, Law, and Peacebuilding*, (Washington D.C.: United States Institute of Peace, 2004, 345-374); Colm Campbell, "Peace and the Law of War: The Role of International Humanitarian Law in the Post-Conflict Environment," *International Review of the Red Cross*, No.839 (2000), 627-52. Colm Campbell and Fionnuala Ní Aoláin, "Local Meets Global: Transitional Justice in Northern Ireland," *Fordham International Law Journal*, 24 (2003), 1201-23. Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, "The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland," *Modern Law Review*, 66 (2003): 317-45.

as the preferred way of dealing with internal conflict.³⁹⁶ Such settlements necessitate the involvement of levels of compromise, which in turn translated into legal and political institutions, thus premising the location of law in assisting in transitions. Both the Bonn Agreement and the CPA, in their respective laying out of the judicial system and legal framework, as well as systems of governance including election rules and appointment procedures, correspond to this reality. Second, there is the increased status of human rights law in state-to-state and state-to-people interactions. The centrality of human rights law and its preponderance in transitional negotiations, offers increasing opportunities for mitigating the worst accesses of conflict.³⁹⁷ Third, there is an increased interlinking between human rights and humanitarian law to address the excesses of state and non-state actors even in internal conflicts. This in turn has led to more emphasis on accountability and individual responsibility particularly in dealing with past human rights abusers³⁹⁸ and raises the difficulty of how to reconcile normative legal standards with the pragmatics of making peace.³⁹⁹ In other words, those who privilege human rights compliance and democratic governance as the primary goal of “transitional justice” mechanisms find law to represent the supremacy of legal norms of legal accountability. Correspondingly, for

³⁹⁶ Christine Bell, *Peace Agreements and Human Rights*, (Oxford, UK: Oxford University Press, 2000)

³⁹⁷ Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, Justice Discourses in Transition, *Social Legal Studies* 13, no. 3 (September 2004), 306.

³⁹⁸ Campbell, *Peace and the Law of War*.

³⁹⁹ See Anonymous, “Human Rights in Peace Negotiations,” *Human Rights Quarterly* 18, no 2, (1996), 249–58. Also see Pauline H. Baker, “Conflict Resolution versus Democratic Governance: Divergent Paths to Peace?” in Chester A. Crocker and Fen Osler Hampson with Pamela Aall, eds. *Managing Global Chaos: Sources of and Responses to International Conflict*, (Washington D.C.: United States Institute of Peace Press, 1996), 563–72

example, the CoA has detailed stipulations regarding who can run for elected political offices and clearly does not permit human rights abusers from participating in public activities and in affairs of the state.⁴⁰⁰ According to two leading scholars of human rights compliance “there is not a single case in which a sustained improvement of human rights condition was not preceded by the country’s move toward the rule of law.”⁴⁰¹ Therefore, for those who visualize the aim of “transitional justice” mechanisms to be the instantiation of a human rights culture, consolidation of law appears to be a necessary stop along the way.

For transitional justice scholarship, law then provides both an entry point and a tool of analysis to examine the question of impact in transitional societies. Scholars tend to view rule of law as a necessary condition for the achievement of those goals that they assert to be primary -- security, stability and overall stable governance. Yet it is law’s unique role and position in the period of transition -- both because of demands on it to generate legal reform on one hand, and to provide answers for the excesses of war and the subsequent tension that result -- that calls for a more in-depth discussion. “There is a

⁴⁰⁰ Article Sixty-Two Ch. 3, Art. 3 states: Presidential candidates should not have been convicted of crimes against humanity, criminal act, or deprivation of the civil rights by a court. Article Seventy-two Ch. 4, Art. 2 states: A Minister should not have been convicted of crimes against humanity, criminal act, or deprivation of civil rights by a court. Article Eighty-five Ch. 5, Art. 5 states: Members of the National Assembly should not have been convicted by a court for committing a crime against humanity, a crime, or sentenced of deprivation of his civil rights. Article One Hundred and eighteen Ch. 7. Art. 3 states: A member of the Supreme Court Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court. See *The Constitution of Afghanistan*, 1382, http://www.afghan-web.com/politics/current_constitution.html#chapterthree. (Accessed February 12, 2008).

⁴⁰¹ Thomas Risse and Stephen C. Ropp, “International Human Rights Norms and Domestic Change: Conclusions,” in Thomas Risse and Stephen C. Ropp and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge, UK and New York, NY: Cambridge University Press, 1999), 249.

tension between the rule of law in transition as backward looking and forward looking, as settled versus dynamic...in this dilemma, the rule of law is ultimately contingent; rather than grounding legal order, it serves to mediate the normative shift in justice that characterizes these extraordinary periods.”⁴⁰² Further, Teitel suggests that law’s function during transitional periods is “deeply and inherently paradoxical...law is caught between the past and the future, between backward and forward looking, between retrospective and prospective, between the individual and the collective [Accordingly] “transitional justice is that justice associated with this context and political circumstances.”⁴⁰³

Since transitions imply shifts in paradigms of justice, consequently law’s responsibilities is not only to establish order but enable transformation, thereby implying that “normal” predicates about law do not apply. According to Teitel, in dynamic periods of political influx, legal responses generate a *sui generis* paradigm of transformative law.⁴⁰⁴ Framed in another way, it is possible to argue that in transitional societies, law must be both the subject and object of change. It must simultaneously both produce change and be changed. In both Afghanistan and Nepal, the responsibility of the newly introduced laws to establish new standards (hence, as a change producer) and the focus on trying to merge customary laws with more standardized practices (as in Afghanistan), or identifying legal and object of change.

⁴⁰² Teitel, *Transitional Justice*. 6.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

Law's claim to holding transformative potential, it may be argued, be stymied when considering how some in the field of international relations recognize and consider the *sequencing* of the rule of law and that of transitional justice. Empirical transitional justice literature comprised of those grounded in a tradition of political realism that has assessed strategies based on how they promote political stability and the absence of violence at the national level argues that justice does not lead, it follows.⁴⁰⁵ In other words, before accountability can be sought in a state overcoming human rights violations, it must first establish political order or enhance the strength of the state, by whatever means necessary. Theorizing in this way is equivalent to viewing justice as secondary to the ends of peacebuilding, meaning that "transitional justice" mechanisms should only be trusted when there is assurance/certainty that they will assist in the provision of order.

Snyder and Vinjamuri argue:

a norm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law. Amnesty—or simply ignoring past abuses—may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible. Attempting to implement universal standards of criminal justice in the absence of these political and institutional preconditions risks weakening norms of justice by revealing their

⁴⁰⁵ For example, see O'Donnell, Schmitter and Whitehead, *Transitions from Authoritarian Rule* Huntington, *The Third Wave*; Jose Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in Neil J. Kritz, ed. "Transitional Justice," (Washington, D.C.: United States Institute of Peace Press, 1995), 3-31; David Pion-Berlin, "The Armed Forces and Politics: Gains and Snares in Recent Scholarship," *Latin American Research Review*, 30, no 1 (1995), 147-162; Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge, UK and New York, NY: Cambridge University Press, 2001); Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal*, 43 (1992), 1425-1438.

ineffectiveness and hindering necessary political bargaining.⁴⁰⁶

The existing and dire weaknesses in the legal infrastructure of both case studies discussed below clearly indicate that for punitive justice to be possible, the corresponding laws have to be both available, and second, implemented effectively. However, law's transformative potential is certainly challenged in both contexts where old actors find themselves largely unchallenged in positions within the new order. In such an instance, the focus on institution building, as premised in Snyder and Vinjamuri's formula for successful "transitional justice" falls short when "justice does not follow" because judicial reform is taking place in a context defined by de facto impunity. The following section examines the legal landscape in Afghanistan and Nepal contexts, their struggles and subsequently how they challenge the theoretical expectations from rule of law and its nexus with "transitional justice."

From Theory to Reality: The Challenges of "Ordinary" Law

Afghanistan today not only struggles with the reality of weak and fledgling rule of law as a consequence of conflict, but also with a complex landscape of legal pluralism brought upon by the tensions between its international legal obligations and historical efforts to modernize its laws and customary laws and the dictates of the *Shari'a*.⁴⁰⁷

⁴⁰⁶ Snyder and Vinjamuri, *Trials and Errors*, 6.

⁴⁰⁷ See, for example, The Customary Laws of Afghanistan, *The International Legal Foundation*, (ILF), September 2004, 7, http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf. (Accessed March 12, 2011); Bruce Etling, "Authorities in the Afghan Legal System (1964-1979)," Harvard Law School: Islamic Studies Program, 2003 <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>. (Accessed March 20, 2011); Mohammed Hashim Kamali, Mohammed Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, Vol. 36, (Leiden, The Netherlands: Brill Academic Publishers, 1985), 6-8; Esther Meininghaus, "Legal Pluralism in Afghanistan,

Consequently, a fundamental challenge to Afghanistan's legal system is how to adjudicate over crimes and deliver justice sometimes using conflicting codes of law and harness traditional mechanisms for dispute resolution. Nepal's challenges in the legal realm are strikingly different from those that face Afghanistan, primarily because the state acquiesces its legal code to international legal standards. Nepal's fundamental challenges therefore arises from trying to address the extraordinariness of the transitional period and its demands, using the existing (and ordinary) legal framework and trying to expand it to delegitimize acts considered criminal in international jurisdiction.

Some international practitioners who have worked in both contexts have interestingly opined that the Afghan context is a much easier one to grasp than the realities in Nepal. A fundamental rationale offered for this claim was because the legal code in Afghanistan is heavily influenced by Germanic and British codes; correspondingly there is a clear criminal code and the laws are more neatly codified. Further, they assessed that the "efforts for working with the *jirgas* has somehow meant a

Center for Development Research Department of Political and Cultural Change, "Research Group Culture, Knowledge and Development, Working Paper Series, Amu Darya Series Paper No 33, University of Bonn, December 2007
http://131.220.109.9/fileadmin/webfiles/downloads/projects/amudarya/publications/ZEF_Working_Paper_Meininghaus_33.pdf. (Accessed March 12, 2011); Neamat Nojumi Dyan Mazurana and Elizabeth Stites, "Afghanistan's Systems of Justice: Formal, Traditional, and Customary," Feinstein International Famine Center, Youth and Community Program, Tufts University, Boston, MA, June 2004, 37,
<http://www.gmu.edu/depts/crdc/neamat1.pdf>. (Accessed March 12, 2011); Astri Suhrke and Kaja Borchgrevnik, "Negotiating Justice Sector Reform In Afghanistan," *Crime, Law and Social Change*, Vol 51, Issue 2, Chr Michelsen Institute (CMI), 2009, 211-230,
<http://www.springerlink.com/content/n5147p5588k43362/fulltext.pdf>. (Accessed March 13, 2011); Marvin G. Weinbaum, "Legal Elites in Afghan Society," *International Journal of Middle East Studies*, 12, no. 1, (August 1980), 39-57; Thomas Barfield, "Afghan Customary Law and Its Relationship to Formal Judicial Institutions," United States Institute of Peace (USIP), Washington D.C. June 26, 2003,
<http://www.usip.org/files/file/barfield2.pdf>. (Accessed March 12, 2011).

chain of interconnectivity and what got addressed by who.”⁴⁰⁸ In contrast, while Nepal, at least in theory, has judicial independence and a singular legal code, but the country’s legal system is not uniform. A rule of law consultant noted:

[T]he body of law that exists was started by one of the early kings and since then later monarchs have added to it; ministries and a judiciary created by a King moved at its pace which was different from how things ran at the local level...[further] some of the laws have been the result of aid agencies getting very excited about funding them, which then passed through the Parliament, but are in fact terrible laws...and in the end, all of this patchwork of laws took place in an atmosphere of very little transparency and entrenched caste and power systems.⁴⁰⁹

Consequently, such a context has, according to an international rule of law specialist, “generated no confidence in independent human rights entities or in the rule of law itself.”⁴¹⁰ Keeping these distinctions in mind, the following section examines the status and challenges of the legal systems and their challenges in Afghanistan and Nepal respectively.

Afghanistan’s Struggles with the Legal System

One of the areas of significant theoretical, conceptual and practical challenges in engaging with Afghanistan has been the site of its extremely complex and intensely exhaustive legal landscape consisting of three separate although at times overlapping components—the provisions of a constitution i.e. the state legal codes, the Islamic *fiqh*⁴¹¹

⁴⁰⁸ Interview with international legal expert, Kathmandu, Nepal, June 29, 2009.

⁴⁰⁹ Interview with an international rule of law consultant, Kathmandu, Nepal July 19, 2009.

⁴¹⁰ Interview with international legal expert, Kathmandu, Nepal, June 29, 2009.

⁴¹¹ Fiqh is Islamic jurisprudence, and succinctly stated, is an expansion of the sharia and it also complements the sharia. In this study, the terms Shari’a and Fiqh are used interchangeably to identify Islamic laws.

and statutory/local customary laws of *Afghanityat*, *Islamiyat* and tribal (e.g. *Pushtunwali*) practices of any particular region. The official legal code, however, is constrained by the limited reach of the de jure government, particularly outside of Kabul and does not represent the de facto norms that govern the lives of the majority of the population. As such, laws in Afghanistan have been, and continue to be, the sites of intense political and religious contention. It also brings to sharp relief the inherent dualities, contradictions and even incompatibilities between the different parallel systems of justice. This section attempts to provide a bird's eye view of these multiple layers of challenges.

Afghanistan's Customary Laws

Till today, customary laws and Islamic *Shari'a*⁴¹² de facto govern the lives of a majority of the Afghan population. While systems of customary law are found throughout the thirty-four provinces in Afghanistan, they are not uniform in philosophy or practice. Further, depending on context, they can be subjected to internal and external manipulation by shifting power structures, contestations and interests of the existing authority. Of the codes of customary laws that are dominant today, the *Pushtunwali*, the code of conduct for the Pushtuns is amongst the most well researched, and given that the Pushtuns are the largest ethnic group in the country (42%)⁴¹³ the most predominant. The

⁴¹² Wardak explains: "Shari'a is an Arabic word, which means 'the path to follow'; it is also used to refer to legislation, legitimacy, and legality in modern Arabic literature. However, shari'a in a jurisprudential context means Islamic Law. The primary sources of shari'a are the Quran and the sunnah." Ali Wardak, "Building a Post-War Justice System in Afghanistan," *Crime, Law and Social Change*, 41, (2004), 323

⁴¹³ See *Afghanistan Demographic Profile 2011*, http://www.indexmundi.com/afghanistan/demographics_profile.html. (Accessed March 12, 2011)/

Pushtunwali, similar to other customary laws, applies to “every aspect of life, have quasi-legal status, and are considered an essential part of Pashtu ‘elegance.’”⁴¹⁴ It is based on the principles of “*Seyal* (Equality), *Seyali* (applying equality through competition) *Namus* (protection of female family members and wealth), *Ezzat or Nang* (honor), *Ghairat* (heroism), *Gundi* (rivalry), *Patna* (feud), *Qawm* (ethnicity, tribe, social network), *Qawmi Taroon* (tribal binding) *Hamsaya* (protection of neighbors or outsiders living with a family or in a village), *Jirga*, *Pur/ Ghach/ Enteqam or Badal* (revenge) and *Nanawati* (forgiveness).”⁴¹⁵

One of the most prominent features of *Pushtunwali* practices is the *jirga*, which is, in an essence an open forum for deliberation at the village level, where the (voluntary) members are older and/or respected men, the *Marakchi*, who are responsible for making decisions on behalf of the entire community, set policies or adjudicate over a misdemeanor. Because *jirgas* are highly deliberative and “democratic” in nature, the focus is on nominal equality, with the participants sitting in a circle, and binding decisions are reached through common consensus. In the case of dispute resolutions, the *Marakchi* decide on the *Nerkh* price), which varies depending on the extent of the

⁴¹⁴ See “The Customary Laws of Afghanistan,” *The International Legal Foundation, (ILF)*, September 2004, 7, http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf. (Accessed March 12, 2011).

⁴¹⁵ Shahmahmood Miakhel, “Understanding Afghanistan: The Importance of Tribal Culture and Structure in Security and Governance,” US Institute of Peace (USIP), November 2009, <http://www.pashtoonkhwa.com/files/books/Miakhel-ImportanceOfTribalStructuresInAfghanistan.pdf>. (Accessed March 12, 2011)

damage done.⁴¹⁶

Traditional Dispute Resolution

In contrast to the western criminal penal code, the Pashtun criminal law is based on the notion of restorative justice, such that in the event of a crime committed, the wrongdoer has to pay *Poar*, or blood money, and request forgiveness.⁴¹⁷ Nevertheless, the *Pushtunwali* treats issues of intentional crimes (murder, rape, kidnapping, possession of weapons) extremely seriously and demands different levels of *Poar*, based on the severity of the crime and established criteria focusing on the specificity of the crime e.g. murder without intentional abuse or torture, murder and abduction of a married woman, to name a few. Further the *Poar* system can include, among other forms of exchanges, the gifts of girls for marriage to the victims' family. In addition to the concepts of the *Poar* and the *Nanawati*, the principle of *Enteqam/ Pur/ Badal* (revenge) is also extremely important to the *Pushtunwali*. In fact, the following Pushtun saying captures the essence of the responsibility for *Badal*: *Ka cheeri Pakhtun, khapal badal sal kala pas ham wakhle no beya ham-e-bera karay da*, which translates to "if a Pakhtun gets his revenge after 100 years, he is still in a hurry."⁴¹⁸ In *Pushtunwali*, a son, grandson, great grandson or a

⁴¹⁶ For an in-depth discussion of how Jirgas function, see for example, The Customary Laws of Afghanistan, The International Legal Foundation, (ILF), September 2004, http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf. Accessed March 12, 2011. Also see Meininghaus, *Legal Pluralism in Afghanistan*; Nojumi, Mazurana and Stites, *Afghanistan's Systems of Justice*; Thomas Barfield, "Afghan Customary Law and Its Relationship to Formal Judicial Institutions," United States Institute of Peace (USIP), Washington D.C. June 26, 2003. <http://www.usip.org/files/file/barfield2.pdf>. (Accessed March 12, 2011); See Wardak, *Building a Post-War Justice System*

⁴¹⁷ See *The Customary Laws of Afghanistan*.

⁴¹⁸ Shahmahmood Miakhel, *Understanding Afghanistan: The Importance of Tribal Culture and Structure in Security and Governance*, US Institute of Peace, Chief of Party in Afghanistan Updated

cousin can take revenge even after several generations.⁴¹⁹

The *Pushtunwali*, of course, is not the only system of customary law in practice within Afghanistan, and even within its practices, there are distinctions regarding rituals of apology and forms of *Poar* within different Pushtun tribes. Similar but still distinct practices of circles of deliberation and consensus building, punishment and forgiveness, compensatory measures also exist among the Hazarat (known as the *Maraka/Marka* or the *Majelisi Qawmi*) the people of Nuristan, and the ethnically diverse provinces of northern Afghanistan (known as *Shura-Eslahi* or *Shura-Qawnii* or *Majles-Eslahi* in certain Uzbek communities and also as *Jirgas* and *Mookee Khans*).⁴²⁰ These traditional mechanisms are not only different in terms of their historicity but often in structure, the type of crimes over which they deliberate and the kind of compensation and forgiveness they proscribe. For example, a striking difference between Hazarat practices of the *Bad* (blood money) and the *Pushtunwali* is that the former rarely asks for the giving over of girls from one family to another to settle a dispute, particularly when the conflict is between individuals. Another striking dissimilarity is that the consent of a Hazara woman is considered critical in the event of marriage.

While the discussion above on customary laws is by no means exhaustive, it underscores three important observations that have significant bearing in this study. First, contrary to current internationalized efforts to consult “Afghan culture,” there is no such

November 2009, <http://www.pashtoonkhwa.com/files/books/Miakhel-ImportanceOfTribalStructuresInAfghanistan.pdf>, 6 (Accessed March 12, 2011)

⁴¹⁹ Ibid.

⁴²⁰ For an in depth discussion of the different manifestations of customary laws in Afghanistan, see *The Customary Laws of Afghanistan*.

singular entity that a transitional justice process can consult to make certain mechanisms either appear or genuinely reflect “cultural-sensitivity” for the purpose of legitimacy. The current attempts to understand “Afghan culture,” can lend itself in fact to some healthy skepticism since the international focus is generally on the *Pushtunwali*, thereby privileging Pushtun customs above the practices of other ethnicities and tribes that also lay claims to the Afghan state. The levels of complexity within customary laws in the country is then a reminder of the extent to which current practices of consultation with the “local,” can be at best, be limited in its goal.

Second, while international actors try to grasp reconciliation and attempt to legitimize it through its exploration of the jirga and practices such as *Nanawati*, one might ask where is the equitable attention to parallel questions of *Peor* and *Badal*? How will the questions of equitable justice, of compensation and restitution be asked, deliberated and resolved within a framework that privileges the issue of forgiveness above all other local considerations? To what extent are the limitations of the traditional practices of the jirga, with regard to its systematic exclusion of women, and the essential bartering of women for blood money be addressed in a discussion of applying the local to promote reconciliation? Should Pushtun-based systems take priority over customs of *Nanawati* when trying to mediate between different ethnic groups, which have notable ethnic and religious tensions between them, such as the Pushtun community and the Hazarajat?

Finally, a fundamental critique of focusing on the Pushtun jirga raises the question of the extent to which such practices and mechanism are considered to be “static” entities and mechanisms. Since the 1980s, the relative independence of the jirgas was severely

constrained by the presence of military commanders whose goals was to control and manage populations through exerting influence through such a mechanism. Further, Nojumi, Mazurana and Stites claim that during this period, “the practice of customary law was overwhelmed by numerous different interpretations of *Sharia* law, led by a new generation of clerics trained in Pakistan.”⁴²¹ This trend was especially prominent during the Taliban regime given the increasing number of young Afghan men from tribal areas were enrolled in the madrassah in Pakistan. The direct control of the Taliban on the jirgas through replacing customary laws with their interpretation of the *Shari’a*, constant interference with their functioning and decision-making processes and even replacing the word jirga with the Arabic term *shura* (council) and appointing the village mullah as the head of the shura, ultimately further eroded the independence of this traditional practice.⁴²² Since 2001, the jirgas have continued to come under the influence of warlords and militia commanders.⁴²³ These critical contextual factors, this study insists matters, because the jirga no longer remains an independent, fair system of arbitration, but have been, and can become potent instruments for powerholders to deliberate on matters in their favor.

Shari’a in Afghanistan

In addition to customary laws Afghanistan’s legal code has historically been heavily influenced by interpretations of the Islamic *Shari’a* including their sectarian

⁴²¹ Nojumi, Mazurana and Stites, *Afghanistan’s Systems of Justice*.

⁴²² Ibid

⁴²³ Interviews with international and Afghan civil society actors, Washington D.C. and Kabul, Afghanistan, between 2008 and 2010. See also for example, Meininghaus, *Legal Pluralism in Afghanistan*.

strains and their corresponding ethnic manifestations. In fact, it is impossible to tear Afghanistan's customary laws from the religious laws because of their intricate relationship of influence on every aspect of Afghan life and on customary practices throughout the country's history. The Hanafi jurisprudence, which governs the Sunni population in places as diverse as Turkey, the Indian subcontinent and Central Asia, predominant in Afghanistan but the Jafariyya school of jurisprudence is also influential particularly among the Hazara community who are predominantly Shi'ite. But these bifurcations become even more complicated when considering that Islam in Afghanistan has been integrated within tribal as well as ethnic frameworks. Consequently, there is a constant overlap and infusion between what is tribal and what is Islamic.⁴²⁴

The prominence of Islamic law within the Afghan context is particularly evident when considering the role of the ulema (religious authorities). Hallaq explains the role and authority of the ulema in Muslim societies in the following:

The authority of the [Islamic] jurists...must not be confused with any notions of worldly power, since they wielded none. Nor was their authority of the charismatic or even moral type, though these types of authority were not entirely precluded. Nor, yet, was their authority purely religious, for the Islamic scene witnessed a number of learned religious classes who, despite their impressive erudition and intellectual output, were entirely devoid of legal authority. The jurists' authority was predominantly, if not essentially, epistemic. Their very learning and erudition bestowed on them the authority that they enjoyed, in the first place the authority to interpret the law, but also the authority to command what is morally good and forbid what is morally bad, to lead and administer society and its civic institutions, to collect taxes, to represent the orphans and the downtrodden, to run educational institutions and law schools, and to supervise

⁴²⁴ Kristina Mendoza, "Islam and Islamism in Afghanistan" (undated), <http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf>. (Accessed March 13, 2011)

charities and public works.⁴²⁵

The Afghan ulema is not monolithic in its structure⁴²⁶ and they are different from ordinary village mullahs in terms of their responsibilities and their level of education.⁴²⁷ Of the ulema, some are organized as the *shura-e-ulema* (councils of religious leaders), which exist at local, provincial and even the national levels. Like in other Muslim countries, the ulema in Afghanistan have always been responsible for issuing *fatwas* (legal pronouncements) on religious issues and social matters. Because of their training in a literate tradition of orthodox Islam, the ulema were particularly important for influencing decisions to reflect the *Shari'a* rather than solely customary practices.⁴²⁸ Till Afghanistan's emergence as a modern state in the late 19th century, the ulema had a free reign of the legal system with little or no interference from the state's legal system. The *ulema* has also been historically opposed to codification and homogenization of the *Shari'a*. From the perspective of many *ulema*, codifying *Sharia* amounts to impose human limits on the Divine.⁴²⁹ Noting the contentious relationship between modern codification efforts and Islamic jurists, a Professor of Islamic history, Wael Hallaq states:

⁴²⁵ Wael B. Hallaq, "Muslim Rage" and Islamic Law, *Hastings Law Journal* 54 (August 2003), 1719.

⁴²⁶ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform*.

⁴²⁷ Ibid.

⁴²⁸ See for example, Barfield, *Afghan Customary Law*; See also Wardak, *Building a Post-War Justice System*.

⁴²⁹ Joseph Schacht states: "Islamic law being a doctrine and a method rather than a code...is by its nature incompatible with being codified, and every codification must subtly distort it." Cited in Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi*, *Studies in Islamic Law and Society*, (Leiden, The Netherlands and Boston, MA: Brill Publishers, 1996), xvii.

[C]odification is not an inherently neutral form of law making, nor is it an innocent tool of legal practice, devoid of political or other goals. It is in fact a deliberate choice in the exercise of legal power, a means by which conscious restriction is placed upon the interpretive freedom of jurists, judges and lawyers. In the Islamic context, the adoption of codification had a particular significance since it represented a highly efficacious *modus operandi* through which the law was refashioned and altered in fundamental ways. No longer could the traditional jurists rely on their hermeneutical methods to determine what the law was; the new order had severed the organic link between the divine texts and positive legal stipulations deriving therefrom.⁴³⁰

In Afghanistan's history, the ulema itself has never been devoid of controversy. As custodians of Afghanistan's religious institutions, they have also historically shared a complex relationship with the Afghan state. Dr Mohammed Hashim Kamali, an Afghan legal scholar and former professor of Islamic jurisprudence elaborates in *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and Judiciary* observes:

The religious leaders in Afghanistan have historically been recipients of government grants and subsidies....the *qadis* [judges], *muftis* [jurists] and *mutasibs* [religious superintendents] were keen enforcers of Shari'a [Islamic law] which was the authoritative law of the land. The rulers proclaimed themselves to be patrons of the faith to whom allegiance was declared as a religious duty by the congregate on leaders in their Friday sermon of khutba. In sum, so long as the government avoided radical measures against the religious leaders and did not attempt a direct clash with the principles of Islam, the religious leaders, unlike the tribal chiefs, in potential alliance with the political authority.⁴³¹

It is because of these reasons, argues Ahmed, "ulema in countries like Afghanistan have grown increasingly suspicious of codification measures, considering them to be the latest attempts of foreign powers to subjugate Islamic law and religious

⁴³⁰ Hallaq, *Muslim Rage*, 1712-13.

⁴³¹ Kamali, *Law in Afghanistan*, 6-8.

actors to secular authorities.”⁴³² Zaman concurs with this analysis, asserting that official legal codes inevitably challenge the ulema’s interpretations of law, and hence has always created little room for equivocal acceptance of official (and western) codes without some degree of resistance.⁴³³ Indeed the history of Afghanistan has repeatedly served as a reminder that rule of law based on legal implants and little consultation with, and acceptance from the traditionally independent ulema structure, will be bound for failure.

Resistance to external forces and ideas however did not necessarily mean that there was uniformity between and within the religious civil society in Afghanistan. In the 1980s and the 1990s, a growing polarization emerged between the ‘modernists’ -- products of the University of Kabul and in turn influenced by Egyptian (and Pakistani) Islamism and/or inspired by the philosophies of the Al-Ahzar University in Cairo – and the ‘traditionalist’ ulema, the product of private, home-grown madrassahs.⁴³⁴ This bifurcation along ideological and political lines was repeated as recently as 2001, with the schism between government supporters (perceived by other ulema as political opportunists) and government skeptics (whose main interest was the independence of the ulema from government interference).⁴³⁵

⁴³² Faiz Ahmed, Afghanistan’s Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic, *Gonzaga Journal of International Law* 10, no. 3 (2007), 269-314.

⁴³³ Muhammed Quasim Zaman, *The Ulama In Contemporary Islam: Custodians Of Change*, (Princeton, NJ: Princeton University Press 2000), 95-97.

⁴³⁴ Gilles Dorronsoro, *Revolution Unending: Afghanistan: 1979 To The Present*, (New York, NY: Cambridge University Press, 2005).

⁴³⁵ Astri Suhrke and Kaja Borchgrevnik, “Negotiating Justice Sector Reform In Afghanistan,” *Crime, Law and Social Change*, 51, no. 2, *Chr Michelsen Institute* (CMI), (2009), 211-230, <http://www.springerlink.com/content/n5147p5588k43362/fulltext.pdf>, (Accessed March 13, 2011)

In addition to acknowledging the role of the ulema in Afghanistan, the place of Islam within Afghanistan's constitutional provisions demands a discussion. Article 3 (1) of Afghanistan's current constitution clearly acknowledges *Shari'a*'s place in the country in its pronouncement "in Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."⁴³⁶ But this is not the first time that the place of the *Shari'a* was constitutionally recognized in the country. Islamic law was recognized in all of Afghanistan's constitution since 1923, but its specific role has varied.⁴³⁷ King Amanullah's modernization efforts were reflected in the 1923 constitution, which stressed the principle of complementarity.⁴³⁸ The 1931 constitution, reflecting the hostile response to Amanullah's modernization efforts (discussed below), established the *Shari'a* as the primary source of laws. The 1964 constitution, which has been perceived of the most liberal constitution till then and served as a template for the current constitution, nevertheless was conservative about matters of law.⁴³⁹ It confirmed "the subsidiary principle (courts would apply *Shari'a* principles in the absence of statutory law), but also the stronger principle of repugnancy."⁴⁴⁰ Suhrke and Borchgrevink explain, "The repugnancy principle established *Shari'a* as the foundational law and positioned the

⁴³⁶ Article 3(1), Constitution of Afghanistan, 1382, *Afghanistan Online*, http://www.afghan-web.com/politics/current_constitution.html. (Accessed March 10, 2011).

⁴³⁷ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform in Afghanistan*.

⁴³⁸ Article 21 stated: all cases "will be decided in accordance with the principles of sharia and general civil and criminal law," Article 21, *Constitution of Afghanistan, 1382*.

⁴³⁹ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform*.

⁴⁴⁰ Article 14 stated no law must be repugnant to the principles of the sacred religion of Islam. Article 14, The Constitution of Afghanistan, 1964, *Afghanistan Online*, <http://www.afghan-web.com/history/const/const1964.html>. (Accessed March 10, 2011).

ulema as the ultimate authority on the constitutionality of a given code. The relationship meant that ‘the government defines the *qanun* [statute]’, but the religious authorities ‘interpret and control the *fiqh*.’⁴⁴¹

Despite the subsequent political developments in the country and the corresponding power shifts, the repugnancy law’s privileging of Islamic laws prevailed, despite efforts for some modification. King Daoud’s constitution for example confirmed respect for Islam and recognized a subsidiary role for *Shari’a* (particularly to be applied in contexts where statutory law was absent). Comparable provisions are to be found in the PDPA’s interim constitution. Afghanistan’s 1987 Constitution recognized Islam in the preamble and in a separate Article 2 which stated: “The sacred religion of Islam is the religion of Afghanistan and no law shall run counter to the principles of Islam.”⁴⁴² Summarily, the repugnancy tenet was re-established, but a caveat was introduced through the complementarity principle that was in Amanullah’s constitution.⁴⁴³

Finally, a discussion of the *Shari’a* requires recognition of how it played out in the legal infrastructure of Afghanistan. By the time of the Taliban’s collapse, the Afghan court system, as a consequence of the parallel systems of justice that operated in the country and different efforts at modernization at different points in history, was sharply divided between the *Shari’a* courts and the special courts to deal with matters of the state

⁴⁴¹ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform in Afghanistan*.

⁴⁴² Article 2, Constitution of Afghanistan 1987, *Afghanistan Online*, <http://www.afghan-web.com/history/const/const1987.html>. (Accessed March 12, 2011).

⁴⁴³ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform in Afghanistan*.

administration and the economy. This division was also reflected within the legal personnel--judges, lawyers, prosecutors--regarding where they obtained their formal legal education, at the Islamic Law Faculty or the Law and Political Science Faculty at Kabul University.⁴⁴⁴ The body of law to be applied dependent on the training of judges, except in the case of special statutory courts where judges were trained in the western legal system and applied statutory law.⁴⁴⁵ Judges who were trained in the *fiqh* applied Islamic jurisprudence.⁴⁴⁶ While in the 1960s, there was some concerted effort to integrated these two parallel legal systems with a focus on judges' training, little progress was made on this front⁴⁴⁷ and with the beginning of the war in 1978, such efforts were inevitably abandoned.

The discussion above provided a glimpse into the complex legal landscape in Afghanistan involving customary laws and Islamic jurisprudence. The following section outlines the sites of tension and historic faultlines that emerged at different points in Afghanistan's history in the efforts to develop a comprehensive and uniform legal code, a struggle that continues till this date.

Formal Legal Code, Customary Laws and the Fiqh: A Case of Tricky Configuration

The formal justice system in Afghanistan is a complex framework, which is not solely defined by the western criminal code, but "has been influenced, to varying degrees,

⁴⁴⁴ Interviews with Afghan lawyers and international rule of law specialists, Afghanistan and Washington D.C. 2008 and 2010.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid. Also see Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform in Afghanistan*.

⁴⁴⁷ Weinbaum, *Legal Elites*.

by western (mainly French) legal thought and moderate Islam, radical Marxism and by radical interpretations of Islam.”⁴⁴⁸ In fact, since Afghanistan’s establishment as a nation-state in 1747, “one of the leading indicators of the central government’s weakness in the country has been the prevalence of competing legal systems, particularly in the outlying provinces.”⁴⁴⁹ The resultant scenario has been “a patchwork of differing and overlapping laws, elements of different legal systems and an overall incoherent collection of law enforcement and military structures with extensive diversity and internal dissonance within individual branches and ministries of the Afghan state.”⁴⁵⁰ The complex pluralism in the legal system has had two obvious consequences. First, it has generated general uncertainty among legal practitioners about applicable and procedural laws, knowledge about the organization of the court system and overall deficiency in legal procedures. Second, it has resulted in a fragmented complex and confusing legal education system (provided by religious and secular faculties) which in turn has produced under qualified legal practitioners ill-prepared to be in legal practice and prone to providing arbitrary legal decisions. The subsequent struggle to create a comprehensive legal code and minimize these confusions pre-dated 2001; however it has to be appreciated within the

⁴⁴⁸ Wardak, *Building a Post-War Justice System*, 319.

⁴⁴⁹ Kamali, *Law in Afghanistan*, 5-6, 9.

⁴⁵⁰ For example, the three permanent legal institutions of the Afghan state--the Ministry of Justice, the Supreme Court and the Attorney General’s office (the Saranwali) are “coequal in stature and for a variety of political, personality and turf-consciousness have fractious relations with each other.” See “Establishing the Rule of Law in Afghanistan,” Special Report 117, *United States Institute of Peace (USIP)*, March 2004, 3. www.usip.org/pubs/specialreports/sr117.html. (Accessed March 1, 2008). Others have observed there is a combative relationship that exists between the Ministry of Defense and the Ministry of Finance. For a discussion on this, see Mark Sedra, “Security Sector Transformation in Afghanistan,” Working Paper 143, *Geneva Center for the Democratic Control of Armed Forces*, August 2004 http://www.dcaf.ch/_docs/WP143.pdf. (Accessed March 10, 2011).

context of three broad exigencies: (a) tensions produced because of, and between “legal implants,” i.e. “western law versus the fiqh and customary laws; (b) power struggles between local authorities, tribal councils and the state-sanctioned uniform criminal code; and, (c) the country’s record of decentralized government, factionalized politics, localized political authority, discontinuous and violent political regimes and above all, ongoing conflict.

Afghanistan’s official encounter with the western-styled “secular” legal code began in 1919 when King Amanullah attempted to cut back reliance on traditional leaders and increase support for educational reform. Despite his successor’s efforts to include the religious and tribal leaders in the National Council to review legislature, such a framework had already made its mark in Afghan society, particularly due to the increasing presence of foreign aid in the country. Weinbaum states: “secular law [was] expected to be in harmony with the *Shari’a* and to supplement it, and both overlay indigenous tribal codes or customs (*adat*).”⁴⁵¹ In reality, secular/western legal system and the *Shari’a* collided with jurists in one school of thought unable to converse in another and vice versa.⁴⁵²

This clash of competing legal codes brought to the forefront yet another dimension of the complex legal landscape of Afghanistan -- contention between the urban and rural society and between the state and the autonomy of local powerholders, particularly the *shura-e-ulema*. While several Kabul administrations did not interfere

⁴⁵¹ Weinbaum, *Legal Elites*, 39

⁴⁵² Ibid, 41.

with the autonomy of the *ulema* and regional and local powerholders, the perception of the central government as the only legitimate structure for command was not accepted among the local powerholders. Former Rule of Law specialist, Alexander J. Thier at the USIP observes:

[T]he historical reality is that power in Afghanistan has almost always operated through a negotiation between the central authority and local power holders –and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy. Most of Afghanistan has always been remote from the center, and the infrastructure is insufficient to impose high levels of central control. Moreover, centralization has never been popular. This is due in part to strong local social organization and a tradition of independence, which means that decisions imposed from outside are usually resented locally. Distrust of central government is also based on the experience of authoritarianism and brutality.⁴⁵³

Faiz Ahmad furthers this observation with this analysis: “while proponents of democratization have conventionally viewed secular elites to be the natural pioneers of reform in Muslim countries -- and religious leaders as backwards, regressive opponents -- emerging studies in comparative law and anthropology suggest such views from Western jurisprudential paradigms that overlook the dynamic roles of Islamic scholars in societies where formal divisions between law, religion and politics are often suspect.”⁴⁵⁴

Despite the lofty promises of a western-based criminal code and the support it had in the international community and amongst the Kabul elite, the reality on the ground was

⁴⁵³ J. Alexander Thier, “The Making of a Constitution in Afghanistan, State Reconstruction and International Engagement in Afghanistan,” *Panel IV: Re-Establishing a Legal System*, Bonn, Germany. June 1, 2003. http://eprints.lse.ac.uk/28380/1/Thier_LSERO_version.pdf. (Accessed March 12, 2008).

⁴⁵⁴ Ahmed, *Afghanistan's Reconstruction*, 292.

the stark inability of the formalized legal structure to actually deliver justice effectively. In fact, an unfortunate outcome of the formalization of the legal structure was that among local Afghans and traditional authorities, it soon developed a reputation for being elitist. Those who ventured into the system experienced long delays in administrative procedures and were victimized by practices of bribery and corruption. Faced with such obstacles, many Afghans have been unwilling to interact with state judicial institutions. Instead, they continue to rely on the traditional institutions of informal justice.

In the 1950s and 1960s, the influx of foreign aid for education and legal reform played a significant role in modernizing the justice system and subsequently marginalizing the *Shari'a* significantly.⁴⁵⁵ The reforms of the 1960s under King Zahir Shah also witnessed the birth of a “modern” constitution, influenced by the U.S. Bill of Rights and the Universal Declaration of Human Rights (UDHR).⁴⁵⁶ Even though *Shari'a* remained a secondary source for law in the 1964 constitution where Article 69 states “in area [s] where no such law exists, the provisions of the *Hanafi* jurisprudence of the *Shariaat* of Islam shall be considered as law,”⁴⁵⁷ the new constitution included guarantees for fundamental freedoms, including thought, speech, association, and press.⁴⁵⁸ It also guaranteed the right of freedom of association⁴⁵⁹ and affirmed several basic economic

⁴⁵⁵ See for example Wardak, *Building a Post-War Justice System*.

⁴⁵⁶ See “Afghanistan: Judicial Reform and Transitional Justice,” Report No. 45, *International Crisis Group (ICG)* 2003, <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan016653.pdf>. (Accessed March 12, 2008).

⁴⁵⁷ Wardak, *Building a Post-War Justice System*, 325

⁴⁵⁸ Article 3, *Afghanistan Constitution 1964*.

⁴⁵⁹ *Ibid*, Article 32

and social rights, among them free education.⁴⁶⁰ Further, it prohibited coerced confessions, arbitrary detention, torture, and other forms of punishment “incompatible with human dignity, provided guarantees against arbitrary search and seizure⁴⁶¹ and prohibited government surveillance of private communications without a court order.⁴⁶²

Summarily then, Afghanistan, like many other decolonized and decolonizing countries, was subjected to the global influx of foreign aid for the purpose of “development.”⁴⁶³ In these “receiving” countries, “Euro-American sociolegal norms came to be perceived as Trojan horses of neocolonial projects as brave new forces promoting liberalizing, civilizing processes in the darker corners of the world.”⁴⁶⁴ In his study of American development lawyers working in Latin American countries in the 1960s and 1970s, Gardner presented a bold criticism of American development lawyers, describing the latter group by the term “legal missionaries.”⁴⁶⁵ He argued that American trained lawyers’ parochial definitions of law in non-US jurisdictions, lack of consultations with local actors and inexperience in interacting with the multiplicity of

⁴⁶⁰ Ibid, Article 34

⁴⁶¹ Ibid Article 28

⁴⁶² Ibid, Article 30.

⁴⁶³ See for example, James A. Gardner, *Legal Imperialism: American Lawyers And Foreign Aid In Latin America*, (Madison, WI: University of Wisconsin Press, 1980); David M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in David M. Trubek and Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal*, (Cambridge, UK and New York, NY: Cambridge University Press, 2006), 74-94; Rosa Ehrenreich Brooks, “The New Imperialism: Violence, Norms, and the ‘Rule of Law,’” *Michigan Law Review*, 101, no. 7, (June 2003), 2275-2340; Ruth E. Gordon and Jon H. Sylvester, “Deconstructing Development,” *Wisconsin International Law Journal*, 22 No. 1(2004), 1-98.

⁴⁶⁴ Ahmed, *Afghanistan’s Reconstruction*, 284.

⁴⁶⁵ Gardner, *Legal Imperialism*, 1980.

legal actors and layers of law in post and neo colonial settings was the writing on the wall for the American law and development movement. This “naïve” view of funneling resources to poor countries for immediate development severely neglects social and cultural complexities and political dynamics that have curtailed reform efforts.⁴⁶⁶ In Afghanistan, the normative underpinnings of these efforts created the grounds for an inevitable confrontation.

Initially however, the reforms of the 1960s did not alter the traditional moral authority vested in the mullahs and khans in the countryside, existing agrarian relations or even challenge the existing rural power structure. For basically the entire period of the New Democracy Period⁴⁶⁷ and under Daoud, while tribal leaders participated in Loya Jirgas, they were allowed their own autonomy to manage local affairs.⁴⁶⁸ This changed drastically after the PDPA’s seizure of power, because one of its main objectives was to instrumentalize the legal system and its affiliated institutions to promote its social and political agendas for a complete social transformation. In particular, the PDPA aimed to “curb the power of local jurists and the authority of Islamic legal reasoning through secularizing administration of the law.”⁴⁶⁹ It deployed a range of different tactics to achieve this goal --in the rural areas, it imposed radical reforms through decrees, challenged the local religious’ leaders’ control over family matter and systems of social

⁴⁶⁶ Ahmed, *Afghanistan’s Reconstruction*, 291.

⁴⁶⁷ The “New Democracy” period of the 1960s was led by Zahir Shah, who began the process of secularizing criminal, commercial and general civil law.

⁴⁶⁸ See *Afghanistan: Judicial Reform and Transitional Justice*.

⁴⁶⁹ Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2nd edition, (New Haven: Yale University Press, 2002), 39

organization, and even instituted, often by force, new regulations on rural land ownership and tenancy, debt, and customs regulating marriages and bride price.⁴⁷⁰ Further, the PDPA regime established “popular committees,” under the control of state bureaucrats, to resolve legal disputes about land ownership.⁴⁷¹

Such unpopular measures inevitably led to a series of revolts across the rural countryside, with rural, tribal and religious leaders joining forces with urban- educated Islamists and non-Pushtuns minority leaders to “reject the imposition of alien concepts of state and religion that threatened their power.”⁴⁷² It must be underscored however that the this clash between the “secularist” PDPA and the “traditionalists” was not simply a “clash of civilization,” or merely a response to overt government intervention in matters of rural society where local traditions were far more entrenched and consolidated, but also a response to the harsh and brutal response of the PDPA regime to these revolts.

The tension between the different codes of law inevitably came to a head during the period of the Taliban rule. Under the Soviet administration, “real power rested with extra- judicial proceedings that replaced due process,”⁴⁷³ but it was under the Taliban regime that a new, perverse legal system emerged as a consequence of what could be termed as an “idiosyncratic” interpretation of Islamic law intermingled with the *Pashtunwali*. Under the Taliban legal practices, there was no distinction between criminal

⁴⁷⁰ See *Afghanistan: Judicial Reform and Transitional Justice*.

⁴⁷¹ Rubin, *The Fragmentation of Afghanistan*, 116-117.

⁴⁷² *Afghanistan: Judicial Reform and Transitional Justice*.

⁴⁷³ Ibid

and military jurisdictions.⁴⁷⁴ They frequently held summary trials and exacted specific penalties (e.g. amputations) for violations of the Islamic penal code for *hudud* crimes and established the infamous Ministry of Enforcement of Virtue and Suppression of Vice (*al-Amr bi al-Ma'ruf wa al-Nahi 'an al-Munkir*), for enforcing all decrees regarding moral behavior including decrees against imported videos, music, improper haircuts, women travelling alone, to name a few.

Afghanistan's Rule of Law Post-Bonn

The fall of the Taliban and the subsequent Bonn Agreement allowed international practitioners of legal reform, in conjunction with Afghan lawyers, a unique opportunity to standardize legal practices based in accordance with universal legal norms while acknowledging the role of local laws. In early 2002, the reform of a large part of the Afghan public administration was divided between “lead” nations each one being in charge of managing reconstruction activities within a single sector of responsibility.⁴⁷⁵ Italy was made responsible for judicial sector reform. Tensions in the reform project began early. To draft the law, the Italian expert drew extensively for the Italian code

⁴⁷⁴ See “Final Report On The Situation Of Human Rights In Afghanistan” submitted by Mr. Choong-Hyun Paik, Special Rapporteur, Question Of The Violation Of Human Rights And Fundamental Freedoms In Any Part Of The World, With Particular Reference To Colonial And Other Dependent Countries And Territories, In Accordance With Commission On Human Rights Resolution 1995/74, Fifty-Second Session, Item 10 Of The Provisional Agenda, *UN Commission On Human Rights* E/CN.4/1996/64, February 27, 1996 <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/d473d7cb72ece7b7802566f2004d3d14?OpenDocument>. (Accessed March 12, 2011); See also “Final Report On The Situation Of Human Rights In Afghanistan, submitted by Choong-Hyun Paik, Special Rapporteur, in accordance with UN Commission On Human Rights Resolution 1996/75,” *UN Commission On Human Rights*, February 20 1997, E/CN.4/1997/59, <http://www.unhcr.org/refworld/docid/3ae6b0d34.htm>. (Accessed March 12, 2011).

⁴⁷⁵ Matteo Tondini, Justice Sector Reform in Afghanistan: From a Lead Nation Approach to a Mixed Ownership Regime? *Transitional Studies Review* 15, no. 4 (2009), 660-673.

without consulting with Afghan officials who resented their exclusion. In response, they requested President Karzai not to sign the draft.⁴⁷⁶ To add insult to injury, the Italian government fully supported their expert and instead threatened to withdraw funding for related projects unless the draft was approved.⁴⁷⁷ As the justice sector reform project struggled to get on its feet, what became evident was not only problems with the lead nation approach, the inability of Afghanistan to absorb fast flowing assistance, but also Italy's own limitations.⁴⁷⁸ Some of the significant challenges that faced Italy in its work on legal reform stemmed from a too narrow focus on western legal tradition with little engagement with Islamic legal norms.⁴⁷⁹

Evaluating five years of aid to the justice sector, legal scholar Cherif Bassiouni concluded that “internationally supported rule of law programs tend to ignore or avoid issues of Islamic law [and] this negatively impacts the acceptance of these programs by Afghan society.”⁴⁸⁰ Ultimately, Lauri argues: “the convergence of the rule of law and

⁴⁷⁶ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform In Afghanistan*.

⁴⁷⁷ Ibid

⁴⁷⁸ The lack of activity for most of 2002 was not entirely Italy's fault; the long delay in establishing a functioning Judicial Commission—the logical partner in any reform effort—is partly to blame as were the obstacles posed by the political rivalries between the three main components of the justice system. However, as the 2003 ICG report notes: some of the activities that Italy could have initiated earlier, such as assessment of institutional and training needs in Afghanistan and the provincial centers did not take place.

⁴⁷⁹ See “Reforming Afghanistan's Broken Judiciary,” Asia Report N°195, International Crisis Group (ICG), November 17, 2010, <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.ashx>. (Accessed March 15, 2011)

⁴⁸⁰ Suhrke and Borchgrevnik, *Negotiating Justice Sector Reform In Afghanistan*. See also M. Cherif Bassiouni and Daniel Rothenberg, “An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan,” presented at the Conference on the Rule of Law in Afghanistan, Rome, Italy, July 2, 2007

Islamic law has not resulted in a well defined set of judicial procedures nor have the discrepancies between the 2004 constitution and the law in force been resolved.”⁴⁸¹ Cast in this light, and given Afghanistan’s tumultuous relationship with legal reform, it is then possible to understand why the *ulema* who historically have had the authority to interpret and implement law are suspicious of codification measures, considering them to be the latest attempts of foreign powers to subjugate Islamic law and religious actors to secular authorities.⁴⁸²

There continues to be tangible areas of serious conflict between western-based laws and the country’s customary practices. “Afghanistan [already had] a large body of codified laws including the 1975 Afghan Civil Code, the 1976 Criminal Codes, the Amended 1973 Law of Criminal Procedure and the 1973 Law of Police.”⁴⁸³ It has also signed and ratified a number of international legal documents including the Geneva Conventions of 1949, Genocide Convention of 1948, Convention on non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, International Covenant on Civil and Political Rights of 1966, Convention on the Elimination of all Forms of Racial Discrimination of 1966, Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment (CAT) of 1984,

http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gli_uffici/. (Accessed September 10, 2008).

⁴⁸¹ Antonio De Lauri, Legal Reconstruction in Afghanistan: Rule of Law, Injustice, and Judicial Mediation, *Jura Gentium: Journal of Philosophy of International Law and Global Politics* VI no. 1, (2010) 4.

⁴⁸² Ibid

⁴⁸³ Ali Wardak, *Building a Post-War Justice System*, 329.

Convention on the Rights of the Child of 1989 and the Convention on the Elimination of Discrimination Against Women (CEDAW) of 1979.⁴⁸⁴ A significant contradiction to Afghanistan's international legal obligations arises from Article 3 (1) of the Afghan constitution, which states: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."⁴⁸⁵ This conflating of strict interpretations of the *Shari'a* and adherence to cultural practices on one hand, and the dictates of official law constitutes a formidable challenge when it comes to for example, the confrontation with CEDAW and CAT. For example, in cases of murder, the *Jirga* may recommend *badal* or the marriage of a woman from the par (perpetrator's) tribe to the victim's close relative. Under an interpretation of the *Shari'a*, a rape victim needs to produce four male witnesses; for the commission of a crime, a perpetrator's limb needs to be cut off. Some of these practices such as *badal* are in direct conflict with the Afghan state laws and its international legal obligations. Furthermore, although there is pressure for change, *jirgas* are male-only institutions and are under the influence of elders. As the section on customary laws outlined, they are also under the influence of warlords and their decisions are usually undermined and controlled by weapons or wealth. These realities constitute some very serious legal challenges to adjudicating over crimes given the immense task of weaving in the informal adjudication mechanisms into the formal justice system for the overall development of legal procedures.

The section above was an attempt to provide the extremely complex historical and sociopolitical landscape within which a discussion of rule of law in Afghanistan needs to

⁴⁸⁴ *Afghanistan: Judicial Reform and Transitional Justice*.

⁴⁸⁵ Article 3(1) *Constitution of Afghanistan* 1382.

be assessed and considered. It began with examining some of the fundamental elements of customary laws in the country and provided an insight into how the role of jirgas and general traditional dispute mechanisms amongst the Pushtuns and pointed out that there are variations within different customs and customary practices amongst and within Afghans. Next, it tackled the place of Islam, particularly the role of the Islamic *Fiqh* in the Afghan legal code. Third, it examined the inevitable tensions between the western-based criminal code and the traditional legal codes, and the urban elites and the rural powerholders in the country within the context of turbulent politics, changing regimes and an escalating conflict.

Law and Auxiliary Forces

A discussion about the legal system also requires an examination of the auxiliary arm of law and order -- the police. Afghanistan's National Police (ANP) forces now number at 68,000, with a target goal of 86,000 personnel. It comprises of several distinct entities operating under the direction of the Interior Ministry including the Afghan Uniformed Police (AUP), responsible for general police duties, and the specialized police organizations of the Afghan National Civil Order Police (ANCOP), the Afghan Border Police (ABP), the Afghan Highway Police (AHP), the Counter Narcotics Police of Afghanistan (CNPA), the Counter Terrorism Police (CTP) and the Standby Police. As of 2002, a vast majority of the police was untrained, ill equipped, illiterate and loyal to warlords and local commanders.⁴⁸⁶ Further, many were former mujahideen whose past

⁴⁸⁶ Robert M. Perito, "Afghanistan's Police The Weak Link in Security Sector Reform," *United States Institute of Peace (USIP)*, 2009, 3 http://www.usip.org/files/afghanistan_police.pdf. (Accessed February 10, 2010).

experiences of acting with impunity, should have, in an ideal setting, disqualified them for being too poorly equipped to act as officers of the law. The few professional police officers from the Soviet period did not have the necessary training or qualifications to be law enforcement officials in the new order. Ultimately, the state of the ANP reflects the international community's failure to grasp the centrality of comprehensive reform of the law enforcement and justice sectors. In Afghanistan's case, the explosion of organised crime and the inability of security forces to respond adequately to drug cartels and profiteers, which have included governing warlords, militia commanders, and members within and around the armed forces, compounded this further. The United Nations Office on Drugs and Crime (UNODC) and the World Bank (WB) found:

The degree to which the appointment of some provincial or district police chiefs sometimes serve to facilitate and consolidate criminal activities. These appointments are essential parts of a now established system of protection in some parts of the country, with state functionaries such as police officers playing a key role.⁴⁸⁷

The same report further observed:

The district police chief (or an equivalent official) receives payment directly from traffickers in order to operate....The district level official makes a payment to the provincial police chief (or equivalent officials) who in turn provides payment to the individual who provides overall political protection (either at high level in the provinces or at the centre) for the trafficking pyramid to operate.⁴⁸⁸

⁴⁸⁷ Mark Shaw, "Drug Trafficking and the Development of Organized Crime in Post-Taliban Afghanistan," in Doris Buddenberg and William A. Byrd, eds. *Afghanistan's Drug Industry: Structure, Functioning Dynamics and Implications for Counter-Narcotics Policy*, World Bank and the United Nations Office of Drugs and Crime (UNDOC), 2006, 199
<http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/Publications/448813-1164651372704/UNDC.pdf>. (Accessed January 10, 2008)

Subsequently, the image of the police both amongst the public remains largely unfavorable. An extensive study on the ANP conducted on the Afghan police by the AREU in 2007 found that:

Police were routinely accused of being corrupt and operating on an “arrest, bribe and release” basis; of violating human rights through arbitrary and illegal detentions and cruel, inhuman and degrading treatment of prisoners, including torture; and of being involved in criminal activities including theft, kidnapping, extortion and drug trafficking.⁴⁸⁹

At a June 2008 USIP event in Washington D.C., Afghan Attorney General Sabbit acknowledged both the pressing problems of corruption and the realities of impunity when he reflected:

[W]hat makes it difficult for us to strengthen the rule of the law in the country is the corruption -- corruption in the law enforcement agency -- in the police and even within the Prosecutor’s Office. Corruption has helped a lot of criminals, a lot of terrorists, a lot of drug dealers to get away with their crimes they have committed. But this is not the only challenge. We do not have a complete rule of law in Afghanistan.... because, we have warlords, who consider themselves above the law, they do whatever they want to do and we cannot touch them. For example, General Dostum. He has done so many things with impunity has killed so many people or at least he is accused of killing so many people, raping women, taking the property of people but so far we have not been able to touch him. And he is not the only one...there are others who benefit from extortion... it is always an exercise of their will, not of law.⁴⁹⁰

⁴⁸⁸ Ibid, 202.

⁴⁸⁹ Andrew Wilder, “Cops or Robbers? The Struggle to Reform the Afghan National Police,” *Afghanistan Research and Evaluation Unit (AREU)*, July 1, 2007, <http://www.areu.org.af/Uploads/EditionPdfs/717E-Cops%20or%20Robbers-IP-print.pdf>. (Accessed February 1, 2008).

⁴⁹⁰ Afghanistan’s Attorney General Sabbit’s presentation at USIP, Washington D.C June 24, 2008.

Irrefutably, the challenge of a corrupt police system emerges as a consequence of, and in turn engenders, the continuous political environment of impunity. The vicious cycle not only inhibits the principle of equality before the law, but also in fact, ensures that some individuals continue to be placed above the reach of the law.

Technical shortcomings

Afghanistan's legal infrastructure is in shambles. Even the Ministry of Justice and the University of Kabul do not have complete sets of Afghanistan's main statutory laws and judges, lawyers, educational institutions and even most courts even do not have access to them⁴⁹¹ Many of the Afghan courts are non functional; a vast majority of those are understaffed and ill equipped. The challenges of corruption, low salaries and delays in salaries for legal professionals have not dissipated, thereby failing to generate any form of confidence in the official legal system. Organization reports produced since 2001 indicate that the existing legal system is highly fragmented with limited or no contact between the judiciary, the police, the prosecution, and the prison/correction service.⁴⁹²

⁴⁹¹ Martin Lau, "Islamic Law and the Afghan Legal System," (undated) <http://www.ag-afghanistan.de/arg/arp/lau.pdf>. (Accessed January 10, 2008).

⁴⁹² See for example, "Afghanistan: Re-Establishing The Rule Of Law," *Amnesty International*, August 14, 2003. <http://www.amnesty.org/en/library/asset/ASA11/021/2003/en/18f584dc-f7a9-11dd-8fd7-f57af21896e1/asa110212003en.pdf>. (Accessed January 10, 2008); "Afghanistan: Police Reconstruction Essential for Protection of Human Rights," *Amnesty International*, March 2003, <https://www.amnesty.org/en/library/asset/ASA11/003/2003/en/3dbda90b-d753-11dd-b024-21932cd2170d/asa110032003en.pdf>. (Accessed January 10, 2008); "Judicial Reform Commission Starts Up With Support From UNDP," *United Nations Development Programme (UNDP)*, December 2002, www.undp.org. (Accessed January 10, 2008); Chris Johnson, William Maley, Alexander Thier and Ali Wardak, "Afghanistan's Political and Constitutional Development," *UK Department for International Development (DFID)*, January 2003, <http://www.odi.org.uk/resources/download/4810.pdf>. (Accessed January 10, 2008); See also generally, "Afghanistan Rule Of Law Project: Field Study Of Informal And Customary Justice In Afghanistan And Recommendations On Improving Access To Justice And Relations Between Formal Courts And Informal Bodies," *United States Agency for International Development (USAID)*, June 2005. http://www.usip.org/files/file/usaaid_afghanistan.pdf. (Accessed January 10, 2008);

In addition, there are no corrective regimes and rehabilitative programmes for adult and young offenders in the country. The *dar-al-ta'adeeb* (juvenile correctional institution) exists in Kabul, but it is more in terms of name rather than an effective institution that has the necessary facilities and the professional personnel to address the concerns of those in prison. In general, “the Afghan prison/correction service has a very basic existence in the main urban centers; it has no existence at all in many rural districts and some provincial centers.”⁴⁹³ Last, but not the least, many of the training programs and facilities for legal practitioners continue to be concentrated in the capital, leaving most of Afghanistan outside of the formal legal structure, and subsequently engendering their continued dependence on informal mechanisms of justice and arbitration.

Nepal: From Customary Laws to a Secular Legal Code

Contrary to Afghanistan where historically there has been significant tension between “secular” laws, customary codes and the Shari’a and between the Kabul elite and the agrarian rural/traditional communities, Nepal’s official legal system has generally taken precedence over its customary practices. Neither did the privileging of a secular legal code meet with as much resistance. A second category of difference between the two countries is the position and importance attached to customary practices in the

Martin Lau, “Afghanistan’s Legal System and its Compatibility with International Human Rights Standards,” *International Commission of Jurists (ICJ)*, <http://www.unhcr.org/refworld/pdfid/48a3f02c0.pdf>. (Accessed January 10, 2008).

⁴⁹³ See Johnson, Maley, Thier and Wardak, *Afghanistan’s Political and Constitutional Development*. Also see “Afghanistan: Crumbling Prison System Desperately in Need of Repair,” *Amnesty International (AI)*, July 1, 2003, London, UK. <http://www.amnesty.org/en/library/asset/ASA11/017/2003/en/25569fd4-d6c8-11dd-ab95-a13b602c0642/asa110172003en.pdf>. (Accessed January 10, 2008).

constitutional framework in both countries. While Article 3, Chapter 1 of the COA clearly states: “no law can be contrary to the beliefs and provisions of the sacred religion of Islam,”⁴⁹⁴ Nepal’s contemporary claim as a secular state privileges international legal standards above that of domestic laws. Third, there is significant literature that has emerged on the customary laws in Afghanistan, particularly those relating to *Pushtunwali* and in general about Shari’a. Much remains to be known about the complex legal customs in Nepal, home to 61 ethnic groups and 45 indigenous populations living within a complex hierarchy of caste and ethnicity and within a context of Hindu, Buddhist, Islamic, Kiranti, Jainism and other religious beliefs and their corresponding sociocultural norms.

Nepal’s engagement with a western-based code, like Afghanistan, is fairly recent. Until about half a century ago, its laws were primarily based on complex interplay between social customs, values, cultural practices and Hindu legal texts, and royal edicts.⁴⁹⁵ In fact, similar to Muslim societies in their situating the place of Shari’a in society, laws in Nepal were considered to be a branch of religion.⁴⁹⁶ Thapa states: “Traditional concepts of fairness and impartiality under the laws of religion were the basic rules of justice. The kings of subsequent dynasties [i.e. since Licchivus]⁴⁹⁷ began to promulgate laws with the advice of the *dharmadhikara* (the owner of justice) and

⁴⁹⁴ Article 3 (1) *Constitution of Afghanistan*, 1382.

⁴⁹⁵ Ali Riaz and Subho Basu, The State-Society Relationship and Political Conflicts in Nepal (1768-2005), *Journal of Asian and African Studies*, 42 no. 2 (April 2007), 123-142.

⁴⁹⁶ Kanak Bikram Thapa, Religion and Law in Nepal, *Brigham Young University Law Review*, (April 1, 2010), 921-930.

⁴⁹⁷ Ancient kingdom in Kathmandu approximately between 400 and 750 A.D.

pundits.”⁴⁹⁸ Further, till Nepal was united as political entity in 1768, the king was considered to be the source and foundation of law and justice and Brahmin (highest caste) pundits were responsible for their implementation.⁴⁹⁹

The Brahmanic philosophy and practice of law and justice has been historically and categorically inherently problematic. The importance of caste and the traditional privileging of the Brahmin and Chetris⁵⁰⁰ particularly ensured that the concept of equality did not exist in legal and judicial practices. This had (and continues to have) severe implications for people of the lower castes and for women. Brahmanic principles particularly relating to family laws are singularly and blatantly patriarchal; for example, it strictly prohibits women from owning property, having access to inheritance or, for example, the remarriage of widows. Adam, one of the perhaps earlier anthropologists studying the complex social system in Nepal observes: “This prescription is derived from the Dharmasutras and other sources, and is simply a consequence of both the rule that the

⁴⁹⁸ See Thapa, *Religion and Law in Nepal*, 922. Historians classify Nepal into the phase of Ancient Nepal (which consists of the Kirata and Lichhavi periods), Medieval Nepal and Modern Nepal. Particularly during the Kirata and Lichhavi periods, there was heavy reliance on customary laws, which in turn borrowed from traditional practices and socio-cultural values. During the Kirata period, the state’s primary responsibility was the maintenance of peace and security. Violence was considered to be particularly sinful and those responsible for violence were dealt with harshly. Justice followed the principle of “an eye for an eye, a tooth for a tooth, a life for a life.” Those who were responsible for the death of another were handed the death sentence. During the Medieval period, there was a complex intersection between crime and sin with classifications about what constituted the greatest sin. For example, Strihatya (killing of a woman) was considered as heinous as Brahmahatya (killing of Brahmin), Balhatya (infanticide), Gohatya (cow-slaughter), Guruhatya (killing of a teacher) and Gotra hatya (killing of a relative). See Rajit Bhakta Pradhananga, *Homicide Law in Nepal; Concept, History and Judicial Practice*, (Kathmandu, Nepal, Ratna Pustak Bhandar, 2001).

⁴⁹⁹ D.R. Regmi, *Modern Nepal: Rise and Growth in the Eighteenth Century*, Vol. I & II, (Kathmandu, Nepal: Rupa Publishers, 1961), 294.

⁵⁰⁰ Chetris is the widely used term for Kshatriyas, the warrior caste within the Hindu caste system.

bride has to be a virgin and the custom of marrying children.”⁵⁰¹ For Dalit women, consequently, Brahmanic laws have constituted a double discrimination leading inevitably to less access to education, health care and employment opportunities.⁵⁰²

The Rana system that emerged since 1846 first introduced some form of western influence on the multiple legal practices and customs in Nepal. Impressed with the English and French legal infrastructure, Jung Bahadur Rana began a review process of the multiple laws in Nepal and in 1851 appointed an *Ain Kausal* (Law Council) to institute a unified legal code, which became the *Muluk Ain* (Country Code) in 1854.⁵⁰³ The original *Muluk Ain* was a comprehensive compilation that included criminal and civil laws, and “provided provisions relating to administrative law, land law, regulation for the management of revenues administration, and land survey.”⁵⁰⁴ It also tried to define the legal relations in terms of *Kul* (Kin group), *Santan* (family lineage), *Jat* (caste) and *Linga* (sex).⁵⁰⁵ But the Code was also heavily infused with the multiple and varied customs, rules and royal proclamations that existed in the country at the time, such that it institutionalized some troubling discriminatory practices such as the inclusion of

⁵⁰¹ Leonard Adam, The Social Organization And Customary Law Of The Nepalese Tribes, *American Anthropologist* 38, no. 4 (October-December 1936), 544.

⁵⁰² See “Across the Lines: The Impact of Nepal’s Conflict on Women,” *Advocacy Forum and the International Center for Transitional Justice (ICTJ)*, December 2010, <http://www.ictj.org/sites/default/files/ICTJ-Nepal-Across-Lines-2010-English.pdf>. (Accessed March 10, 2011).

⁵⁰³ Krishna K. Adikhari, Criminal Cases And Their Punishments Before And During The Period Of Jang Bahadur, *Journal Of The Institute Of Nepal And Asian Studies*, 1976, 3, no. 1 (1976) 105-116.

⁵⁰⁴ Thapa, *Religion and Law in Nepal*, 921-930.

⁵⁰⁵ Rajit Bhakta Pradhananga and Purna Shrestha, “Domestic Violence against Women in Nepal: Concept, History and Existing Laws” (undated). http://www.fwld.org/pdf_files/domestic_voilence.pdf. (Accessed October 15, 2010).

provisions for untouchability as a punitive action and the legalization of the caste-based system. In short, the *Muluk Ain* was the first and most comprehensive effort to codify diverse legal customs pertaining to ethnic groups and caste-based practices based on Hindu jurisprudence resulting in an institutionalization of caste hierarchy.⁵⁰⁶

The collapse of the Rana Regime in 1951 provided the first real opportunity to revise several of the laws within the *Muluk Ain*. While there were additions in the shape of public and private laws, constitutional law, criminal law, administrative law, contract law, commercial law, and private property laws since that period, it was in 1963 that the new *Muluk Ain* emerged, “based on the principle of legal equality and removing caste and religious considerations.”⁵⁰⁷ The new Country Code not only provided a common criminal and civil code for Hindus, Buddhists, Muslims, and other groups of different religious persuasions but also finally addressed family matters such as in marriage, adoption, inheritance, and succession. It also simultaneously abolished the premises of discrimination and untouchability and recognized the customary practices of certain indigenous communities.⁵⁰⁸ However, the new code continued to perpetuate gender segregation and gender-based discrimination.⁵⁰⁹

In addition to the shift in the *Muluk Ain* from a more Brahmanic-based code to a more comprehensive and egalitarian framework, Nepal’s constitutions have also

⁵⁰⁶ Anne de Sales, The Kham Magar Country, Nepal: Between Ethnic Claims and Maoism, *European Bulletin Of Himalayan Research* 19 (2000), 41-71.

⁵⁰⁷ Thapa, *Religion and Law in Nepal*, 927.

⁵⁰⁸ Ibid.

⁵⁰⁹ Pradhananga and Shrestha, *Domestic Violence against Women*.

undergone significant changes during its different periods in history, thereby institutionalizing secularist principles within legal practices. Since 1948, Nepal has had six constitutions, including the Constitution of 1962, which dismissed the parliamentary system and introduced the far less democratic four-tiered Panchayat system,⁵¹⁰ and the 1992 Constitution, which introduced multiparty parliamentary democracy but recognized Nepal to be a Hindu Kingdom. But it is the Interim Constitution of 2007, which followed the success of the People's Movement that thus far has the most comprehensive reach and recognition of the complex and varied demographics in the country. Article 3 of the Interim Constitution of Nepal declares: "Having multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations, and being committed to and united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepali people collectively constitute the nation."⁵¹¹

Further, Article 4 consolidates the place of secularism and inclusivity in stating Nepal is

⁵¹⁰ At the lowest tier, there were 4,000 village assemblies (gaun sabha), which elected nine members of the village panchayat. They in turn elected a mayor (sabhapati). Each village panchayat sent a representative to one of seventy-five district (zilla) panchayat. Members of the district panchayat elected representatives to fourteen zone assemblies (anchal sabha) for the National Panchayat, or Rashtriya Panchayat, in Kathmandu. Moreover, there were class organizations at village, district, and zonal levels for peasants, youth, women, elders, laborers, and ex-soldiers, who elected their own representatives to assemblies. There were strict rules for the functioning of the panchayat system including that the National Panchayat of about ninety members could not criticize the royal government, debate the principles of partyless democracy, introduce budgetary bills without royal approval, or enact bills without approval of the king. The King was the supreme commander of the armed forces, appointed (and had the power to remove) members of the Supreme Court, appointed the Public Service Commission to oversee the civil service, and could change any judicial decision or amend the constitution at any time. For Nepali citizens, particularly amongst the poor and the uneducated the King was also representative of the god Vishnu upholding *dharma* on earth. See The Panchayat System under King Mahendra, <http://countrystudies.us/nepal/19.htm>. (Accessed September 20, 2010).

⁵¹¹ "Part 1, Article 3, The Interim Constitution Of Nepal, 2063 (2007)," [Http://www.Worldstatesmen.Org/Nepal_Interim_Constitution2007.Pdf](http://www.Worldstatesmen.Org/Nepal_Interim_Constitution2007.Pdf). (Accessed September 10, 2010).

now “an independent, indivisible, sovereign, secular, inclusive and fully democratic State.”⁵¹²

The secularization of Nepal’s laws, drawing heavily on international legal standards was not met with the same kind of resistance as the experiences in the formalization of the Afghan legal code indicated, but certainly, their institution have significantly obscured the place and space for customary laws. Customary laws remain prevalent across Nepal, and their practice is particularly prevalent among indigenous communities in matters as wide-ranging as resource ownership, management and allocation, systems of governance, dispute resolution mechanisms, traditional methods of food preparations, medicinal practices, preservation of natural and genetic resources, dietary restrictions, languages, care of historical sites, resources management and distribution, and knowledge-sharing and environmental and biodiversity conservation.⁵¹³

Traditional Dispute Resolution

An inevitable outcome of the decade long conflict has had a direct impact on both state and customary laws, in several cases forcing their retreat.⁵¹⁴ Chapter 6’s section on Shadow Justice discusses in detail the substantive vacuum created by this disruption and the space created for Maoist led People’s Courts to adjudicate over criminal as well as

⁵¹² “Part 1, Article 4, The Interim Constitution Of Nepal, 2063 (2007). As of writing of this dissertation, Nepal’s new constitution has yet to be finalized.

⁵¹³ Parshuram Tamang, “Customary Law and Conservation in the Himalaya,” (undated), http://www.earthlore.ca/clients/WPC/English/grfx/sessions/PDFs/session_1/Tamang.pdf. (Accessed November 10, 2010)

⁵¹⁴ For a detailed discussion see “Nepal: Justice in Transition,” *International Commission of Jurists (ICJ)*, February 2008, 19. http://www.icj.org/dwn/database/Nepal_-_Justice_in_Transition_formatted_-_final_.pdf. (Accessed November 1, 2010).

civil and social matters and the challenges they pose to state-sanctioned adjudication processes. Meanwhile, customary practices relating to resource ownership, particularly relating to land and water access and distribution⁵¹⁵ and conflict resolution continue to be areas that are currently being explored to understand the scope and potential of legal pluralism in the country. While there is limited literature on the different forms of traditional dispute mechanisms that have, and continue to be used within Nepal's highly diverse ethnic communities, and while the scope of this project does not allow an examination of the topic in great detail, a discussion of justice nevertheless merits an exploration of such practices.

Historically, in Nepal, dispute resolutions have taken the shape of mediation by community leaders, decision-making processes by community leaders and the practice of *Divya Pariksha* (Ordeal).⁵¹⁶ Each of these was a flawed process, in that as discussed above, privilege, power and decision-making authority was in the hands of exclusively male higher caste pundits and local landlords. More recently, Nepal has had experience with “community-based” mediation, but unlike the traditional jirgas and shura in Afghanistan, for example, many of these practices were donor-driven and designed.⁵¹⁷

⁵¹⁵ See for example, Ruth S. Meinzen-Dick and Rajendra Pradhan, “Legal Pluralism and Dynamic Property Rights,” CGIAR Systemwide Program on Collective Action and Property Rights, International Food Policy Research Institute (IFPRI), January 2002, <http://www.capri.cgiar.org/pdf/CAPRIWP22.pdf>. (Accessed November 1, 2010). See also, Rajendra Pradhan and Ujjwal Pradhan, “Negotiating Access and Rights: A Case Study of Disputes over Rights to an Irrigation Water Source in Nepal” in Bryan Randolph Bruns and Ruth Meinzen-Dick, eds. *Negotiating Water Rights* (New Delhi, India: Sage Publications, 1997) 221-247.

⁵¹⁶ The practice of an accused undergoing a prescribed physical test to prove their guilt or innocence

⁵¹⁷ *Nepal: Justice in Transition*.

Of the more traditional based of these mediation exercises, there is diversity between and among the *Khata Yangi* practices of the Sherpa community, the Tharu population, to name just a few. Traditionally, these systems were specifically focused on addressing security concerns of a village in question and deliberate over irrigation waters, but later on, they also adopted a more mediation-based role.

There has been some effort to incorporate such traditional dispute resolution mechanisms within the local government. In some civil cases, the Local Self-Governance Act, 1999 (LSGA) has elaborate provisions for mediation and arbitration to be carried out by Village Development Committees (VDCs) and Municipal Development Committees (MDCs), although the conflict, pressure by the CPN-M to stop community-based traditional dispute resolution mechanisms and political developments since the CPA have slowed such efforts.⁵¹⁸

Clearly, on certain civil matters, there is much to be learned about how such traditional dispute mechanisms can continue to enhance and support the formal legal structure in Nepal. The use of such mechanisms for conflict resolution and mediation also opens up an opportunity to explore how, and if, they can play a role in enhancing the maximalist goals of transitional justice, particularly relating to that of reconciliation. Nevertheless, given Nepal's history of power hierarchy and the disenfranchisement of Dalits, the landless, the janajatis and women in traditional practices, its recent history with the CPN-M's arbitrary and often dangerously flawed People's Courts, its current politicization of grass-roots peace committees, there can be concern about to what extent

⁵¹⁸ Ibid.

such traditional mechanisms can effectively deliver on justice as well transitional justice goals.

Criminalizing Human Rights Violations: The Glaring Gaps
in the Formal Legal Code

The *Nepali Brihyat Sabdhakosh*, the root dictionary for Nepali does not recognize the term *dandahinta* –or what, according to human rights activists is the Nepali synonym for impunity.⁵¹⁹ *Dandahinta*, itself is fairly new and gained currency with the explosion of human rights activism in the recent years. A few terms could possibly come close-- *ucchrinkal* (meaning, one unfettered by rules and discipline or out of control) and *uddhanda* (insinuating one who seeks to exert control over others even with the use of force and does not fear retribution). Neither term, even collectively, ultimately captures the depth and magnitude of its equivalence in English. Impunity has been a long-standing challenge for Nepali society with its history of breaking its own rules and privileging the powerful and the connected.

Yet, in addition to customary practices, Nepal is a country of formal laws. As a fledgling democracy in 1990, Nepal ratified all major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol, the Covenant on Economic, Social and Cultural Rights (ECOSOC), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC) and the Convention for the Elimination of Discrimination against Women (CEDAW). Nepal's parliament also passed the 1990 Treaty Act stipulating that international human rights treaties ratified by Nepal are to be applied in Nepal as national law; but unlike

⁵¹⁹ Bhattarai, Mainali, Ghimere and Upadhyay, *Impunity In Nepal*.

Afghanistan where international laws and *Shari'a* need to be conform for their application, Nepal's Act instructs that international laws can supersede national laws if the latter are inconsistent with the former. However, "because the constitution or existing criminal law have not included the crimes in the treaties, enforcement of the treaty provisions has been impossible and the two bodies of law are treated differently by practitioners and courts."⁵²⁰ According to a 2008 HRW report:

In Nepal, there is no involvement of district courts or other judicial officers at the time an alleged serious crime is discovered. This is due in part to a lack of specific protection of the right to life in the Nepali Constitution, making it fruitless for relatives to argue in court that alleged extrajudicial executions are violations of their fundamental rights.⁵²¹

Some could argue that what Nepal mainly suffers from is not necessarily a lack of laws, but the absence of their implementation. A representation of the local Protection Desk (PD) observed: "We are signatories to many laws but very weak in their execution...so its very contradictory -- signing convention but not holding the laws to that standard."⁵²² But outside of implementation, there are serious gaps that merit attention. One of the major problems Nepali human rights organizations and victims face is that several of the human rights abuses detailed in First Information Reports (FIRs) have not been prohibited in the Interim Constitution; further, existing Nepali criminal law does not specify some of these abuses as distinct crimes. A representative of FOHRID reflected: "Such *lacunae* not only limits the reach of law and the activism of legal

⁵²⁰ Interview with international lawyer, Kathmandu, Nepal, June 30, 2009.

⁵²¹ See *Waiting for Justice...*

⁵²² Interview with PD representatives, Kathmandu, Nepal, June 10, 2009.

practitioners, but also meets with political apathy and issues a *carte blanche* to authorities for not investigating and prosecuting such crimes.”⁵²³ The absence of criminalization of enforced disappearances for example is a good illustration of this. A second legal *lacuna* is with regard to the issue of torture. Nepal ratified the CAT on April 14 1991, just after the restoration of parliamentary democracy in 1990. The 1990 Constitution enshrined the freedom from torture as a fundamental right of the citizens. Article 14(4) of the 1990 constitution expressly prohibited “physical and mental torture” and “cruel, inhuman or degrading treatment,” the first time this principle was recognized in the Nepali Law.⁵²⁴ ‘This constitutional provision also required that “persons subjected to torture shall be compensated in a manner determined by law.”’⁵²⁵

The ratification of CAT in 1991 created some important obligations including provisions that no exceptional circumstances whether a war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture. Further, an order from a superior officer or a public authority may not be invoked as a justification of torture⁵²⁶ and all acts of torture are offenses under its criminal law and should be punishable by appropriate penalties which take into account their grave

⁵²³ Interview with member of FOHRID, Kathmandu, Nepal, July 12, 2009

⁵²⁴ See “Hope and Frustration: Assessing the Impact of Nepal’s Torture Compensation Act- 1996,” *Advocacy Forum (AF)*, June 26, 2008, 3. http://www.advocacyforum.org/pdfcoll/June26_Report_English_2008.pdf. (Accessed November 1, 2010).

⁵²⁵ Reshma Thapa, “Nepal ‘s Failure to Address Torture: The Relevance of the UN Torture Convention,” University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 5 Winter 2008, 6 . http://www.nd.edu/~ndlaw/cchr/papers/thapa_nepal_torture.pdf. (Accessed January 10, 2008)

⁵²⁶ Article 2, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.hrweb.org/legal/cat.html>. (Accessed January 10, 2008)

nature.⁵²⁷ Despite these constitutional and international legal obligations, the practice of torture in Nepal is not only rampant, but also significantly increased between 1990 and 2005. Since 1991, UN Committee Against Torture received only two reports from the Nepali government. The first is the preliminary report on 16 December 1993;⁵²⁸ the second was a periodical report on 14 January 2005.⁵²⁹ Most recently, in 2007, the Committee against Torture again reminded the GoN of the most basic obligations that it had failed to meet since 1991:

The State Party should adopt domestic legislation which ensures that acts of torture, including the acts of attempt, complicity and participation, are criminal offences punishable in a manner proportionate to the gravity of the crimes committed, and consider steps to amend the Compensation Relating to Torture Act of 1996 to bring it into compliance with all the elements of the definition of torture provided in the convention.⁵³⁰

Nepal has yet to meet these basic requirements. Torture still does not violate criminal law and no one to date has been prosecuted for committing torture. The only existing recourse for victims is the provision of “physical assault” in the *Muluki Ain* (Country Code), which stops short of covering torture used by security forces, who

⁵²⁷ Ibid.

⁵²⁸ See “Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention-Nepal, Conclusions and Recommendations of the Committee against Torture,” *Committee Against Torture, United Nations (UN)*, CAT/C/16/Add.3 December 16, 1993, http://www.bayefsky.com/reports/nepal_cat_c_16_add.3_1993.php. (Accessed January 15, 2008).

⁵²⁹ Ibid

⁵³⁰ Ibid.

continue to be one of its main users.⁵³¹ The 1996 Torture Compensation Act (TCA) has been of little relevance in the practical protection of human rights, mainly because fear and intimidation faced by victims' prevents them from going to the courts for compensation. One of the examples cited by Amnesty International shows that, "during 1998, 12 people claimed compensation. Of these 12 people, six later withdrew their cases because of intimidation and fear for their safety."⁵³² Moreover, even if compensation is provided, it occurs in exchange for impunity. Advocacy Forum (AF) one of the most prominent national human rights organizations stated:

[T]he courts have awarded compensation of between NPR 5000 (approximately USD \$66) and NPR 100,000 (approximately USD \$1,333). Over the whole of the 12 years, only 7 victims have thus far received this money. So far none of these perpetrators named in these cases have actually been brought to justice.⁵³³

The formal parliamentary enactment of the TCA in 1996 is the only concrete step taken by the GoN in relation to CAT and the 1990 constitutional obligation.

The existing legal system in Nepal is further undermined both by the glaring absence of clear statutes and the subsequent absence of any means of inquiry to look into cases of "wrongful" deaths or inhumane treatment. The State Cases Act is a prime example. While the Act lays out the procedures for the investigation and prosecution of cases where a state authority is a party to a case filed, it does not specify the necessary

⁵³¹ Interviews held with civil society actors in Kathmandu, Nepal, June-July 2009.

⁵³² See "Nepal: Make Torture a Crime," *Amnesty International (AI)*, March 1, 2001, 5-7, 10 <http://www.amnesty.name/en/library/asset/ASA31/002/2001/en/0054baf9-dc50-11dd-bce7-11be3666d687/asa310022001en.pdf>. (Accessed January 10, 2008).

⁵³³ See *Hope and Frustration..*

measures for state authorities when security forces are implicated in the case of a “suspicious” death. Consequently, the police, public prosecutors, and other agencies can leave serious crimes uninvestigated, often in limbo for even years often using specious justifications. This continues to be one of the main reasons why Nepal has yet not been able to ensure independent investigations in many cases of wrongful or suspicious deaths. In the absence of an inquiry procedure under an independent authority, such as a legal or court officer, victims’ bodies can “disappear” without any post-mortem examination.

A significant source of concern for the Nepal human rights community continues to be the excessive use of force used by security forces. From a legal standpoint, proponents of the need for force argue that the security forces are not breaking the law. The 1971 Local Administration Act (LAA) in fact provides the legal framework for the use of force by state apparatus -- it allows police to use lethal force against violent demonstrators without adequate safeguards. It also permits the Chief District Officer (CDO) to direct the police to prevent any gatherings likely to result in a breach of public order.⁵³⁴ In case of any political disturbance, the police are allowed to use force, include *lathi* (batons), blank shots, teargas, and water canon depending on the situation.⁵³⁵ If the crowd does not disperse, the police may open fire upon a written order from the CDO after issuing a warning to the crowd.⁵³⁶

⁵³⁴ See “Section 6(1), Local Administration Act, 2028 (1971),” www.lawcommission.gov.np. (Accessed January 10, 2008).

⁵³⁵ See *Waiting for Justice*.

⁵³⁶ “The April Protests Democratic Rights and the Excessive Use of Force: Findings of OHCHR-Nepal’s Monitoring and Investigations,” *United Nations Office of the High Commissioner for Human Rights in Nepal (OHCHR-Nepal)*, September 2006,

During the April 2006 *Jana Andolan*, OHCHR-Nepal documented many incidents where excessive force was used by security forces under the LAA. In the case of the killing of six demonstrators at Belbari, Morang District (Cases 49-54), the Parliamentary Probe Committee found, “before opening fire the security forces should make an announcement, first take other measures such as batons, tear gas, and firing into the air but in this case they have not used any of these alternatives and have shot the people.”⁵³⁷ At the height of the state of emergency between November 2001 and August 2002, the RNA extensively invoked the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO). TADO allowed the use of “necessary force or weapon” for a range of situations including if “any person or group with or without weapon hinder security force(s) while obeying their duty.”⁵³⁸

The Police Act of 1955 is another example of a law that provides immunity for CDOs or for any police personnel “for action taken...in good faith while discharging...duties.”⁵³⁹ It contains no provisions, which establishes individual criminal liability for extrajudicial executions, disappearances, arbitrary detention, torture, or ill treatment. HRW states: “the only provision that comes close addressing responsibility for human rights abuses is section 34(n), which makes a police official liable for up to five

http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_09_21_OHCHR-Nepal.Report%20on%20The%20April%20Protests.pdf. (Accessed January 10, 2008).

⁵³⁷ “Report of Parliamentary Probe Committee,” as cited in *Waiting for Justice...*

⁵³⁸ “Article 5 J, Appendix III: Terrorist and Disruptive Activities (Control and Punishment) Ordinance, 2004: Extract and Comment,” <http://www.article2.org/mainfile.php/0306/176>. (Accessed January 10, 2008).

⁵³⁹ “Police Act, Section 37” as cited in *Waiting for Justice...*, 53.

years of imprisonment and up to one year suspension of salary if, “he unjustly harasses any person through arrogance or intimidation or causes loss or damage to the property of any person.”⁵⁴⁰

There are two additional acts that human rights organizations, local and international have identified as significant areas of concern that provide protection to perpetrators rather than protect the rights of civilians -- the Army Act of 1959 and the 2006 new Army Act. HRW’s 2008 report *Waiting for Justice* states: “The 1959 Army Act has a provision requiring a court of inquiry board and a court martial for any violations of the Act,”⁵⁴¹ which allows, in principle, making soldiers accountable for human rights abuses. But this has only been evoked for a few cases such as the killings at Doramba and the torture, disappearance, and Maina Sunuwar’s death in custody. Such cases were not brought before regular civilian courts and victims’ families were not allowed to participate in the few trials that were held in military courts. In the Sunuwar case, the RNA, in violation of a court directive, the RNA refused to share the results of the court martial with the police and her family. The 2008 HRW report states:

[T]here are no provisions in the 1959 Act or any other law that stipulates which situations the army is obliged to release full and complete details of court-martial proceeding, including if a FIR was filed, if police commenced criminal investigations, and any judgments.⁵⁴²

⁵⁴⁰ Ibid.

⁵⁴¹ “Army Act, 2106 (1959), Sections 97, 98 and 107,” as cited in *Waiting for Justice*..54.

⁵⁴² *Waiting for Justice*.., 48

The December 2004 WGEID report urged amendments to the Army Act to ensure that civilian courts would have the only legal mandate to try security forces personnel accused of the disappearance, murder, or rape of civilians.⁵⁴³ The subsequent 2006 Army Act put many perpetrators of torture and enforced disappearances outside the reach of punishment. For example, Section 62 of the 2006 Army Act allows for the creation of a special committee to investigate cases of corruption, theft, torture, and “disappearances” and has the provision to allow any prosecution to take place before a Special Court Martial (consisting of a Court of Appeal judge, the Secretary of the Ministry of Defense and the Judge Advocate-General of the NA).⁵⁴⁴ But it still provides that such actions shall not be considered an offence when committed “in good faith in the course of discharging duties.”⁵⁴⁵ The Public Security Act of 1989 is another illustration of the existing weakness in the legal system. The Act was used extensively during the April 2006 *Jano Andolon*, to arrest thousands of suspected members and sympathizers of the CPN-M and members of mainstream political parties.

Nepal’s current *Muluki Ain* also has significant weaknesses. Under it, judges do not have the adequate authority to ascertain that security forces and other state organs cooperate wholly with the courts. *Habeas corpus* cases particularly have suffered because of existing defects in Nepal’s law on perjury and contempt of court. For example, “while witnesses can be liable for perjury under Section 169 of the *Muluki Ain*,

⁵⁴³ Ibid, 54.

⁵⁴⁴ Ibid, 55.

⁵⁴⁵ Ibid.

government officials are not considered witnesses; [consequently] state officials, including security forces personnel, cannot be sanctioned if they fail to tell the truth.”⁵⁴⁶ Furthermore, given that *habeas corpus* petitions can only be filed at Appellate Court or Supreme Court level, the stark absence of sufficient courts and the remoteness of areas where atrocities took place, relatives have to often travel for days before they can lodge a petition. This has special bearing in cases of “disappearances” since district courts are not mandated to hear *habeas corpus* writs.⁵⁴⁷

The Auxiliary Forces

One of the continuing sources of concern regarding impunity in Nepal has been the security sector, both the army and the police. These concerns have related to the result of deploying armed forces in areas to quell the conflict, but in Nepal, apprehension about the armed forces stems also from their code of conduct during “peace” times. The NP in particular has come under severe scrutiny in this regard. Till today, it has a reputation of unprofessionalism marked by high levels of corruption in recruitment,⁵⁴⁸ endorsement of transfers,⁵⁴⁹ misuse in the provision of opportunities to travel, failures in case registration,

⁵⁴⁶ Ibid, 57.

⁵⁴⁷ Ibid.

⁵⁴⁸ Malla argues that police corruption starts from the very first day an individual enters into the force as a trainee. Recruitment officials, for example, demand substantial bribes from a candidate before they will allow them to pass their examination to enter into the police force. He further states that the amount of bribes for a Assistant Sub-Inspector ranges from NPR 300,000 to 500,000 (approximately US\$ 4,600 to 7,700), and for a post of Inspector it ranges from NPR 500,000 to 700,000 (approximately US\$ 7,700 to 10,800). Bribes are also used by police personnel pay substantial bribes to their seniors for getting transfer approval or promotion. See Sapana Pradhan Malla, *Rule of Law and Policing in Nepal, Policing in Nepal: A Collection of Essays*, (London, UK: A Saferworld, September 2007).

⁵⁴⁹ Patronage links are quick established in the police force. Upon appointment of a Inspector General of Police or when police chiefs are posted to new districts, there is an immediate reorganization of

the collection of evidence, interrogation, arrest and in the presentation of cases to court.⁵⁵⁰ In some instances, the NPF has been recorded offering money and bribes to victims' families to drop charges rather than filing FIRs through the proper channels. "In one case," stated a local civil society actor, "the District Police Office informed it would not act on any conflict-related FIRs and that such FIRs have been filed away separately."⁵⁵¹ In other cases even if FIRs were registered, there has been no progress on investigations. The politicizing of police institutions has ultimately undermined the capacity of the police to operate effectively or within the limits of the law and has contributed to the emergence of institutionalized impunity.⁵⁵² This political interference has more than often resulted in offenders being granted amnesty in peace times, and also for the crimes committed during the period of conflict. A report by the ICG states:

The vast majority of crimes during the conflict were not random acts of violence or insubordination. They were the product of a strong set of beliefs, values and experiences at the core of the security forces and the Maoist movement. These institutional cultures not only enabled the crimes to be committed, but gave both sides reason to reject accusations that they had acted unlawfully and to insist that they alone could legitimately judge their conduct. Neither side has changed its approach. In fact both have worked hard to cloud the record and protect their interests.⁵⁵³

departments to ensure that patronage links are firmly entrenched flow of illegal income in not impeded. Malla, *Rule of Law and Policing in Nepal*.

⁵⁵⁰ Ibid.

⁵⁵¹ Meeting with member of FOHRID, Kathmandu, Nepal, July 12, 2009.

⁵⁵² See Sapana Pradhan Malla, *Rule of Law and Policing in Nepal*.

⁵⁵³ See "Nepal: Peace And Justice," Asia Report N°184, International Crisis Group (ICG), January 14, 2010, 6 <http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/184%20nepal%20peace%20and%20justice.ashx>. (Accessed January 12, 2009).

An overview of developments as recent as 2008 and 2009 indicate that an overwhelming number of cases show continuing obfuscation and failure by state authorities to initiate meaningful investigations relating to past grave human rights abuses. The Maina Sunuwar case is a rare exception where have the authorities filed charges, and then only under the pressure of sustained campaigning and litigation. However, although the police and public prosecutor identified four army officers as suspects in that case, murder charges were brought in absentia. Despite the court issuing arrest warrants, to date police have not arrested the suspects.⁵⁵⁴ According to the 2009 HRW and AF report, *Still Waiting for Justice*:

All the political parties (including the CPN-M) have put pressure on the police not to investigate certain cases in order to protect their members. Institutions long opposed to accountability--most notably the Nepal Army--have dug in their heels and steadfastly refused to cooperate with ongoing police investigations. Nepal Army assurances that army officers responsible for human rights violations will be excluded from United Nations peacekeeping duties or from being promoted appear meaningless, since the army not only makes no efforts to investigate the worst abuses but indeed resists such investigations by police.⁵⁵⁵

The Nepali military has its own sphere of influence when it comes to ordinary law enforcement. In fact, according to ICG's 2009 report, an important factor for the lack of effective investigations is the *esprit de corps* between the army and the police. Other reasons include instructions from higher police officers not to investigate cases involving

⁵⁵⁴ Very recently, on September 13, 2009, the court ordered the army to suspend one of the accused and to submit all the documentation it has on the case

⁵⁵⁵ See "Still Waiting for Justice: No End to Impunity in Nepal, *Human Rights Watch and Advocacy Forum*, 2009, http://www.swisspeace.ch/typo3/fileadmin/user_upload/Media/Countries/Nepal/HRW_Advocacy_Forum_No_end_to_impunity_in_Npeal_Oct09.pdf. (Accessed November 10, 2010).

soldiers; fear that the government might change and the army might again seize power, putting police officers at risk; and considerable difference in rank between the junior police officers often responsible for these investigations and senior army officers named in the FIRs. Additional structural factors echo not only Afghanistan's experience but that in general of societies transitioning out of conflict: low reporting of incidences, a lack of confidence in the system, misunderstandings (by both the public and police investigators), insufficient capacity, the lack of accountability, and weak monitoring mechanisms. The lack of incentives and the lack of vertical and horizontal coordinating mechanisms among the police stations, government attorneys, police, civil society and the media serve as a deterrent to the rule of law. Then too is the lack of cooperation in the presentation of evidence before court, insufficient record keeping, poor management and communication, poor laboratory services and the lack of compliance with judicial orders. In more than four years since the CPA, little progress on security sector reform continues to be the single largest threat to the Nepali peace process.

Technical challenges

Nepal's legal system also has a range of other formidable challenges. The statute of limitations serves as a serious impediment to seeking justice, particularly in cases of rape and sexual violence. Currently there are inadequate measures to protect witnesses. Nepal is also plagued by corruption within the judiciary and law enforcement forces that makes "justice" a commodity that goes to the highest bidder. While in Afghanistan warlords and militia commanders are above the reach of the law, in Nepal, politicization of the judiciary and its auxiliary branches continue to be a significant hindrance to legal

access. A spokesperson from the directorate of Public Relations of the Nepali army summed it up as follows: “there is an over politicization of armed and civilian police; they can get promotions depending on who they know within political parties; such parties also provide a lot of protection to various criminal gangs....all of this means a very weak enforcement of law and order.”⁵⁵⁶

Finally, the capital-centric nature of the legal infrastructure means that there are too few judges, lawyers and law enforcement agencies in areas outside of Kathmandu. Consequently, “people in remote areas either cannot access the legal system, or cannot access it on time to file a FIR (because of the statute of limitations) resulting in a dependence on parallel structures of justice.”⁵⁵⁷ The limited number of lawyers and judges, many of who are of poor quality, do little to inspire confidence in an already fragile and often ineffective legal system. A rule of law specialist with Asia Foundation summarized his analysis as follows: “The lawyers here are so bad. They are keen to take as long as possible on any case so as to make as much money as possible. The sort of negative stereotype of divorce lawyers, its all over here. It’s a sad state of affairs. Using mediators is a much better way to resolve disputes than through the court system in this country..”⁵⁵⁸

This section has emphasized the significant challenges that face Nepal’s legal system both in terms of legal content, as well as administrative infrastructure. Given

⁵⁵⁶ Interview with a spokesperson of the Public Relations of Nepali Army, Kathmandu Nepal, July 19, 2009.

⁵⁵⁷ Interview with a local civil society actor, Kathmandu, Nepal, June 30, 2009.

⁵⁵⁸ Interview with rule of law specialist, Asia Foundation, Kathmandu, Nepal, July 3, 2009.

law's strong relationship to justice, it is possible to understand the rationale behind why human rights based organizations and lawyers in Nepal, both national and international, have coalesced heavily in Nepal around the legal system to seek for ways to strengthen and at times construct the reach of accountability legislation and mechanism. A similar, but a far weaker trend in some aspects has also emerged in Afghanistan. It is to this discussion of law as a site for human rights activism that this chapter now turns.

Ordinary Laws in Extraordinary Times: A Site for Mobilization

Given the scope and magnitude of impunity in both Afghanistan and Nepal, the law has become a critical site for mobilization for greater protection for the civilians. This kind of activism is motivated by a terse logic – more laws mean greater accountability; and the philosophy of inverse proportionality – the greater the number of laws, the lower the possibility of impunity. Correspondingly, a significant site for mobilization for both Afghan and Nepal human rights actors and lawyers has been the Rome Statute for the ICC. Since February 10, 2003, Afghanistan has been a signatory to the Rome Statute, and in recent years, this has brought together Afghan lawyers and civil society actors to push the GoA for compliance with its international commitments. In Afghanistan the local Afghanistan Watch (AW) has taken its leadership role seriously, acting as the Afghan member of the international coalition for the ICC in this regard. Although in its infant stages, AW in its first major activity, held a comprehensive consultative meeting in October 2009, bringing together the AIHRC, representatives of the Afghanistan's judicial sectors, including representatives of the justice sector and Taqnin, the legislative department of the Ministry of Justice (MoJ), civil institutions,

legal experts and representatives of international human rights organizations. The focus of the meeting, and the ensuing discussions on compliance with ICC has not been with a focus on the question of “transitional justice” per se, but rather on amending national criminal laws. Thus, for example, Afghan lawyers have been pushing their government to take on the legal responsibility to investigate and prosecute the crimes listed in Articles 6,7 and 8 as per the requirement of the Rome Statute. They also look to the standards of fair trial outlined in the Statute to push for a revision of the national laws dealing with prosecutions.

A significant gap in Afghanistan’s legal system today is the right of suspects and accused persons detailed in Articles 66, 67 and 85, the protection of victims and witnesses outlined in Paragraph 3 of Article 68 and their right to compensation in Article 75 of the Rome Statute. According to Afghan lawyer, these specific legal lacunae demand immediate attention to strengthen Afghanistan’s criminal procedural law, criminal law, law governing crimes against Internal and External Security of the Country and the Law of Detecting and Investigating Administrative Offences.

In contrast to Afghanistan, Nepal has never signed the Rome Statute. But the current transitional period, with the general mobilization around “transitional justice” activities has provided a unique opportunity for Nepali legal actors and general human rights activists to push for Nepal’s accession to the ICC community. While there is recognition that the Rome Statute will not have retroactive effect, since its establishment in 2001, the Nepal Campaign on International Criminal Court (NCICC), a loosely established coalition of human rights NGOs, media, lawyers and academics, coordinated by the local Informal Sector Service Center (INSEC) and the Nepal Bar Association

(NBA) have been actively involved in putting pressure on the Nepali government to ratify the Statute. The NCICC in particular has conducted conducting education and promotional campaigns to build support for the ratification, which have included working with members of parliament (MPs), bureaucrats and other stakeholders. The ratification, both NCICC and NBA argue would strengthen Nepal's existing laws in accordance with international standards. More importantly, as pointed out in Officer-in-Charge Office of the OHCHR-Nepal David Johnson's address to the Nepal Bar Association (NBA) in 2006, the ratification would ultimately bring about changes in the legislative process that would "promote accountability, place the Nepal Army personnel under the jurisdiction of civilian courts, criminalize torture and ensure that blanket amnesties are not granted for serious human rights violations."⁵⁵⁹

A striking distinction between Afghanistan and Nepal is the state and strength of civil society, particularly when one refers to contemporary official non-state organizations as opposed to more traditional associations and networks. Rights based advocacy organizations have had a longer history in Nepal, particularly since its first democratic shift in 1990. The resultant professionalization, specialization and advocacy skills has meant that the human rights movement in Nepal has been, even in times of conflict, been notably strong. It is these civil society actors who have spearheaded the movement for "transitional justice" in Nepal. These organizations have particularly

⁵⁵⁹ Address by David Johnson, Office of the United Nations High Commissioner for Human Rights in Nepal, *Accountability and the International Criminal Court Nepal Bar Association*, Kathmandu, Nepal, August 6, 2006, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2006/2006_08_06_HCR_DJ_Speech_NBA.pdf. (Accessed March 20, 2011).

mobilized around the commitments made in the CPA -- the disappearance commission and the TRC -- and for the criminalization of torture, providing recommendations on the draft laws for the commissions and pushing for anti-torture legislation, while simultaneously filing FIRs on behalf of victims of conflict. “We will continue to file FIRs” insisted a human rights lawyer, “and push on for revised drafts of the TRC and the disappearance commission...we will have to push for anti-torture legislation...till they meet international standards...we have to continue to do our part till the time when transitional justice becomes a priority for the government.”⁵⁶⁰

Conclusion

This chapter set out to discuss a component of justice -- the law -- and examine its relationship to “transitional justice.” To that end, it laid out the legal landscape in Afghanistan and Nepal, focusing on the multiple systems of parallel legal codes that exist in both, the tensions they produce, and the challenges they pose to creating a comprehensive legal framework. In Afghanistan, it traced the customary laws and methods of dispute resolution, the role of the *Shari’a*, and the political and ideological tensions between the two. It then examined the role of customary laws in Nepal, its traditional dispute resolution mechanisms, and focused on how the secularization process granted primacy to a western-based penal code and the existing legal lacunae that continues to challenge human rights activists and lawyers in the country. In both cases, the chapter also explored the subsidiary branches of the security sector particularly the state of the police and the overall technical challenges faced by the respective systems of

⁵⁶⁰ Interview with a human rights lawyer, Kathmandu, Nepal, July 19, 2009.

rule of law in both countries. Finally, it emphasized how human rights actors in both countries perceived law as a vital instrument to challenge both *de jure* and *de facto* impunity in their respective contexts.

What emerged in this discussion is that law's position within both these transitions is unique because of the dualistic roles they are expected to fulfill --that is, *retroactive* justice, to underscore the criminality of war's excesses -- and *proactive* or *successive* justice, to create a new set of rules to determine the impermissibility of certain acts even during times of peace. Correspondingly, then, this blurring of the lines between past and present justice underscores that since law derives legitimacy from past events, inherits problems from the past and strives to fulfill past promises,⁵⁶¹ justice cannot be an auxiliary component of the peacebuilding process. The chapter also laid some crucial distinctions between the two emerging legal systems -- Afghanistan, where the tensions between parallel legal codes often overshadow the functionality of the courts and impede justice deliverance, and Nepal, where legal *lacunae* has consistently ensured that those in power use excessive ways to suppress the Nepali population. These distinctions are critical, because they question the formulaic prescriptions of "rule of law" and "transitional justice" offered to countries trying to emerge from conflict. Finally, the chapter emphatically underscored that the local context in both countries, even those relating to customary laws and traditional mechanisms of adjudication are neither unitary entities, nor static institutions. Instead, as the discussion highlighted, the resistance to "legal implants" in Afghanistan was not simply a consequence of rejecting a western-

⁵⁶¹ John J. Moore, "Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador," *Stanford Law Review* 43, no. 3 (February 1991), 733

styled framework, but also a response to the brutal ways in which the PDPA attempted to secularize the legal-political system and rifts between capital-centric elite and the agrarian society. Further, the vulnerability of the jirgas to manipulation by military commanders and later the Taliban and warlords underscore that traditional practices, are not in and of themselves independent and resistant to contextual factors. Finally, it highlighted that growing scholarship and concerted attempt to learn about Afghan cultural practices of justice is limiting, particularly since it focuses on understanding in particular the Pushtunwali. In a context where there are deep-rooted tensions between different ethnic groups, this narrowed focus on singular mechanisms for dispute resolution does not necessarily provide an in-depth grasp of the multiple dimensions and manifestations of justice within and among Afghan cultures. Nepal's history of the monarchy formalizing the Panchayat system, and even earlier, the institutionalization of caste hierarchies also indicate that what is considered local and customary are not necessarily the static, impervious and unchanging local that contemporary understandings of the local imply. In both instances, traditional mechanisms' general inability to incorporate marginalized voices, of the women, or of minority communities, also highlight why official and secular codes of law have their appeal in both contexts.

Ultimately however, the law, writ large, while critical in establishing norms of justice and "transitional justice" is not the only instrument to challenge impunity or address every dimension of injustice experienced by the Afghan and Nepali populations; and its challenges alone do not explain the current situation in Afghanistan and Nepal. It is to the larger questions of de facto impunity and what constitutes justice in the two contexts respectively to which the dissertation next turns.

CHAPTER 5

THROUGH LOCAL LENSES: THE POLITICIZATION OF TRANSITIONAL JUSTICE

She sat quietly on the broken, dirty bench, her eyes darting to my face and his, trying to follow the conversation in a language she did not understand. In the dim light of the dingy, cramped tea-stall in which this man, a member of a victims' group, wanted us to meet, I could see her expressionless face, though still beautiful, lined with worry, exhaustion, and resignation. In her hands, she clutched a large black and white photo of a handsome man with thick wavy hair and dark glasses. "This was her husband," he explains to me in Hindi: "he was beaten, then killed by Maoists in front of her eyes. She needs some justice, some answers -- she is still waiting -- just like we all are."⁵⁶²

On May 9, 2010, in an unprecedented event, more than 100 victims from every phase of the country's long-standing conflict, and their representatives from every region of Afghanistan convened for the Victims' Jirga for Justice in Kabul. Organized by the Transitional Justice Coordination Group (TJCG), a network of 25 civil society organizations, the event was a response to the much criticized National Consultative Peace Jirga (NCPJ) for its lack of transparency and its pandering to President Karzai's loyalists. The Victims' Jirga brought together Afghanistan's "forgotten majority" – the victims of Afghanistan's wars. In the discussion groups that ensued, they stressed their demand for the trial of war criminals, for social and

⁵⁶² Interview with a member of Maoists' Victims Association [MVA], outskirts of Kathmandu, Nepal, July 11, 2009.

economic support, support for disabled victims, transparent and fair reconstruction efforts, aid delivery to conflict-affected populations, and the creation of more spaces for victims to express their claims.⁵⁶³ When breakout groups were asked about measures that could be taken to address justice, some recommended the removal of perpetrators from government, the prevention of future crimes through comprehensive disarmament and the freezing of perpetrators' assets.⁵⁶⁴ Finally, participants articulated clear roles for the international community -- to aid in the location and documentation of mass graves and other atrocity sites, and to strongly support the transitional justice process.⁵⁶⁵

In articulating their claims, survivors in Afghanistan and Nepal distil the “intellectual and normative framework of transitional justice which float in the realm of the transcendent”⁵⁶⁶ to matters that are directly relevant to their lives. Their demands -- of punitive punishment, of reconciliation and forgiveness, but not for the worst perpetrators, a rejection of amnesty, of access to basic needs (compensation and/or reparation) and acknowledgement -- fundamentally assert the *universal* value

⁵⁶³ I was present in Afghanistan during the period of the preparation for the NCPJ and the Victims' Jirga. These demands were also outlined in email correspondence with the Transitional Justice Coordination Group at the end of the Jirga. Also see “Victims' Jirga for Justice, National Reconciliation is Not Possible Without Justice,” *Afghanistan Watch*, May 10, 2010, <http://www.watchafghanistan.org/article023.php>. (Accessed September 12, 2010).

⁵⁶⁴ *Victims' Jirga for Justice...*

⁵⁶⁵ Ibid.

⁵⁶⁶ Lars and Waldorf, *Localizing Transitional Justice*, 4.

of justice.⁵⁶⁷ This universal claim to “right the wrongs,” this chapter essentially argues, seriously calls into question the legitimacy of the new trend within transitional justice of coating some of the most difficult questions (e.g. how to address the issue of perpetrators) facing societies in transition with the “dressings” of reconciliation (i.e. framing warlord/perpetrator bargaining as a process of reconciliation, claiming legitimacy from local customs and values). In other words serious questions about accountability and the power exerted by warlords and elites in political bargaining are, it maybe argued, evaded with superficial measures. These realities of *ongoing* injustice blur the line between the past and present, and pose one of the most significant challenges to the standardized transitional justice toolkit. Perhaps the most exigent problem of “addressing the past” remains: How does internal and external politicization around the transitional justice process impact the objectives set such packages? What do such tensions reveal about *which* local is heard and prioritized and for whom is transitional justice performed? Does situating the local within a preordained transitional justice framework necessarily make it responsive and legitimate to particular contexts? And finally, should there be sequencing to the transitional justice question determined by the local context?

This chapter explores these questioned above when it asserts: engaging with the local is not only complex, but, in certain circumstances, could be merely symbolic and even futile if the goal is to fit the “local” into a pre-existing standard. In other words, the local becomes acceptable so long as it does not challenge some of the

⁵⁶⁷ The most prominent demands of Afghan and Nepal victims and survivors, i.e. the “local voices” will be discussed in detail in Chapter 6.

underlying normative assumptions and the ordained good that transitional justice toolkits offer and deployed only to bolster the legitimacy of a transitional justice package. In the case of Afghanistan, it has focused international attention on how to use the jirgas to explore issues of peace and reconciliation, while moving away from a concerted discussion of justice with victims.⁵⁶⁸ In Nepal, the sufferings of the Nepali population have legitimized the focus on political justice. Actors such as ICTJ, USIP and ICJ and the Asia Foundation to develop and strengthen the country's legal reform and promote peacebuilding activities, but has in the process generally overlooked specific concerns of socioeconomic realities and the challenges of impunity in the country. Sometimes, this study argues, the strategic deployment of the local serves to inculcate a more authentic cultural flavor to such mechanisms, as is the case particularly in the exercises for "reconciliation." Framed differently, the fashionable trend to situate the "local" in transitional justice with its overt focus on how indigenous communities "do" reconciliation obfuscates the imperative and importunate claims against ongoing injustices. Ultimately, the standardized toolkit with its "kinder, gentler" formula stops short of being able to deliver on the very front from which it purports to derive its legitimacy: the voices of survivors.

In tackling the very challenging and highly complex terrain of transitional justice and ordinary justice, perhaps it is best to first engage with dissecting the

⁵⁶⁸ International excitement about the most recent Peace Jirga held in 2010 was palpable among the international community and among the Washington D.C. community at the same time that Afghan local civil society actors were highly skeptical and critical of the process of the jirga and its outcomes since they predicted that real concerns about justice and peace would be avoided in the discussions between hand-picked participants and supporters of the Karzai administration.

assumptions, dynamics and limitations of the transitional justice discourse in Afghanistan and Nepal before delving into the tensions between transitional justice and ordinary justice. This chapter constitutes the first part of this discussion – the politics of transitional justice in the Afghan and Nepal contexts and whether their respective frameworks are apposite to the very fluid, non-linear and often confusing period termed as a “transition.” It begins by providing an overview of the actual commitments on transitional justice in both countries, and the subsequent politicking around them. Next it analyzes what has been unfolding in transitional justice in each context. Finally, it brings up the question of timing and sequencing, and examines within each context what is feasible.

Through a Kaleidoscope: Transitional Justice in Afghanistan and Nepal

Afghanistan’s Transitional Justice

The 2005 National Action Plan is an ambitious document. Limited to a mandate of four years, it had an impressive framework, identifying five key fields of activity: (1) establishment of national remembrance days, memorials and museums; (2) establishing accountable state institutions and purging human rights violators and criminals from the state institutions (through appropriate legislation, establishing a Civil Service Commission, an Advisory Panel for Presidential Appointments); (3) truth-seeking and documentation; (4) promotion of reconciliation and national unity; and (5) establishment of accountability mechanisms (using a legal, procedural and institutional framework to clarify the question of non-amnesty and ensure that

Afghanistan complies with Islamic laws and international obligations such that perpetrators of crimes against humanity are not overlooked).⁵⁶⁹

An analysis of the plan indicates that it is a comprehensive effort to address the expansionist position of transitional justice -- it takes into account the importance of symbolic gestures of acknowledgement, the importance of documentation and concrete measures to prevent individuals with records of wartime atrocities from occupying public posts. At the same time, it obligates the GoA to begin the process of looking into how communities in war-torn Afghanistan can be reconciled. In short, on paper at least, the National Action Plan is a comprehensive arrangement, promising to deliver on justice *and* reconciliation. Nevertheless, it is possible to offer some critiques of the document -- it makes no mention of gender and gender based crimes, of compensation and/or reparations for victims and makes no reference to rehabilitating survivors with disabilities. Furthermore, the document is very weak on the issue of accountability and any form of retribution; in fact, anecdotal evidence collected in the course of the research underscored the unpopularity of any discussion of the possibility of trials, both among international power-brokers, including the United States and political actors within Afghanistan.

What's in Name? The Search for a Term for Transitional Justice

In Afghanistan, the term “transitional justice” quickly became polarizing and provocative, dragging the United Nations Assistance Mission in Afghanistan

⁵⁶⁹ For a more detailed look see “Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan,” <http://www.norway.org.af/NR/rdonlyres/C9F4CAAC24814924BA760231E37D9BC5/72001/070109TJHandlingsplanenpdf.pdf>. (Accessed January 12, 2007). .

(UNAMA) and other international actors into a direct confrontation with key warlords and militia commanders, who through the implementation of the “peace at all costs formula” quickly rose to prominence soon after the signing of the 2001 Bonn Agreement. Subsequently, international actors involved with human rights and “transitional justice” promotion, instead of being able to define a clear agenda for culpability for the past and accountability for the future, quickly found themselves in a defensive position, unable to control the growing vitriol emanating from these political actors. In 2005, when the momentum was building around the National Action Plan, warlords and militia commanders were quick to conflate the discussion of accountability with that of a western-led agenda to legally prosecute “holy warriors” who had fought for Islam and Afghanistan against the Soviet invasion. By 2007, when the amnesty bill was first introduced in the Afghan parliament, they were dictating the rhetoric significantly, and organized perhaps one of the largest public rallies held in Kabul since 2001, comprising of 25,000 people to show support for the draft legislation. Accounts and analyses of the event vary, but what was evident was the momentum around the demand for blanket amnesties for all those who fought in the decades of war. Paul Fishtein, former director of AREU reflected: “you saw [the warlords’] continuing ability to mobilize people and to potentially influence politics.”⁵⁷⁰ USIP Rule of Law advisor Scott Worden noted:

[F]or the thousands of people who came out in support of the amnesty law, transitional justice meant prosecution of holy warriors even more important,

⁵⁷⁰ As cited in “Former Afghan Warlords Rally For Amnesty,” *Christian Science Monitor*, February 26, 2007. <http://www.csmonitor.com/2007/0226/p06s01-wosc.html>. (Accessed February 12, 2008).

removal of their patrons on behest of the infidels...they had the advantage of using the religious language because these warlords define themselves as mujaheds who had fought for Islam against the Russians, and they gloss over the fact they have killed thousands of their own country men who are also “good” [quotes with fingers] Muslims.⁵⁷¹

This hijacking of the project by warlords and militia commanders, particularly, the harnessing of religious language provides insight into several emerging dynamics -- (i) the increasing strength of warlords; (ii) their ability to harness the nationalist sentiments particularly in light of the growing frustration and resentment towards the military forces; (iii) the heavy-handed approach of international presence and their failure to deliver on their promises to the Afghan people; (iv) the “peace” rhetoric gathering strength in Karzai’s speeches and amongst international stakeholders all the while when “transitional justice” became “a code word for prosecuting warlords or ushering western liberalism or both.”⁵⁷²

The immediate reaction from the international community working on human rights and “transitional justice” was to seek a new term that would be both less antagonistic by implying a shift away from punitive measures. Local human rights actors interviewed for this research, however, saw the knee-jerk response as a confirmation of what they already feared -- the UN’s growing reluctance to take a firm stand on the negotiating for political positions between international actors and warlords. Earlier, UNAMA had withdrawn publication of a report that would have

⁵⁷¹ Interview with Scott Worden, USIP Rule of Law Advisor, Washington D.C, June 10 2008.

⁵⁷² Interview with Scott Worden, Rule of Law Advisor, USIP, Washington D.C, 2008.

supported the findings of HRW and the AIHRC.⁵⁷³ Its eagerness to seek a less minatory term was further indication that it refused to “ruffle feathers” and challenge policies that would inevitably destroy the momentum around the National Action Plan.

According to some of the local civil society and human rights actors, however, the energy and focus on trying to find a literal translation of the term “transitional justice” that would also not be considered antagonistic was an almost ineffectual endeavor. They offered that this in fact stressed the weak position of the international human rights while such a term, even in translation, does not in the end either capture the realities in Afghanistan nor the fundamental demands for justice in the country. Rina Amiri, formerly with the Open Society Institute (OSI) captures these contradictions best when she reflected:

When translated into Farsi the words transitional justice [at best] sounds awkward. In Farsi we say *adalate (justice) taqqalli (transition)*, which literally means ‘justice in transition.’ But the reality is that we don’t even have current justice in Afghanistan. We don’t even have rule of law. There is still tremendous impunity... there is still gross violations of human rights and the rights that have been accorded to the population in the constitution is only on paper. Why are we even talking about transitional justice when we don’t even have current justice and what does it mean for us to be advocating for justice in transition?⁵⁷⁴

⁵⁷³ Expressed in interviews held with international civil society actors in Washington D.C. and Afghanistan between 2008 and 2010. Also Hazan, *Transitional Justice After September 11*.

⁵⁷⁴ Interview with Rina Amiri, Open Society Institute, New York, July 9, 2008.

Outside of these contradictions, other local actors questioned whether a name change would necessarily pull the wool over the eyes of those most opposed to any mechanism for accountability. “I think that you can call it whatever you want,” noted an Afghan rights activist, “no one is going to think its something different once you start talking about reform and removing war criminals from power. Frankly speaking, I don’t understand how the name change helps at all.”⁵⁷⁵ What this study found to be an issue of even greater concern among the local actors was the depiction of “transitional justice” as a western agenda and how quickly the international community assumed a defensive position, as if the *raison d’être* for demanding accountability itself was borne out of western sensibilities, rather than local realities. An Afghan human rights activist working with victims summarized it as the following:

[T]his idea, [that transitional justice is a western agenda] is mainly coming from people who have blood on their hands. If it is an imposed idea from the west what about the afghan people who have suffered for the last 30 years, what about the people who have lost their loved ones and who continue to experience violations for the last thirty years....i am really shocked when I hear something like that...what about an Afghan’s human rights?⁵⁷⁶

A Tale of Two Doctrines

A discussion about the local cannot take place in a vacuum; it needs to engage with the religious and cultural contours of the context. In Afghanistan, as Chapter 4 pointed out, the complexity of parallel legal systems, an outcome of the attempted

⁵⁷⁵ Interview with an Afghan human rights activist, Washington D.C. August 10, 2008.

⁵⁷⁶ Phone interview with an Afghan civil society actor, July 11, 2008.

synthesizing of western laws, *Shari'a*, and customary practices, has led to multiple and sometimes contradictory laws. The intermingling of culture and religion has also resulted in differing understandings and practices of justice, some of which pose serious challenges to international legal norms. Two particular aspects about justice have special relevance in the discussion on “transitional justice” in the Afghan context, which compliment international humanitarian law’s position on war crimes and crimes against humanity.

In 2007, when the Wolesi Jirga (lower house of parliament) circulated the draft bill for amnesty, Afghanistan’s highest body of mullahs (clerics) criticized the legislation, stating that under *Shari'a* only the victims of crimes, not the state, have the right to forgive the perpetrators. This doctrine of *Haqqul Ibad* is based on the principle that in Islam, sins against men are forgivable only if the offended pardon the offender.⁵⁷⁷ Islamic clerics’ engagement with the amnesty bill highlights that blanket amnesty against war criminals is as much a violation of international legal norms as of Islamic jurisprudence, and justice for war crimes may be approached from the standpoint of Islamic rules of conflict, which clearly delineate what may not be hurt or destroyed in war.⁵⁷⁸ Indeed, Afghan tradition is also infused by various injunctions in the *Shari'a*, which uphold that those with blood on their hands should stand in the back row, as much in the mosque as in government. Hence, “consulting the local”

⁵⁷⁷ See for example Hammudah Abdulati, “The Islamic Perspective on Sin,” *On Islam*, September 13 2006 <http://www.onislam.net/english/shariah/refine-your-heart/it-is-never-too-late/441343-the-islamic-perspective-of-sin.html>. (Accessed March 8, 2008).

⁵⁷⁸ Ibid.

when designing and implementing a transitional justice package is not a matter of objectively infusing static local practices, but of selectively infusing subjective interpretations of the local. The question is, then, whose subjective interpretations of the local – which in any case is dynamic and evolving -- are prioritized?

Both these doctrines -- one that clearly asserts the moral authority of victims to address their sufferings, and another that pronounces moral opprobrium on perpetrators – are powerful articulations of Islam’s position on victims’ prerogative to justice claims, accountability and forgiveness. They also speak to the local that has been obscured by the existing power dynamics and hierarchies between and amongst local actors and local actors and the international community. Further, if harnessed at the right moment, these doctrines might have resulted in a different political outcome. Certainly, an emphasis on *Haqqul Rab* might have allowed for a deeper exploration of how victims were articulating their demands and certainly created the scope for developing mechanisms for compensations and/or reparations. Islamic and Afghan chastisements on criminal acts, could have strengthened the standardized practices of vetting and lustration that took place, although not necessarily effectively, during the parliamentary elections of 2005.⁵⁷⁹ While such a scenario is speculative, the actual developments between 2002 and 2007 indicate that the window of opportunity to privilege the “local” and allow it to be the centripetal force driving questions of justice, accountability and reconciliation was undeniably lost.

⁵⁷⁹ See the section on Justice as Marginalization, Chapter 7.

Engaging with local norms and practices can challenge standardized practices; sometimes, this engagement can be uncomfortable and at times impossibly incompatible. An extreme example is the continuing conflict between the death penalty in national laws and the prohibition of such a form of punishment in international laws. Even sincere enthusiasm to incorporate the local does not iron away fundamental differences; such tensions are particularly significant when neoliberal assumptions of “human rights” and “justice” collide with local communities’ understandings and practices of the same. An international actor working on human rights in Afghanistan described this tension between universalism and cultural relativism in the Afghan context:

[T]he dialogue on transitional justice as a human rights concept is in a very early stage in Afghanistan in terms of reaching out to the religious community. My experience is that the idea of human rights is not generally accepted by the religious community in Afghanistan at this stage and every time we tried to create a dialogue about Islam and human rights the typical conversation was that Islam and Qur’an provides all the human rights anyone would need...so a discussion of human rights is irrelevant and unnecessary. That was the kind of context in which the transitional justice topic came up. We always had local mullahs at the provincial and regional consultations but I am afraid to say it was very rare when they were constructive participants in these consultations.⁵⁸⁰

Moreover, a local civil society actor assessed that “international law’s position on criminality was too lenient, and might not necessarily be palatable amongst many Afghans who adhere to strict codes of justice and punishment.”⁵⁸¹ Several of the local

⁵⁸⁰ Phone interview with former international civil society actor working in Afghanistan, August 8, 2008.

⁵⁸¹ Phone interview with Afghan local civil society actor, Afghanistan, August 3, 2008.

human rights and transitional justice activists interviewed also questioned the wisdom of international organizations trying to locate transitional justice's position in Islam. At one level, like Amiri above, they pointed to the absurdity of seeking accountability for extraordinary crimes in a context that is neither in a clear state of transition nor has a culture of effective justice. At another, they were concerned that it detracted from the actual task of delivering on justice claims and responding to the urgent realities in Afghanistan. A local human rights actor passionately captured this dilemma when she said:

I don't think justice contradicts any religion. I don't think transitional justice needs to be analyzed from the point of Islam. If you want justice, I don't know any part of the Qu'ran and any part of the Shari'a that discourages people from seeking justice...I think this discussion of cultural relevance of transitional justice in Afghanistan is a whole lot of excuses that the international community makes. When they wanted to bomb us they never asked consulted our culture or the Islamic perspective. When they send troops they never ask if it is contradicting our culture or our religion. But when it comes to the issue of justice, then they raise the question of whether we should do it and does it contradict the religion.⁵⁸²

This reiteration, that external actors' search for the "right" answers in a possible intersection between Islam and "transitional justice" some of the local actors asserted, is a more of an intellectual exercise at and detracts from addressing the urgent problems in Afghanistan -- the issues of ongoing impunity, poor governance and poverty. Cherry picking by external actors could amount to opening of a Pandora's box that could be seen as privileging certain interpretations of justice and

⁵⁸² Phone interview with Afghan human rights actor, Afghanistan, August 8, 2008.

reconciliation over others. In Afghanistan's geopolitical landscape where there is a history of mistrust and hostility between ethnopolitical identities and between "secular institutions" and more "traditional-oriented" communities (outlined in Chapter 4) some expressed concern that such naïve efforts could mean new fault lines would be drawn, or old fault lines could be deepened. Some also considered that an overzealous but naïve effort to delve into the specificities of Islam's philosophy of justice would be a waste of time and resources particularly give that the Afghans' insistence on justice claims already mirrored what the universalist position on justice promises to deliver. An important question to ask in such a pursuit would be how to deal with a potential fall-out when such an endeavor did not result in the answers that international actors were necessarily looking for. An Afghan human rights activist framed these very critical questions in her following reflection:

I have mixed feelings about consulting Islam for transitional justice and not particularly good ones. We can rely on the Moroccan experience... but a lot of times international organizations fail to recognize it is more often than not, not about just religion...its about cultural practices... and trying to pull apart the amalgamation of tribal practice, religious practice and cultural practice, superstition—just deciphering these layers is the work of decades. For you to say you want to encourage a native discourse on Islam and an Afghan based Islam and transitional justice ---you are playing with fire. First of all, you don't understand Islam. None of us are religious experts here. The way I understand Islam is very different from the way tribal elders in Jalalabad understand Islam. Do you really want to have a discussion about Islamic principles and justice and accountability amongst religious clergy many of whom are quasi-literate? This question is not about indigenous dialogue so don't force it. What you will do is paint your efforts with an Islamic veneer and say now we have an indigenous discourse. And what if you start getting answers you don't like? Are you prepared to face the fact that you don't have

legitimacy and authority in this area at all?⁵⁸³

Such questions, about legitimacy and authority, and of appropriate interpretations bring back the questions on which this dissertation is premised – where is the local situated in the lofty transitional justice goals? In the case of Afghanistan, its position seems to be still at the margins, available only to be gainfully employed as and when it would fit the international political agenda and a predisposed framework of what transitional justice would look like in the country. This assertion holds true when considering the discussions around the possibility of a TRC in particular, and of reconciliation in general in Afghanistan.

Today, international think tanks, policy-makers, researchers and academics are churning out research papers and policy proposals examining Islamic/Afghan-based models of “reconciliation” for *afwa* (forgiveness), *sulh* (arbitration) and *jirgas* for dispute resolution. While culturally sensitive and informed mechanisms for promoting ways to reconcile hostile parties are undisputedly critical, the privileging of the discussion of reconciliation, its basis in Islam and the absence of any discussion on justice raises some questions. For those who have been involved in the human rights field under dire circumstances, the focus on “reconciliation” as a singular technique, a “magic bullet” that will attain societal healing through certain culturally bound exercises, diminishes it as a progression, and undermines it as an

⁵⁸³ Interview, Afghan human rights actor, Washington D.C. September 12, 2008.

outcome of some extremely difficult but irrefutably long-term processes.⁵⁸⁴ For these actors, this overt focus on “reconciliation” signals a softer, resigned approach and ultimately futile route that international stakeholders wish to pursue and seem comfortably pursuing. An international long-term observer of Afghanistan remarked:

After all this pomp and circumstance around reconciliation, what does it really mean? The word gets tossed around a lot in Afghanistan, in policy circles, in the UN, in donor communities and afghan officials but I don’t think anyone has ever really come up with a definition of what reconciliation means and unless we know what were talking about, people will be talking over each other and offering their own version of reconciliation.⁵⁸⁵

Some critics recognize that if done the “right way” and used as a “basket of carrots and sticks” with the threat of prosecution, reconciliation could have potential. But without a functional judicial system and a rampant system of corruption “the stick” has little leverage. “In the offer of reconciliation”, noted an Afghan human rights actor, “it is almost seen as a mechanism, not a process that is only enabled when certain reformative measures are taken. In marginalizing these reforms, the space and scope for transitional justice, and reconciliation gets reduced to mere “window-dressing.”⁵⁸⁶ Ultimately, the possibility of a truth commission, if it ever were to happen, remains suspect for those who question the effectiveness of a mechanism, particularly if it is premised on amnesty provisions. An international

⁵⁸⁴ Views expressed in interviews held in Washington D.C. and Afghanistan between 2008 and 2010.

⁵⁸⁵ Interview with independent Afghanistan analyst, Washington D.C. July 11, 2008.

⁵⁸⁶ Follow-up interview with local Afghan civil society actor, Kabul, Afghanistan, April 3, 2010.

actor privately acknowledged: “I am personally skeptical of the truth commission in a lot of scenarios because its an attractive option when there is no political will for demanding accountability, nobody loses, nobody gets punished and it looks Karzai has done something about transitional justice.”⁵⁸⁷

In the discussion about a truth commission and reconciliation, what do the Afghans want? According to the only comprehensive report that exists thus far on this topic, the AIHRC’s *A Call for Justice* published in 2005, 95% were of those interviewed that it is important to establish the truth of wartime violations.⁵⁸⁸ But the report noted that the concept of a truth commission is virtually unknown in Afghanistan: “While the concept of truth seeking was explained to respondents in the survey, it was not possible to fully convey the workings and benefits of a truth commission in these circumstances.”⁵⁸⁹ This reality is an important observation because first, it signals to international transitional justice actors that an “empty canvass” exists on which to draw the contours of a truth commission modeled on past experiences in other contexts, predominantly the South African version with its emphasis on forgiveness and amnesties. Second, it generates the possibility that Afghans might see such a mechanism as an external mechanism, which is ultimately ineffective in addressing pressing questions that today dominate Afghan lives.

⁵⁸⁷ Phone Interview, international actor, Afghanistan August 12, 2008.

⁵⁸⁸ See “A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan,” *Afghanistan Independent Human Rights Commission (AIHRC)* 2005, 29 <http://www.ictj.org/static/Asia/Afghanistan/aihrc.callforjustice.eng.pdf>. (Accessed February 27, 2007).

⁵⁸⁹ Ibid.

The discussion above traced the emergence of the transitional justice discourse in Afghanistan and how quickly it became a polarizing topic in a tenuous landscape pitting a weak civil society and human rights community against an increasingly powerful group of warlords. It also discussed the defensive position that the international community, particularly the UN occupied in response and the corresponding search that was initiated to capture the essence of transitional justice that would not seem too provocative. It also focused on how local civil society actors perceived and analyzed such a response, and their specific criticisms about what essentially amounted to a disengagement and reluctance on the part of the international community to address victims' calls for justice and their understanding of what such an effort would encompass. Finally, and perhaps most importantly, it provided insight into how the overt focus by international actors on reconciliation resulted in being considered a strategy, rather than a process, that could only truly begin once concerns of survivors and the Afghan population could be addressed. The section ultimately highlighted one of the areas of serious contention that requires further and extensive scholarly exploration and continuous debate, which is beyond the scope of this dissertation, but which have been discussed at some length in Chapter 4 – the tensions between the assumptions and formula of justice in standardized transitional justice efforts, and the conceptualization and exercise of justice (and reconciliation) both within the *Shari'a* and between *Shari'a*, customary laws and the diverse cultural practices in Afghanistan.

Nepal's Accounting for the Past

Nepal's CPA outlines three specific mechanisms to address transitional justice. Article 5.2.3 specifically talks about the preparation "of the disappeared persons or those killed in the conflict with their real name, surname and residential address and publicize it within 60 days from the day of signing this agreement and inform the family members of concerned persons."⁵⁹⁰ Article 5.2.4 mentions the formations of a "national peace and rehabilitation commission to initiate process of rehabilitation and providing relief support to the persons victimized by the conflict and normalize the difficult situation created due to the armed conflict."⁵⁹¹ And finally, Article 5.2.4 is an agreement between the government of Nepal and the CPN-Maoists to create "a high level Truth and Reconciliation Commission (TRC) on mutual understanding to conduct investigation about those who were involved in gross violation of human rights at the time of the conflict and those who committed crime against humanity and to create the situation of reconciliation in the society."⁵⁹²

Questioning the Transitional Justice Template in the CPA

At one level, CPA's detailed engagement with "transitional justice" can be commended for outlining specific mechanisms for the specific needs that emerged in Nepal as a consequence of war -- the large number of enforced disappearances and a

⁵⁹⁰ See "Comprehensive Peace Agreement 2006"
<http://www.satp.org/satporgtp/countries/nepal/document/papers/peaceagreement.htm>. (Accessed February 9, 2008).

⁵⁹¹ Ibid.

⁵⁹² Ibid.

demand to know of the whereabouts for loved ones; for “truth-seeking” about the perpetrators of atrocities and the violations experienced by Nepali citizens and of the urgent need to provide relief and compensation to survivors. At another level however, these very specifications with their respective mandates raises deep-seated concerns. As in Afghanistan, it raises questions about how and why the appeal of the South African styled TRC became the blueprint for a “transitional justice mechanism” in Nepal and indeed the appropriateness of such a model in the Nepal context.

Chapter 2 provided an overview of the intense negotiations around the CPA involving national political actors and international specialists, particularly the roles of Günther Baechler and South African Hannes Smibert in the process. In retrospect, Smibert’s particular contribution in bringing a discussion of a South African styled TRC to the forefront of the deliberations of a transitional justice process is indeed notable. Such an assertion is further supported by the subsequent visits of Nepali politicians to South Africa and several visits by South African experts to Nepal. Later on, interviews revealed that with Bachelor’s involvement, the Peruvian Truth Commission was also brought to the attention of the negotiating parties, together with NTTP supported visits to Peru, but “these visits did not mitigate the overwhelming primacy of the South African example.”⁵⁹³

The seemingly deliberate introduction of the South African model and the championing of the TRC by the official negotiators and stakeholders in the Nepali

⁵⁹³ Farasat and Hayner, *Negotiating Peace in Nepal*

peace process has not gone unnoticed by some the Nepal human rights community. Amongst both the Nepali elite in the Kathmandu valley and among ordinary Nepalis who have been closely following the political developments in the country, it has been seen as an evidence of the “transitional justice” discussion being an imposition driven by external actors who are either not cognizant of, nor interested in Nepali realities. For such critics, such efforts also undermine the complex intersection of multiple cultures, caste, ethnicity, a feudalistic societal structure, poverty and lack of privilege that determine Nepal’s social realities. They also questioned whether the TRC’s mandate could in any way begin to address the real challenges in Nepal with its history of feudalism, caste-discrimination and the revolutionary shift from a monarchy to a possible federal republic. Further, a focus on a TRC further obfuscates how a predominantly Christian model of public apology and forgiveness could in fact be an alien and alienating exercise for a population consisting of primarily those who are Hindus, followed by Buddhists, Sikhs, Jains, Muslims and other religious persuasions, most of whom fall outside of the immediate Judeo-Christian framework. Further, a lack of understanding of the genesis, purpose and outcome of a TRC model discussed in policy and political circles not only makes such a framework more unfamiliar to not only the ordinary Nepalis who have had no opportunity to engage in a national debate about how an “accounting for the past” process should take place, but serves as a source of perplexity and inaccessibility. One civil society actor pointed out that given the lack of knowledge of such a mechanisms and vague references to

the South African experience, the TRC is at times being confused for a mediation program, similar to the ones that already exist in the country.⁵⁹⁴

For some in the human rights community, the greater concern has been the appropriateness of a reconciliatory mechanism with its focus on confessions and amnesties rather than on punishment. The unfamiliarity of public confessions modeled on the Christian framework has been raised above. The concern about amnesties is prescient, given that Nepal has historically experienced cycles of impunity with formal and informal practices of state, elite pardons, through legal loop-holes and lack of adequate laws for criminality, without individuals, including members of the armed forces, ever being held accountable for their actions. Further, an analysis of the negotiations leads to the emergence of two specific strains, which bears significant weight. First, there was a demand by civil society actors for acknowledging the sufferings of the Nepali population. Second, what may be extrapolated is a notable apprehension amongst negotiators that a mechanism for addressing the past would lead to retributive measures, which would subsequently endanger their positions and even threaten their political ambitions. A former commissioner of the Nepal Human Rights Commission (NHRC) recalls:

[R]ight from the start every one was talking about South Africa...and how it dealt with apartheid...but I think our circumstances share more similarities in Latin America rather than South Africa...like Peru...but the momentum for a South African styled TRC was coming from everywhere...and we even had people coming in from South Africa to talk about how the TRC helped South

⁵⁹⁴ Interview with local civil society actor, Kathmandu, Nepal, July 14, 2009.

Africa...and in the end, we had a TRC in the CPA.⁵⁹⁵

Beyond the issue of cultural appropriateness and concerns about the alien nature of a TRC, local actors who have long been active in human rights activism in Nepal, also raised questions about the absence of contextual considerations in implementing such a mechanism in Nepal. In particular, they pointed to the historical, structural and political distinctions between two vastly different contexts, i.e. Nepal and South Africa, which would render such an exercise ineffective. The South African challenge, after all, was contained within the abhorrent practices of the apartheid regime; the constitution was discriminatory, as were state practices that drew clear lines between “whites,” “blacks,” “coloreds” and “Indians.” The fundamental challenge then was to rewrite an inclusive constitution and roll back on discriminatory practices and policies. The struggle was therefore about racial equality. “In Nepal,” noted a prominent human rights activist and civil society actor, “everything comes at once -- the need for restructuring the state, feudalism, abolition of the monarchy, a dire need for social security reform, of dealing with the caste system, of basically reconfiguring an entire political entity... and yet, we don’t have a system, a complaint structure, anything to build on, as they did in South Africa, so the context is very, very different here.”⁵⁹⁶ Richard Bennett, the relatively newly appointed head of OHCHR-Nepal particularly reflected on the spelling out of the TRC in the CPA, acknowledging both the possibilities and short-comings of

⁵⁹⁵ Interview with a former commissioner of the NHRC, Kathmandu, Nepal, July 18, 2009.

⁵⁹⁶ Interview with a prominent human rights actor, Kathmandu, Nepal July 13, 2009

identifying institutions within a peace agreement apriori ascertaining what survivors demand in the aftermath of the conflict and the feasibility of instituting mechanisms of “transitional justice” within a particular context. He notes:

[O]ne could look at it in two ways...a different reference to the TRC [at one level] means it a TJ mechanism is formally introduced in the agenda, which spells good intentions, if also ignorance about what it means...but there are two problems...there is already a description of a mechanism, of a structure, rather than of a process, which is what TJ needs to be...and [second] there is a view here, cynical but not inaccurate, that the TRC was promoted by those who wanted a vehicle to provide amnesty..and the South African model with its configuration of truth for amnesty was very appealing.⁵⁹⁷

Translating Transitional Justice in Nepal

As in Afghanistan, human rights activists, local and international have made an effort to find terms to capture both the meaning of “transitional justice” and the mechanisms specified in the CPA. *Sankramankaalin Nyaya*, the newly coined term for “transitional justice” nevertheless has its limitations. First it is unable to fully capture the meaning of the term “transitional,” effectively laying out where is the transition *to*. Second, it fails to express how this *nyaya* (justice) is different from the justice that has been demanded in Nepal’s ongoing struggles against socioeconomic cleavages and caste system on which the Maoist war was primarily premised. “People don’t know what to really expect from transitional justice, noted an interviewee, “they don’t know what the term means...but then they do not have faith in justice or the justice system...after all, they never saw justice at work in this country.”⁵⁹⁸ Some

⁵⁹⁷ Interview with Richard Bennett, head of OHCHR-Nepal, Kathmandu, Nepal, July 17, 2009

⁵⁹⁸ Interview with Nepal civil society actor, Kathmandu, Nepal, June 27, 2009

of those interviewed pointed to the confusion the term also engenders because of the general association of Nepal's transition to the new constitution, i.e. that the transition would end as and when the country formalizes its new constitution and in turn would mean that the mandate of the mechanisms of CPA would also end with this new chapter in Nepal's political development.

The Disappearance Commission, *Bepatta Aayog*, has had better fortune in translation because it captures the *raison d'être* for its establishment and is a direct response to people's demands to track down the missing and the dead. But by far, it is the *Satya Nirupan Tatha Melmilaap Aayog* (TRC) that has been the most difficult to define, and has been the subject of both confusion regarding what reconciliation means, and criticism because of the perception that it is a vehicle for institutionalizing amnesty. This is because of two reasons – first, as mentioned above, the confessional-forgiveness mechanism informed and advocated by an Anglican bishop (Desmond Tutu) is seemingly at odds in a predominantly Hindu country. Second, the formula of amnesties in exchange for confessions did not resonate in a society, which continues to struggle against political and economic impunity throughout much of its history. When asked about which commissions established in other countries reflects the realities of Nepal and would be the most effective, Mandira Sharma of AF bluntly dispelled any notion that replication would address the challenges facing Nepal today:

[N]one of the models work... but [perhaps] we can learn something from the process of the South African model...but this idea of TRC tied to amnesty is very problematic In our context. In our discussions with South African

commissioners, they have to demystify this idea of amnesty...and some say don't make that mistake...we made a mistake there and now South Africans are experiencing a lot of violence...so they tell us not to make the same mistake here...in Nepal, a policy on reparations is very important, and so is the need for respecting the rule of law and prosecuting some of those responsible.⁵⁹⁹

Perhaps the following interview best summarizes the inherent skepticism that Nepalis interviewed expressed toward the possibility of a TRC:

[Y]ou know we don't have the word sorry. We don't confess. If someone brings us a cup of tea, we don't say thank you. It is said without words, it doesn't need to be verbalized. It is understood implicitly. If someone bumps you, they don't say they are sorry. It's the way he looks at you that you know he is. But can you really say this is the general culture in Nepal? It's people's decision if they want justice or forgiveness, but this kind of commission...it just seems to be an external way of addressing grievances.⁶⁰⁰

In Nepal, the term and possibility of reconciliation in and of itself was ultimately seen to be the most provocative. The term *mil milap* used to define does not in actuality mean reconciliation; it translates to mean something closer to amity, to friendship. Therefore in addition to indicating a closer relationship to antagonistic parties, the term is also colored with the assumptions and understanding of the South African experience -- an overtly Christian model based on public confessions and forgiveness without any punitive recourse or any form of compensation to survivors. Interviews with civil society actors, and conversations with Nepalis in general,

⁵⁹⁹ Interview with Executive Director Mandira Sharma of Advocacy Forum, Kathmandu, Nepal, July 10, 2009

⁶⁰⁰ Interview with representative of Nepal Transition to Peace (NTTP), Kathmandu, Nepal, June 27, 2009.

indicated that reconciliation was a pronouncement of resignation and defeat to the existing and ongoing conditions of impunity and abuse of power, class and caste, and succinctly stated, a legitimization of the status quo. A representative of PD noted, “people want to move on, and to live together peacefully, but they will understand reconciliation to be too much...at the most they will work with a philosophy of forgetting...but before that, they will say first we want some justice, some compensation, then we can have reconciliation, then we can forget.”⁶⁰¹ The emphasis, the actor further clarified, given the dire poverty levels in the country, and the reality of the poor and the marginalized communities in many parts of the country never having experienced any manifestation of effective governance, is on immediate monetary relief. She further added, “first people need to be able to feed themselves and get access to some source of income, before thinking about issues like trials, or even really forgiving each other.”⁶⁰² Another local human rights actor observed that reconciliation is a process, and requires the fulfillment of certain criteria -- reparations, rehabilitation, somehow justice, accountable governance, democracy, before it can be actually achieved:

[R]econciliation needs certain measures, certain conditions... you cannot just ask or force people to reconcile with the perpetrators. It doesn't happen. So the understanding of the TRC bill is that is that if we ask the victims to reconcile after paying them some compensation it would happen. But we really need to prepare them. We really have to find the truth. If you force a person to shake hands but the feeling of injustice will remain and it will return anytime. So we need to search for the truth, to prosecute cases, find the evidence. We have to create the environment and communicate that to the

⁶⁰¹ Interview with representative of Protection Desk, Kathmandu, Nepal, June 26, 2009

⁶⁰² Interview with representative of Protection Desk, Kathmandu, Nepal, June 26, 2009

victims. That has not been done in Nepal.⁶⁰³

Passing the “Duck Test”:⁶⁰⁴ Concerns About the TRC

The concerns about “transitional justice” in Afghanistan and Nepal and, in particular, the consideration of reconciliation to be delivered through commissions as in the case of Nepal, merit further discussion. At a macro-level and beyond the question of political expediency, the privileging of TRCs should be assessed carefully. In transitional justice literature, TRCs have increasingly been promoted as the vehicles for democracy deliverance and the promotion of democratic values.⁶⁰⁵ Because such mechanisms have the mandate to offer recommendations on legal and institutional reforms and strengthen accountability norms, their influence is seen to be more positive and less antagonistic than retributive measures particularly trials. Further, it is believed they could play a constructive role in promoting a “societal consensus.”⁶⁰⁶ Hayner asserts that making a TRC’s findings public could produce “a more knowledgeable citizenry [that] will recognize and resist any sign of return to repressive rule.”⁶⁰⁷ Other scholars have asserted that there is a positive relationship

⁶⁰³ Ibid.

⁶⁰⁴ The duck test is a humorous term for a kind of inductive reasoning. The expression is: “if it looks like a duck, swims like a duck and quacks like a duck, then it is probably is a duck.”

⁶⁰⁵ See, for example, Minow, *Between Vengeance and Forgiveness*. See also Gutmann and Thompson, *The Moral Foundations of Truth Commissions*. Mike Kaye, “The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratization: The Salvadorean and Honduran Cases,” *Journal of Latin American Studies*, 29, no. 3 (1997), 693-716.

⁶⁰⁶ Teitel, *Transitional Justice*, 82.

⁶⁰⁷ Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York, NY: Routledge, 2001), 29.

between TRCs and human rights protection.⁶⁰⁸ Freeman and Hayner, for example, urge, “truth commissions can promote the accountability of perpetrators of human rights violations.”⁶⁰⁹ The retroactive (backward looking) and the forward-looking measures combined, it is believed, both shed light on past human rights abuses, attempt to end the pattern of impunity and assist survivors in accessing reparations and symbolic structures of acknowledgement of the atrocities.

Despite these claims, TRCs remain a field of ongoing research to examine the extent to which they positively impact human rights and democracy, and to the project of reconciliation. In general, TRCs have a mixed record of being able/or allowed to complete their mandate without interference. There is also a mixed record about the extent to which the recommendations they offer are actually institutionalized. In some instances, they have challenged democratic processes when victims have “resorted to vigilantism when unsatisfied with the limited accountability of the TRC.”⁶¹⁰ Wiebelhaus-Brahm provides a cautionary note in his quantitative and qualitative analysis *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* when he concludes, “truth commissions are

⁶⁰⁸ See for example, Mark Ensalcado, “Truth Commissions for Chile and El Salvador: A Report and Assessment,” *Human Rights Quarterly*, 16, no. 4 (1994), 656-675; Minow, *Between Vengeance and Forgiveness*. See also David Gairdner, “Truth In Transition: The Role Of Truth Commissions In Political Transition In Chile And El Salvador,” *Chr. Michelsen Institute*, Bergen, Norway, Volume 8, 1999, <http://hdl.handle.net/10202/272>. (Accessed January 10, 2008); Gutmann and Thompson, *The Moral Foundations of Truth Commissions*; Kaye, *The Role of Truth Commissions*; See also Boraine, *Truth and Reconciliation in South Africa*.

⁶⁰⁹ Freeman and Hayner, *Truth –Telling*, 125.

⁶¹⁰ Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, (New York, NY: Routledge, 2010), 24.

consistently negatively related to subsequent human rights practices. Meanwhile, there is no statistically significant relationship between either truth commission operations or having conducted a truth commission and subsequent democratic developments.”⁶¹¹ While he suggests areas for further research to assess the efficacy of truth commissions, it is important to keep in mind that such mechanisms ultimately are responses to contingent causes. In short, their temporary nature and their limited powers will not necessarily generate substantive and far-reaching sociopolitical changes, particularly if the context in which they operate has not necessarily undergone significant political shifts such as a complete regime change. Each of these observations about the potential and pitfalls of truth commissions should be kept in mind in continuing the discussion of “transitional justice” programming in Afghanistan and Nepal, and specific considerations toward truth commissions in an effort to close the books in both contexts.

Transitional Justice in Context: The Reality Check

Given ongoing conflict (Afghanistan), continued political turmoil and governments that appear and disappear overnight (Nepal), to what extent does “transitional justice” reach out to the very people whose lives it commits to improve? In both contexts, the discussion of who leads the process, the kind of negotiations and politicking that takes place is limited to not only the capitals, but to a small circle of elites within government and with civil society. This inevitably creates the perception, and rightly so, that “transitional justice” is an elite-driven process,

⁶¹¹Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 140

limited, implemented and guided by a few and distanced from the realities of people's lives. A long-term transitional justice actor and Afghanistan specialist, Dr Gossman reflected:

[U]ltimately this discussion of “transitional justice” remains within a few people in Kabul...if you really get out....I mean even with the amnesty debate and the rest...you get outside a certain area...most people outside a certain area don't even know about the amnesty law...you get a reality check with the rest of the country.⁶¹²

A local human rights actor also remarked on this point, emphasizing how alienated Kabul is, and how removed from the realities of the lives of the majority of the Afghan population in the 34 districts of the country. “Most people,” she remarked “had no idea even about the whole amnesty discussion, the bill and how and when it became the law. It was much later on, and so many people were so upset and confused about how these warlords got into parliament and how they had amnesties. It was an insult to injury.”⁶¹³

Similarly, in Nepal, Kathmandu's monopolization of the “transitional justice” discussion and processes was an inevitability of the privileges endowed upon a capital in any developing context -- access to resources, and the site for congregation of the movers and shakers of society. The outcome consequently is that only a few got to determine what was included in the CPA regarding “transitional justice” and what was left out. A local civil society actor summarized it as such: “It is only among the

⁶¹² Interview with Dr Patricia Gossman, Washington D.C. June 10, 2008.

⁶¹³ Phone interview with local Afghan human rights actor, Afghanistan, July 12, 2008.

elite community of civil society that these debates about transitional justice is taking place, but the vast majority of the people are not familiar with the term or what it promises...information does not get out to the remote areas of the country.”⁶¹⁴ This observation is particularly striking when considering how the slow but emerging support for the TRC is developing in Nepal. In 2007, the USIP developed a 73-minute documentary called *Confronting the Truth: Truth Commissions and Societies in Transition*. This documentary, which lays out the experiences of South Africa, Peru, East Timor, and Morocco, has been used in working groups to inform both local civil society actors and the general public about how truth commissions work and how they are effective. The impact of this kind of information-sharing is best summarized by a local human rights actor who reflected: “the people demand trials, punishment and compensation, but then we explain what a TRC does and what reparations are, and then they want that too.”⁶¹⁵

The example of this top-down approach to transitional justice is not in and of itself problematic, but it does bring to question how an elite driven process can displace, and often marginalize the grass-roots primary concerns. In the end, both in Afghanistan and Nepal, “transitional justice” and its specific mechanisms do not, and will not, address some of the most deep-rooted challenges in society relating to poverty, discrimination and consequent de jure and de facto impunity. This is particularly true in the case of the CPA, which specifies and thereby limits the

⁶¹⁴ Interview with local civil society actor, Kathmandu, Nepal, June 29, 2009.

⁶¹⁵ Interview with representative of Protection Desk-Nepal, Kathmandu, Kathmandu, Nepal, June 27, 2009.

“transitional justice” discourse to three specific mechanisms, which are prescriptive and issue-specific responses rather than remedies for the more compound problems the country faces. Richard Bennett who formerly served in Afghanistan and now heads OHCHR-Nepal recognizes this disjuncture between the need for mechanisms for addressing impunity and the processes required for “transitional justice” and the conflation that happens between the two. He conceded:

[W]e talk about impunity and transitional justice in the same breath as if it is the same thing, as if TJ mechanisms are the only way to address impunity and that’s questionable. I don’t think we should put them together. There are a range of objectives for dealing with an internally damaged society -- physically, emotionally, legally...but impunity is different. In Nepal impunity preceded the conflict, it exists now after the conflict, its something that TJ can have a part to play in addressing but it won’t deal with it wholly. Impunity requires its own strategy.⁶¹⁶

This question, of a strategy for addressing impunity ultimately remains one of the biggest challenges for both Afghanistan and Nepal and the discussion goes beyond the core concerns about “transitional justice.” However, within the limitations of the “transitional justice” framework a few important developments in both societies need to be noted.

There is significant difference between Afghanistan and Nepal regarding any effort on “transitional justice,” given the scale of the conflict and its current complexity in the former, and the strength and professionalization of civil society in the latter. While the mandate for the National Action Plan for Afghanistan has

⁶¹⁶ Interview with Richard Bennett, head of OHCHR-Nepal, Kathmandu, Nepal, July 17, 2009

expired as of 2009, and the “transitional justice momentum has been lost.”⁶¹⁷ Nepal’s civil society has made some strides, although given the current political turmoil, the process too has been significantly slow, and often derailed. Perhaps the most amount of progress has been noted in the Disappearances of Persons (Crime and Punishment) bill, of which there have been several drafts and civil society mobilization to push for the final legislation to have greater compliance with international law. In June 2007, the Supreme Court made a landmark ruling on enforced disappearances,⁶¹⁸ which has brought the issue to the forefront of civil society priorities regarding how Nepal should begin the process of addressing the past. In May 2007, the Ministry of Peace and Reconstruction formed a Working Group mandated to draft legislation necessary to establish a TRC. These initial efforts however met with substantive criticism from the civil society network, which feared it would another amnesty commission.

The first draft of the bill had contained sweeping provisions for amnesty; the general process was non-transparent with little publicity of the activities of the

⁶¹⁷ A recurrent theme in interviews conducted with local Afghan civil society actors as well as international actors working in Afghanistan between 2008 and 2010

⁶¹⁸ Nepal’s Supreme Court ruling included the following provisions:

1. To criminalize the act of disappearance and formulate law according to international standards and the ruling of the Supreme Court dated June 1, 2007.
2. To make known immediately the whereabouts of citizens forcibly disappeared during the armed conflict.
3. To make arrangements of relief, rehabilitation, compensation and reparation for the citizens subjected to enforced disappearance.
4. To create an independent commission with all necessary authority to investigate incidents of disappearances.
5. To implement immediately the recommendations of the Supreme Court and National Human Rights Commission immediately.
6. To ratify the International Convention for the Protection of All Persons from Enforced Disappearance. See “Nepal: Enforced Disappearances Should Be Criminalized,” *International Center for Transitional Justice (ICTJ)*, August 30, 2009, <http://www.ictj.org/en/news/press/release/3014.html>. (Accessed on January 15, 2010).

working group, insufficient consultations with civil society groups, victims and other interested parties. “I don’t know” reflected Mandira Sharma of AF, “to what extent the consultations really helped because drafting of the bill was a closed door process, a lot of people could not participate or get information before hand but still I am very impressed by the level of participation of the victims who were present at the consultations.”⁶¹⁹ Nevertheless, civil society continues to engage with the drafts in the hopes of a stronger legislation. These developments in Nepal are significant in they raise ultimately the question of the timing and sequencing of the “transitional justice” process. The following section engages with some of the issues raised in the discussion about timing and sequencing in both Afghanistan and Nepal.

Timing is Everything: Examining the “When” of Transitional Justice

Two questions were asked during conducting interviews in Afghanistan and Nepal. First, is this the “right time” for “transitional justice”? And should there be sequencing in what should be implemented? The question of timing (i.e. when is best time to examine the past for the purpose of justice and for reconciliation?) is an important one. Slye observes:

Attempts to answer the when question can quickly devolve to a discussion of the comparative advantages of history and law. A historian’s judgment is one that derives its legitimacy in part from its temporal distance—the belief that contemporaries cannot evaluate events of their own time, for they are too close to, and too interested in, the events under examination.⁶²⁰

⁶¹⁹ Interview with Mandira Sharma, Executive Director, Advocacy Forum (AF), Kathmandu, Nepal, July 10, 2009.

⁶²⁰ Slye, *Amnesty, Truth and Reconciliation*, 178.

The idea is that with the passage of time, a more objective truth will emerge. While a step-by-step process rather than a knee-jerk reactionary measure indeed has merits, the question of time is also important when lags in time can be seen as missed opportunities.

The question of timing and missed opportunities was observed several times in the interviews from Afghanistan. An expert on Afghanistan lamented:

[T]he biggest missed opportunity was all the way back in 2001 when essentially the international community and the United States in particular allowing the military commanders who they allied with to essentially form the political leadership of Afghanistan was a big mistake....allowing everybody from Fahim to Dostum, to Sayyaf to become political leaders and occupy the political space. Eventually the warlord dominance meant no accountability in governance and the insurgency also gathered an enormous amount of strength. But a second mistake was shunning former Taliban officials and leaders and not having a good plan to involve them in government.⁶²¹

These missed opportunities, some insisted, meant that not only the possibility but also the value of even considering some symbolic trials is no longer practical. An interviewee framed his argument succinctly when he said:

[T]hese war criminals, warlords, they were, for a moment, paper tigers...they were scared of the political outcome of Bonn and beyond, and we [the international community] could have taken advantage of the situation..., but now these paper tigers are powerful actors... we lost that critical moment and now Afghans pay a heavy price.⁶²²

⁶²¹ Interview with independent Afghanistan analyst, Washington D.C. 2008, June 18, 2008.

⁶²² Phone interview with local Afghan civil society actor, Afghanistan, July 17, 2008.

So what could work in the “transitional justice” platform in Afghanistan?

Views differ, but most evidently, the possibility of local trials is not indeed an option anytime in the near future. This is not only because of the current political climate, and the amnesty law, which John Sifton, the primary author of HRW’s *Blood-Stained Hands* reminded “could be rolled back” but also because of the challenges of bringing together Afghan and international laws to create a comprehensive legal framework for punitive measures.⁶²³ But beyond the question of trials, what could and needs to be done? “In Afghanistan,” reminded an international actor, “today the issue of security overrides everything. Then there is the issue of governance and delivering basic services -- running water, electricity, economic stabilization, then finally you talk about democratization and development...this is just not the right time for a discussion of transitional justice.”⁶²⁴ This logic compliments Okello’s insistence when he argues: “[sequencing] should be distinguished from prioritization. If the preferred sequence is peace followed by justice, this in no way signals that justice is a lower priority than peace -- quite the opposite, in fact. Whichever way you look at it, trying to ensure that the environment is conducive for a comprehensive pursuit of justice is definitive proof that you want real justice to be done.”⁶²⁵

⁶²³ Interview with John Sifton, Executive Director of One World Project and author of HRW’s *Blood-Stained Hands*, Washington D.C. August 25, 2008.

⁶²⁴ Interview with independent Afghanistan Analyst, Washington D.C. June 15, 2008

⁶²⁵ Moses Chrispus Okello, “The False Polarization of Peace and Justice in Uganda,” *International Conference on Peace and Justice*, Nuremberg, Germany, June 25-27 2007, p.3 http://www.beyondjuba.org/Conference_presentations/NurembergPresentation.pdf. (Accessed February 10, 2008).

Afghan civil society actors, however, would argue that in Afghanistan, this logic of sequencing has been synonymous with deprioritization of justice claims. At an ICC conference, Shokriah Barakzai, a member of the National Assembly argued: “Many think that justice is not part of the major policies; but other issues are at the priority. Unfortunately, the international community shows less interest in securing justice in Afghanistan and supports other political reconciliation agenda.”⁶²⁶ In terms of what is feasible, then, a majority of those interviewed insisted that the National Action Plan has a formula that provides the blueprint for more robust vetting in public offices and that is something that can be pursued. Despite the volatility of the political climate, they also insist that the comprehensive documentation process of atrocities is possible without “ruffling feathers” because a historical record is imperative for the Afghan people.

Nepal, which has made more strides comparative to Afghanistan in trying to operationalize the commitments in the CPA, also raised some questions about timing and sequencing. Human rights actors and civil society members that it is not the “right time” to hold trials or even begin the commissions, but it is the right time to articulate demands, begin the work on the commissions and capitalize on the opportunities provided by the special period of transition and the new constitution-making process. In a way, compared to Afghanistan, Nepal has identified a very specific mechanism that responds to the immediate demands of survivors -- the

⁶²⁶ See “International Criminal Court (ICC) in Afghanistan: A Report on the Consultative Meeting on Obligations of Afghanistan under (ICC),” *Afghanistan Watch*, October 24, 2009, 10, http://www.watchafghanistan.org/files/Report_English.pdf. (Accessed March 1, 2008).

Disappearance Commission. The TRC has also a priority although the more experienced civil society actors recognize that this will take time, and that proper consultations need to be held to develop a mechanism that pays attention to issues specific to children, women, the composition of the commission. But while there seems to be traction regarding the Disappearance and TRC bills, some local actors expressed concern that things are not moving quickly enough. This concern was not borne out of the need to see immediate result, but more out of the observation that since the signing of the CPA, the Nepal army, a critical actor in human rights atrocities in over a decade of conflict, has continued to gather strength and prominence in the country. And with a strong army that will insist on holding its own investigations and refuse to cooperate, there is a legitimate concern that any possibility of prosecutions in the future, and a strong TRC is undermined. To this end, stresses Phuyel, the victims still lose:

In the CPA, the Maoists got benefits. The Nepal army, security forces, the police -- they had no threat to their jobs. They even have good positions in UN peacekeeping. Who suffered? The victims. They suffered in the hands of the army and the Maoists and they still did not get anything. And when the Maoists came to power, they tried to politicize the disappearance issues. And with the army becoming strong, it will be very difficult to establish the disappearance commission...and the TRC will become even more difficult to establish because we will need the political consent of the Maoists and the army...⁶²⁷

⁶²⁷ Interview with Hari Phuyel, constitutional lawyer and member of Accountability Watch, Kathmandu, Nepal, July 9, 2009.

Phuyel's questions give the conversations about "transitional justice" and the importance of commissions in post-CPA Nepal pause. In the end, any "transitional justice" mechanism is as good as the conditions in which they are allowed to operate. The observation that the victims continue to lose out in the "post" conflict environment in Nepal and that with the passage of time is strengthen the military's hand, rather than necessarily strengthening nascent democratic processes, raises the question: transitional justice, but to what end? This niggling problem necessitates a deeper analysis the different local levels of understanding of justice.

Conclusion

This chapter examined the internal and external politicization around the transitional justice process in Afghanistan and Nepal. More specifically it situated the *local* within the dynamics of these political tensions. These realities, it argued, problematize the new trend within transitional justice of framing warlord/perpetrator bargaining as a process of reconciliation, claiming legitimacy from local customs. In Afghanistan for example, too much attention to linguistics, that is, arriving at a term that explains transitional justice without antagonizing the perpetrators, while allowing the space for such warlords to dominate the rhetoric, ultimately narrowed the scope and possibility for activism on questions of culpability for the past and accountability for the future. In Nepal, South Africa's TRC providing the blueprint for the truth commission raised questions about the incongruity of a Christian-based forgiveness model functioning adequately in a predominantly Hindu society. It also raised questions about how the retributive model alone, although privileged by international

actors and elite local civil society actors, fundamentally fails to capture the complex realities of Nepal which include the continuing struggle to attain an egalitarian society long fragmented by a highly discriminatory and hierarchical caste and feudal system and an all-powerful monarchy.

Given the complexity of the realities in Afghanistan and Nepal, even the most well-intentioned efforts to “right the wrongs” would generate caution about the mechanisms that would be deployed to fulfill the transitional justice agenda. Instead, as the discussion on the two case studies illustrate, the current trend is both lofty in certain circumstances and too ambitious without sufficient consideration of what such contexts not only demands but what they need. Instead, the current trend within transitional justice of coating some of the most difficult questions facing societies in transition with the “dressings” of reconciliation (i.e. framing warlord/perpetrator bargaining as a process of reconciliation through claiming legitimacy from local customs and values) does not reflect the voices and concerns of survivors. By providing clout to perpetrators through labeling what essentially amounts to elite alliances, the opportunity of implementing true processes of accounting for the past may be lost, as those with a stake in such accountings not taking place become increasingly entrenched in the structures of power.

CHAPTER 6

A MEANING OF JUSTICE

I once went to Bamiyan to work on a human rights case of two young girls who had been bartered in a conflict. People in that community knew that the UN was coming....but they did not know what the UN was. When i approached some people, somebody said, ‘pleased to meet you human rights. Oh we are so happy that human rights has come.’ It is then you realize how far people are removed from the discussion of transitional justice and human rights happening in elite civil society. For people in remote areas, human rights and transitional justice are all new terms. But what i find deeply offensive is when some people argue that afghans don’t believe in human rights. I think most afghans would contest that saying that if your daughter is raped, we do take that pretty seriously and you don’t want that to happen; you don’t want your son to be hauled off to jail without any type of process. You know a lot of the fundamental rights that westerners expect and accord to themselves afghans do as well. Such an argument almost seems to say that we are a different species and we don’t believe in human rights or even justice.⁶²⁸

The victims’ voices are still not being heard. The victims’ agenda is now highly manipulated by civil society organizations and instrumentalized by political parties; there is a big fragmentation and intervention by them, so we face a big challenge to have independent victims’ movement. It has long been clear to us there is a problem with how donors work with agencies and not directly with victims’ groups. They adopt a top-down approach, which has little connection with the grassroots, and are not supportive of grassroots mobilization to advance the victims’ agenda. These organizations now focus on reconciliation, on civil and political rights at the macro-level. But they do not listen to us and address our concerns about truth and justice, and our demand for criminal punishment. They do not focus on our everyday struggles and our need for economic justice. It’s so sad. I find the whole debate today is deviating from the truth and justice discourse. We have again very less hope with the new government.⁶²⁹

What if the local became the center in any particular locality rather than being confined by its assumed parameters?⁶³⁰ What would happen if it became the point of

⁶²⁸ Interview with former UN official, New York, June 10, 2008

⁶²⁹ Used with permission. Email correspondence with representative of Committee for Social Justice (CSJ), Lamjung, February 9, 2011.

⁶³⁰ Lars and Waldorf, *Localizing Transitional Justice*, 6.

departure from which the world was assessed, and indeed, transitional justice understood? What would such justice, so framed, mean and how would it compliment, challenge and impact the existing discourse and framework of transitional justice? What would these voices at the “margins” demand from the existing efforts to “close the books”?

Plato argued, as did Kant later, that knowledge of all the positions from which people define justice, ethics, good, and evil, brings us closer to a true understanding of exactly what is the meaning of human existence. But in a discussion of transitional justice, the audience has increasingly become its scholars and practitioners; and in its implementation, we are no closer to completely grasping who the “local” is, and whether we can honor its demands. To the extent that the local has gained traction, it has been limited to mean cultural practices, rituals and traditions, which international actors involved in human rights, democracy and transitional justice promotion assume to be venerable and unchanging, i.e. a “static local.” This “static local” is increasingly harnessed in recent transitional justice efforts to contextualize pre-ordained mechanisms while ensuring they are palatable to communities in question and the international audience -- the donors and international actors in civil society.

This chapter continues to pull the curtain away from the lofty discussions of transitional justice and delve into what constitutes local demands of justice. Understanding the local to mean an evolving context, not just a supposedly preexisting singular culture in either context, and recognizing it as a dynamic phenomenon, it asks the overarching question: To what extent do the respective transitional justice packages address the voices at the margins? In exploring local and, what this study refers to as the

“dynamic” concerns, this chapter examines how, and if, the voices of those in “autistic isolation” resonate with the transitional justice boxes in Afghanistan and Nepal. It begins with what is thus far known about the Afghan and Nepali understandings of justice from the standpoint of the margin. It then focuses attention on four specific areas of “justice” that emerged in both contexts: (i) the question of retributive justice; (ii) the issue of marginalization; (iii) concerns about socioeconomic inequities; and (iv) the crosscutting broader dimension of gender justice.

Visions of Justice: Afghanistan and Nepal

In January 2005, the AIHRC released *A Call for Justice*, the only comprehensive report to date which documents Afghan people’s understanding of justice. Of the total 4151 respondents included in the interview, 69% identified themselves as being direct victims of a human rights violation during the more than twenty-three year old conflict. The analysis of fifty focus groups used in the study identified the following as fundamental rights: “the right to live and the right to its necessary components of food, shelter, clothing, and basic health care; Islamic rights; the right to security and justice; and the right to an occupation and employment; freedom of thought and speech; ethnic, religious and gender equality; political rights such as the right to participate in free and fair elections; and the right to education.”⁶³¹ 76.4% of all respondents indicated they thought that bringing war criminals to justice in the near future would increase the

⁶³¹ *A Call for Justice...*

security in Afghanistan;⁶³² 61% of the respondents rejected the idea of amnesties or pardons for anyone who confessed their crimes before an institution created for transitional justice⁶³³ and 90% of respondents favored the removal of perpetrators from their positions and wanted to prevent perpetrators from gaining political power in the future.⁶³⁴ The survey results further indicated that almost 40% of all respondents understood justice as criminal justice in the courts, although in the research the participants expressed a more holistic view of justice.⁶³⁵ The report states: “Some of this preference may stem from a lack of familiarity with other mechanisms, but it is clear that for many, a transitional justice strategy without a *criminal* justice component is likely to be viewed as unsatisfactory.”⁶³⁶

In March 2008, the ICTJ and the local AF released *Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparation and the Transition in Nepal*. Of the 811 surveys conducted, respondents defined human rights primarily as “the right to live without intimidation and fear (22%); civil and political rights, such as the right to life, freedom of speech and expression, and freedom of movement (14%); and socioeconomic rights, such as food, shelter, clothing, and employment (13%); [approximately] a fifth of respondents could not define the term; among female respondents, ‘don’t know’ formed

⁶³² Ibid, 17

⁶³³ Ibid, 21

⁶³⁴ Ibid, 28

⁶³⁵ Ibid, 18

⁶³⁶ Ibid, 18

the single largest category of responses.”⁶³⁷ In the survey, 24% of the respondents equated the understanding of justice with the ability of individuals to gain access to justice, 12% as punitive punishment, 8% as compensation, 7% saw justice as the fulfillment of victims’ demands, 6% saw justice as establishing the truth about human-rights violations and 6 % saw it as a means of equality.⁶³⁸ Further, 60% of the respondents across ethnic and gender groups consistently defined peace as the absence of conflict.⁶³⁹ Finally, 80% of the respondents defined reconciliation as living in peace and harmony with everyone but only 0.6% equated reconciliation with forgetting the past⁶⁴⁰ and 77% said that human rights perpetrators should not receive amnesty for their crimes.⁶⁴¹

The methodologies of both studies are open to criticism. *A Call for Justice*, for example, despite its efforts, is not adequately comprehensive. Afghanistan, after all, is a country of thirty-four provinces with many ethnic and linguistic groups people of different religious persuasions, the majority of whom are Sunni Muslims. As such, the report does not do justice to Afghanistan’s diversity; nor does it engage in-depth about how its different groups perceive the questions of justice, reconciliation and amnesties. In addition, it does not provide explanations as to why there could be regional variations in

⁶³⁷ “Nepali Voices: Perceptions of Truth, Justice Reconciliation, Reparations and the Transition in Nepal,” *International Center for Transitional Justice (ICTJ) and the Advocacy Forum*, Kathmandu, Nepal, March 2008, 23 <http://www.ictj.org/images/content/8/3/830.pdf>. Accessed September 15, 2010.

⁶³⁸ Ibid, 26

⁶³⁹ Ibid, 27

⁶⁴⁰ Ibid, 28

⁶⁴¹ Ibid, 43

responses to questions regarding, for example, trials, or that of amnesties. Furthermore, the report fails to pay detailed attention to gender variations regarding the question of peace, justice and reconciliation. It also makes no mention of the question of IDPs and refugees, nor of persons with disabilities, both of which are significantly marginalized voices in Afghanistan's demographic landscape today. Finally, given the poverty levels in the country, a substantive gap in the report is the lack of a greater engagement with the socioeconomic dimensions of justice, and how survivors articulate specific claims. Undoubtedly, the realities of conflict served as an obstruction to a more in-depth research. Nevertheless, these conspicuous gaps expose the limited information that is still available about how the Afghan collective reflects and demands of the peace, justice, and reconciliation debate.

Nepali Voices likewise raises several questions, in particular about the selection of respondents and its reliance on quantitative methods. Indeed, it is well recognized that a survey-based methodology has limitations, in part because it is restricted to answering the set of questions asked. Robins observes: "the nature of the qualitative work that preceded the survey is unclear, but without an understanding of the issues that concern victims, a quantitative methodology to find the views of the victim population is flawed."⁶⁴² Pham and Vinck state: "[p]rior ethnographic research [...] [is] critical in informing the type and content of the questionnaire, but there was "no interaction with victims to guide the

⁶⁴² Simon Robins, "Whose Voices? Understanding Victims' Needs In Transition, A Review of *Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and the Transition in Nepal*," *Journal of Human Rights Practice: Review Essay*, (2008), 325.

topics and emphasis of the questionnaire.”⁶⁴³ In addition, the sampling procedure failed to adequately represent the traditional marginalized communities in Nepal – the *janajatis*,⁶⁴⁴ *madhesis*⁶⁴⁵ the lower castes particularly the *dalits*,⁶⁴⁶ and women, many of whom, apart from the violations they experienced were also survivors of sexual violence. Finally, the report fell short of recognizing context and the reality that poverty inevitably would determine the priorities of those surveyed. Hence, when asked an open question about their priorities, victims overwhelmingly responded in terms of basic needs, with only 3% prioritizing judicial process. A 2009 study of victims in Nepal confirms that whilst victims want retributive justice, subsistence comes first.⁶⁴⁷ Considering that a root cause of the Nepal conflict was socioeconomic marginalization, *Nepali Voices*’ limitation in delving further into socioeconomic justice is worth noting. Further, as Robins points out, the report “represents the supremacy of a legalism that sees transitional justice narrowly, as a primarily legal exercise rather than as something which can begin to address the

⁶⁴³ Phuong Pham and Patrick Vinck, “Empirical Research and the Development and Assessment of Transitional Justice Mechanisms,” *The International Journal of Transitional Justice* 1, no. 2 (2007), 243. Also see Robins, *Whose Voices?*...

⁶⁴⁴ The term Janajati generally refers to the indigenous people of Nepal constituting 35.6% of the total population.

⁶⁴⁵ Madeshis are those of Indian origin, considered to be more recent migrants and living predominantly in the plains of the Terai (the flat lands or plains). They constitute about 32% of the population of Nepal.

⁶⁴⁶ The term Dalit refers to the lowest caste in the Hindu caste hierarchy, the Shudra. Historically, the Dalits were relegated to doing dirty, menial work and was considered “untouchable” by the higher castes. Traditionally, they have been subjected to socioeconomic marginalization including by the Civil Code of 1853. The New Civil Code of 1963 and the 1990 Constitution have banned untouchability and abolished discriminatory legal provisions, but socially, the Dalits continue to occupy the margins of Nepali society.

⁶⁴⁷ See “Families Of Missing Persons In Nepal: A Study of Their Needs,” *International Committee of the Red Cross (ICRC)*, Kathmandu, Nepal, June 30, 2009 <http://www.icrc.org/eng/resources/documents/report/nepal-missing-persons-report-300609.htm>. (Accessed September 15, 2010).

broader consequences of violations during the conflict.”⁶⁴⁸

Despite these shortcomings, the contributions of the reports and their importance cannot be denied. First, both *A Call for Justice* and *Nepali Voices* represent the first (and only) efforts of their kind to document victims’ understandings of and demands for justice at a time when neither government was inclined to engage with survivors of the conflicts. Second, despite their shortcomings, these two projects underscored fundamental realities in both contexts -- the dire need for socioeconomic compensation, a demand to address questions of ongoing impunity and lack of access to judicial institutions and political machinations. Strikingly, despite the closeness of these respective communities to their own cultural and traditional practices, a significant majority of respondents in both countries decried amnesty for perpetrators of the worst violations and demanded punitive punishment, a means for recording history and the truth of the atrocities they endured. The following section unpacks and analyzes key demands, underscoring that the question of “justice” is by no means limited to redress for extraordinary crimes.

These Spaces in Between: Transitional Justice or Ordinary Justice?

Of Perpetrators Amidst Politics: Justice as Retribution

Overtly accommodative politics in Afghanistan and to a great extent in Nepal have engendered a systemic prevalence of *de facto* impunity. *A Call for Justice* and *Nepali Voices* generally underscored that while those interviewed wanted some form of

⁶⁴⁸ Robins, *Whose Voices?..* 326

conciliation and conflict resolution between antagonistic parties, their primary association with justice was based on punitive measures. Several hypotheses can be offered for this. First, punitive responses to crimes committed, the minimalist approach to justice, is the most commonly known way to address questions of accountability and redress. The universality of its appeal, its scope of individualizing criminality, its intricate association with punishment i.e. “just dessert” for a past crime makes it the most dominant recourse. The question of individual culpability is important -- the need to identify perpetrators by names and their crimes and hear the pronouncement of judgment is a universal demand. Punitive punishment is perhaps the closest form of “vengeance,” where those who commit crimes are held responsible through the concerted efforts of a larger community - - whether it be an immediate social network, or perhaps better still, the state, which, in incarcerating and punishing the crime and the criminal exercises both legal and moral jurisdiction, and publicly denounces the illegality of the atrocity while acknowledging the suffering of the victim. In instances such as Afghanistan and Nepal, however, trials and prosecutions hold an even more significant position, beyond the immediacy of the state’s responsibility and the demand of the victims. They speak to what law represents, and the emblematic significance of justice -- a clear statement of a break from systematic exemptions enjoyed by those in power and the continuing exploitation of those who are vulnerable.

This symbolic nature of trials and their potential to serve as a deterrent for the activities of perpetrators still abusing the political system was a recurrent theme in the interviews held in both Afghanistan and Nepal. Afghan human rights actors are well aware of the limitations of their legal system, but maintain that without isolating some of

these individuals and publicly forcing them to face their crimes, the Afghan government's very legitimacy is called into question. An Islamic scholar and elected delegate in two of Afghanistan's jirgas, voiced:

From the start we needed to have a strong central government, not the puppet American one we have now, ...and we needed to punish 6, 7 or 9 of the biggest criminals in Afghanistan either directly or indirectly... it would have been a kind of teaching for others and paved the way for bring all those other criminals to trial in the future. This is something that the central government should have done.”⁶⁴⁹

In Nepal, too, the idea of criminal prosecution resounds with the human rights network because they insist that without a few criminal prosecutions, a transitional justice process will neither be complete nor successful. AF has taken a lead on this issue, gathering evidence, filing FIRs and lobbying for more stringent and at time tougher laws, in conjunction with other local organizations to prosecute human rights abusers. A voluntary civil society network called Accountability Watch (AW), serving as an umbrella for the demand for justice has also emerged in Nepal, focusing on questions of transitional justice and voicing Nepal's long-standing battle against impunity.

AW has attracted perhaps the best and brightest of the country's human rights activists with significant experience in human rights monitoring, investigation, lobbying and advocacy, to challenge the government on meeting the CPA commitments, push for Nepal's ratification of anti-torture and ICC legislation and for constitutional provisions on the statute of limitations of crimes. Constitutional lawyer Hari Phuyel, a member of AW, stressed there should be no illusion of the current legal system in Nepal. However,

⁶⁴⁹ Phone interview with Islamic scholar and former delegate of two Loya Jirgas, Afghanistan, June 12, 2008.

he insisted that without the trials of at least 10-20 people directly responsible for the atrocities committed in the decade long conflict and their isolation from political offices and the military, “accountable governance without impunity in Nepal is just not possible.”⁶⁵⁰ Mandira Sharma of AF was more cautious in assessing how many of the FIRs filed and case investigated could, given the existing challenges, be taken to court. Nevertheless, she determined that 5 to 6 cases, such as the massacres in Doramba and Bhairabnath, could serve as the “emblematic cases” and would require the OHCHR-Nepal, the Nepal Human Rights Commission (NHRC), and the ICTJ to work in concert for them to reach trial. For these actors, the act of taking emblematic cases to court was an act of defiance -- both against the current political climate in Nepal, the dismissiveness of international development agencies at the prospects of trials and their outcomes, and the general skepticism many hold in Nepal about what is feasible. Former commissioner of the NHRC and head of AW, Sushil Pyakurel, defended the work of such organizations, insisting that it is important to put in the effort instead of accepting defeat by speculating on outcome:

If we talk like this then we become very pessimistic. Let’s at least give it a try. We can begin with Bhairabnath, for example or with any of the OHCHR investigated cases. Then what next? We need a strategy. We need to see if we can bring it to Geneva. OHCHR can put pressure on the international community for more thorough investigation and NHRC can agree to build on the investigations done...Civil society can achieve something if they come together...its our challenge. And we still have to investigate incidents about which still not much is

⁶⁵⁰ Interview with Hari Phuyel, constitutional lawyer and member of Accountability Watch, Kathmandu, Nepal, July 9, 2009.

known.⁶⁵¹

Emerging literature critical of prosecutions in transitional justice practices cautions against Nepal's insistence on trials as deterrence and the significance it is attaching to "emblematic" cases.⁶⁵² It would also issue a similar warning for those in Afghanistan who demanded trials against war criminals. The most common argument against the rationale of deterrence is that the threat of prosecutions alone has never been an effective measure to prevent individuals from committing future crimes, particularly those that are committed in the context of war.⁶⁵³ The lead prosecutor at the Nuremberg trials, Robert Jackson, questioned the degree to which that tribunal could serve as a deterrent stating: "Personal punishment, to be suffered only in the event the war is lost is probably not [enough] to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible."⁶⁵⁴ Jon Elster observes: "even if violations are harshly punished now, how can future would-be violators know that they, if overthrown, will be treated in the same way? Incentive effects presuppose stable institutions, which almost by assumption do not exist."⁶⁵⁵

⁶⁵¹ Interview with Sushil Pyakurel, former NHRC commissioner and head of Accountability Watch, Kathmandu, Nepal, July 22, 2009.

⁶⁵² See for example, Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs*, 52, No. 2 (1999), 647-667; Stephan Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions," *Law and Contemporary Problems*, 59, No. 4 (1996), 81-92.

⁶⁵³ Aukerman, *Extraordinary Evil, Ordinary Crime*.

⁶⁵⁴ Minow, *Between Vengeance and Forgiveness*, 50.

⁶⁵⁵ Elster, *Coming to Terms with the Past*, 37.

Scholars have also debated whether deterrence theory is more effective or less in the case of *jus cogens* crimes as opposed to that of ordinary crimes. After all, in a functional criminal justice system, there is the imminent threat of punishment if a perpetrator is apprehended. In contrast, argues Aukerman “in the transitional justice context, ‘getting caught’ usually has little to do with the risk of detection; indeed, many atrocities are committed in plain view.”⁶⁵⁶ Furthermore, the reality that only a few perpetrators actually face trial effectively undermines the logic of deterrence.⁶⁵⁷ “[I]t is not irrational,” writes Minow, “to ignore the improbable prospect of punishment given the track record of international law thus far.”⁶⁵⁸ Further she recognizes, “[n]o one really knows how to deter those individuals who become potential dictators or leaders of mass destruction . . . One hopes that current-day prosecutions would make a future Hitler, or Pol Pot, or [Bosnian Serb leader] Radovan Karadzic; change course, but we have no evidence of this.”⁶⁵⁹

In *Atrocity, Punishment, and International Law* (2007), Drumbl categorically dismisses the unbridled faith in international criminal law, which persuades human rights actors to believe in the transformative potential of criminal trials. He states: “there is a sense that conducting more criminal trials in more places afflicted by atrocity will lead to more justice so long as those trials conform to due process standards.”⁶⁶⁰ To that the end,

⁶⁵⁶ Aukerman, *Extraordinary Evil, Ordinary Crime*.

⁶⁵⁷ See Zyl, *Dilemmas of Transitional Justice*, 647, 651.

⁶⁵⁸ Minow, *Between Vengeance and Forgiveness*, 50.

⁶⁵⁹ Minow, *Between Vengeance and Forgiveness*, 146

“justice is not a recipe and due process is not a magical ingredient.”⁶⁶¹ At the least, the reality on the ground is far more complex; consequently an overt reliance of international institutions on a predetermined formula of due process falls short of actually delivering the promises of credibility and legitimacy, particularly to survivors of atrocities. Finally, an important variable regarding the question of deterrence interestingly also hinges on the personality and rational choices of the perpetrator of extraordinary crimes. Douglass Cassel asserts that against certain dictators, like Milošević, threats could be effective;⁶⁶² while others, like Hitler (and Idi Amin),⁶⁶³ might be undeterrable. Unfortunately in the end, whether in the context of conflict or during times of “peace,” and irrespective of the nature of the crime, deterrence is not uniformly effective on offenders.

Despite these criticisms, the call for criminal justice prevails and is particularly favored by many legal scholars and human rights practitioners. Orentlicher states: “[t]he fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression.”⁶⁶⁴ Kritz reiterates this faith in criminal procedures, noting the imperative of prosecuting key figures, without which “[it will] encourage new rounds of

⁶⁶⁰ Drumbl, *Atrocity, Punishment and International Law*, 9.

⁶⁶¹ Ibid. 7.

⁶⁶² Douglass Cassel, “Why We Need the International Criminal Court,” *Christian Century*, (May 16, 1999), 532-536.

⁶⁶³ Former Ugandan President Idi Amin, was one of the most brutal military dictators in post-independence Africa. He seized power in 1971 and after eight years of power left the country a legacy of extreme repression, killings and economic mismanagement. The death toll during the Amin regime will never be accurately known. The International Commission of Jurists in Geneva estimate that the numbers dead could be anything between 80,000 to most likely 300,000. Exile organizations supported by Amnesty International, put the number killed at 500,000.

⁶⁶⁴ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, *Yale Law Journal* 100, no. 8 (June 1991), 2542.

mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere.”⁶⁶⁵ Bassiouni underscores this argument stressing: “[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization.”⁶⁶⁶ Deterrence theory therefore provides a valuable rationalization for selective prosecution, allowing, as Ackermann argues, “for a cost/benefit analysis in which one assesses whether the advantages of preventing crime through prosecution outweigh the costs to democracy and human rights that might result if trials lead to political instability.”⁶⁶⁷

Certainly, for victims groups and human rights organizations in Nepal demanding some form of retributive measure against perpetrators, the demand for criminal justice has special significance. The trial as punishment formula is compelling because it is about identifying individuals known to have committed atrocities during the conflict and who now exercise political, military and/or social power in the aftermath. The deterrence argument is important to the human rights community in particular because it is perceived to stop the *same* actors from abusing their position in the present and in the future, and a signal that the state has both the political will and the ability to respond to the realities of impunity that plague Nepal. These arguments mirror the demands of the

⁶⁶⁵ Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, *Law and Contemporary Problems* 59 (1996), 129.

⁶⁶⁶ M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, *Law and Contemporary Problems* 59 (Autumn 1996), 18.

⁶⁶⁷ Minow, *Between Vengeance and Forgiveness*, 66.

far more nascent human rights community in Afghanistan, who while cognizant of the sociopolitical realities in the country, focus in on the need to punish those who are guilty. Ultimately, the very reason why a TRC was considered for Afghanistan -- weak rule of law -- was the reason why some believed that a more stringent mechanism was required for the country. An interviewee stated:

[I]n a transitional society, sometimes a truth commission can work. But in others such as Afghanistan, what is important is to strengthen the rule of law and arrest a few of the most heinous criminals; the biggest war criminals. This will send a strong message to the others.⁶⁶⁸

This idealization of criminal persecution in Afghanistan, and Nepal can be appreciated perhaps even more when examining the particularities of impunity in both contexts. It is these issues, which are examined in-depth in the sections that follow.

Impunity in Afghanistan

Many of the *jang salar* (warlords) who were directly and indirectly involved in three decades of conflict in Afghanistan and complicit in the commission of large-scale human rights atrocities, have emerged as some of the country's most prominent political actors. Today, while Kabul remains the center for government bureaucracy, *de facto* political and administrative control is exercised by regional power holders who operate relatively freely without state supervision and who impose their own taxes on those who fall under their authority.⁶⁶⁹ The September 2005 parliamentary and local elections,

⁶⁶⁸ Phone interview with local civil society actor, Afghanistan, September 3, 2008.

⁶⁶⁹ See for example, "Establishing the Rule of Law in Afghanistan," Special Report 117, *United States Institute of Peace (USIP)*, March 2004, <http://www.usip.org/files/file/sr117.pdf>. (Accessed January

which signaled the end of the Bonn process, were marked by a notable number of warlords and war criminals running for political office, many of who won parliamentary seats and took positions in the different ministries.⁶⁷⁰ Well-known human rights violators are officials in Afghanistan's defense or interior ministries serve as public advisors to President Hamid Karzai and/or “function as provincial drug lords or regional strongmen in Kabul, directing proxies in official positions such as the Ministry of Defense, national security, and in the Afghan judiciary.”⁶⁷¹ Many of these warlord-governors are also their incompetence to address governance and development concerns and entrenching corrupt practices. In the upper house, where President Karzai appoints one-third of the seats, a majority of the appointees have had a serious record of human rights violations.⁶⁷² The

25, 2007). Also see Sarah Ladbury and Cooperation for Peace and Unity (CPAU), “Testing Hypotheses On Radicalization In Afghanistan: Why Do Men Join The Taliban And Hizb-I Islami? How Much Do Local Communities Support Them?” *Independent Report For The Department Of International Development (DFID)*, August 14, 2009, <http://d.yimg.com/kq/groups/23852819/1968355965/name/Drivers%20of%20Radicalisation%20in%20Afghanistan%20Sep%202009.pdf>. (Accessed March 15, 2010).

⁶⁷⁰ See, for example, William A. Byrd, “Responding to Afghanistan’s Opium Economy Challenge: Lessons and Policy Implications from a Development Perspective,” Policy Research Working Paper 4545, *The World Bank (WB)*, March 2008, http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2008/03/04/000158349_20080304082230/Rend ered/PDF/wps4545.pdf. (Accessed on February 10, 2009). See also “Addiction, Crime and Insurgency, The Transnational Threat of Afghan Opium,” *United Nations Office on Drugs and Crime (UNODC)*, October 2009, http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf. (Accessed January 5, 2010). For a critique of the UN report, see Julien Mercille, “UN Report Misleading on Afghanistan’s Drug Problem,” *Global Research*, November 6, 2009, <http://www.globalresearch.ca/index.php?context=va&aid=15943>. (Accessed January 5, 2010)

⁶⁷¹ Ahmed, *Afghanistan’s Reconstruction*, 273

⁶⁷² Mohammad Qasim Fahim, a former defense minister and vice president in Karzai’s government is allegedly linked to war crimes and serious human rights abuses committed in the 1990s. Arsala Rahmani, a former high-level in the Taliban’s religious affairs ministry, and under whom, the Ministry of Enforcement of Virtue and Suppression of Vice (al- Amr bi al-Ma’ruf wa al-Nahi `an al-Munkir) imposed severe restrictions of basic freedoms, particularly on women). Sher Mohammed Akhunzada, currently governor of Helmand province, is linked to recent abuses committed by forces under his control, including private prisons. Other prominent parliamentarians with some of the worst human

Kabul government also accommodated mid and lower level commanders, often with the acquiescence of external donors.⁶⁷³ An Afghan human rights activist and commissioner of AIHRC sums up this reality:

The militia leaders have become part of the structure. They made institutions unprofessional, unqualified and corrupt. There's a culture of impunity. Everyone thinks they're immune from prosecution, so they do whatever they want.⁶⁷⁴

Undeniably, the possibility of such trials in Afghanistan's current situation is a significant question, but accusations and anger toward the international power brokers for paving the way for current circumstances is palpable because of their complicity at key moments in Afghanistan's history, when some of the worst perpetrators could have been marginalized. "Today's entrenchment of the warlords," argued an expert on transitional justice in Afghanistan, "is largely a consequence of Pentagon's policy."⁶⁷⁵ Stedman's spoiler framework asserts international custodians can, as "custodians of peace" can manage spoilers; where international custodians have failed to develop and implement such strategies, as in the case of Afghanistan, spoilers have succeeded at the cost of

rights records include Abdul Rabb al Rasul Sayyaf, Mohammed Qasim Fahim, Burhanuddin Rabbani, and Vice President Karim Khalili.

⁶⁷³ See "Afghanistan on the Eve of Parliamentary and Provincial Elections," *Human Rights Watch*, September 15, 2005, <http://www.hrw.org/en/reports/2005/09/15/afghanistan-eve-parliamentary-and-provincial-elections>. (Accessed March 12, 2007). See also "Blood-Stained Hands Past Atrocities in Kabul and Afghanistan's Legacy of Impunity," *Human Rights Watch (HRW)*, July 6, 2005, <http://www.hrw.org/en/node/11668>. (Accessed January 5, 2007).

⁶⁷⁴ Interview, commissioner of AIHRC, September 29, 2007.

⁶⁷⁵ Interview, international civil society actor, Washington D.C. June 13, 2008.

hundreds of thousands of lives.”⁶⁷⁶ Several of those interviewed noted the silence among international powerbrokers about the developments surrounding the amnesty bill in 2007 as a sign that when it comes to “human rights and accountability in Afghanistan, the powers don’t care.”⁶⁷⁷ These developments directly indicate that rather than playing the role of “custodians of peace,” international actors in Afghanistan have acted as “enablers” of the spoiler syndrome.

Why bring in the discussion of spoilers in a chapter focused on justice? Certainly, the role and place of de facto impunity, brought about both by international calculations and state compliance, has instituted a political culture where the “paper tigers” of 2001, have gained considerable power, access and legitimacy, without reciprocal accountability to their constituents. Jose Zalaquett, the renowned Chilean philosopher and activist, long warned that one could not expect morality from politicians, only accountability. Yet, Afghanistan’s current political culture clearly indicates it might be impossible to uphold the expectation of accountability from Afghanistan’s “spoilers of peace.” Certainly, the promise of transitional amnesties and their wide scope in places as diverse as Spain, Brazil and Mozambique have, according to some, resulted the ultimate promotion of human rights, democracy and the rule of law, and generated claims that under dire circumstances, could perhaps bring about the same outcome. Developments since 2001, and indeed earlier in Afghanistan’s history, demonstrate that both the promise of

⁶⁷⁶ Stephen John Stedman, Spoiler Problems in Peace Processes, *International Security* 22 no. 2, (Fall 1997), 6.

⁶⁷⁷ Phone interview with local civil society actor, Afghanistan, June 10, 2008.

transitional amnesties and that of reconciliation have consistently failed to deliver on “democratization” goals. In fact, as this section illustrates, it has not only violated international legal norms but even more importantly perhaps, disenfranchised Afghans of their claims to due process and functional governance. Indeed, local concerns, both reflected in *A Call for Justice*, and articulated by victims and rights-based organizations in the course of this research have underscored that retributive action for the worst human rights offenders, would, in fact, reflect Islamic as well as Afghan principles of criminal punishment.

Impunity in Nepal

Of the innumerable wartime atrocities committed in Nepal in the decade long war, a few incidents stand out in so far as they serve as sites for mobilization for the human rights community in Nepal. One of the best documented and most significant illustrations of RNA impunity was the case of the killing of 21 people in the village of Doramba, Ramechhap district, on August, 17, 2003, the very day that the third round of peace talks got underway after a three-month hiatus. In response to the killings, the NHRC established a high-level inquiry team, comprising of a leading forensic doctor, two former Supreme Court judges and a prominent publisher to investigate the events described by the military as “Maoist ambushes.” The inquiry concluded that twenty-one people, most of whom were Maoists or sympathizers, “had been detained for several hours before they were marched a further two hours, then executed, most with shots to the head from close range

while their hands were bound.”⁶⁷⁸ The Doramba massacre was more than just a violation of the law of armed combat; it unambiguously demonstrated that the military had been given a *carte blanche* and were permitted to use mass executions as a deliberate strategy to undermine peace negotiations. The Maoists too continued “targeted killing and torture of members of the security forces, government officials, politicians civilians, and journalists,”⁶⁷⁹ as well as “recruiting children as soldiers, executing party cadres suspected of disloyalty, and engaging in widespread extortion and abduction against the civilian population.”⁶⁸⁰ Both RNA and the PLA were guilty of severe breaches of Common Article 3 of the Geneva Conventions that governs internal armed conflict. Placing Nepal at the top of the list of priorities for the Commission for Human Rights (CHR) Amnesty International’s (AI) representative at the UN in Geneva, Peter Splinter, reiterated that “Nepal is on the verge of a human rights catastrophe -- basic human rights have been suspended; impunity is rampant. The international community must take immediate and decisive action to pull Nepal back from the verge.”⁶⁸¹

The torture and disappearances at the Maharajgunj barracks illustrate that within the armed forces, perpetrators included members from all three branches of the security

⁶⁷⁸ See “Doramba Incident, Ramechhap: On-the-spot Inspection and Report of the Investigation Committee 2060 BS” Nepal National Human Rights Commission, 2003, http://www.nhrnepal.org/publication/doc/reports/Reprot_Doramba_R.pdf. (Accessed on January 10, 2008).

⁶⁷⁹ Ibid.

⁶⁸⁰ See “Nepal: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights,” *Human Rights Watch*, March 10, 2005 <http://www.hrw.org/node/83518>. (Accessed January 15, 2008).

⁶⁸¹ See “2005 UN Commission on Human Rights: An Important Opportunity To Address Human Rights Violations Whenever And Wherever They Occur,” *Amnesty International (AI)*, March 10, 2005, <http://www.amnesty.org/en/library/asset/IOR41/012/2005/en/6b7a7dd4-d512-11dd-8a23-d58a49c0d652/ior410122005en.html>. (Accessed January 15, 2008).

services -- the NP, the APF and the RNA. In theory the battalion commanders who managed the process were accountable to their brigade commander but, “given their location and the sensitivity of their work, were almost certainly reporting directly to army headquarters.”⁶⁸² Further, major military operations required authorization from higher powers, including the palace.⁶⁸³ According to a 2010 ICG report, “a decision to load a group of detainees onto trucks and take them to be executed, as many former Maharajgunj detainees believe happened on December 20, 2003, would not have been taken by a battalion commander on his own initiative, given the disciplined army hierarchy.”⁶⁸⁴ Further, the same report states: “the systematic torture carried out in Maharajgunj required the participation of entire units, including numerous medical officers who were charged with keeping detainees alive so that they could continue to be tortured.”⁶⁸⁵ Soldiers in the RNA had also developed their own slang for certain techniques, such as the use of electric shocks.⁶⁸⁶ Interviews conducted for this research emphasized that there is substantive

⁶⁸² See “Nepal: Peace and Justice,” Asia Report N°184, *International Crisis Group*, (ICG), January 14, 2010, p.10
<http://www.crisisgroup.org/~media/Files/asia/southasia/nepal/184%20nepal%20peace%20and%20justice.a.shx>. (Accessed January 20, 2010).

⁶⁸³ Ibid

⁶⁸⁴ Ibid.

⁶⁸⁵ Ibid.

⁶⁸⁶ See “Report Of Investigation Into Arbitrary Detention, Torture And Disappearances Office Of The High Commissioner For Human Rights,” *UN Office of the High Commissioner for Human Rights (OHCHR-Nepal)*, Kathmandu, Nepal, May 2006
http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/Pages%20from%202006_05_26_OHCHR-Nepal.Report%20on%20Disappearances%20linked%20to%20Maharajgunj%20Barracks_Eng.pdf (Accessed January 20, 2010).

evidence from other cases to suggest that soldiers were well aware of established torture techniques and used them frequently.

The 2004 infamous Maina Sunuwar case has become a case of symbolic significance. After substantial domestic and international pressure after her disappearance, the army established a court of inquiry. Even though it confirmed that her death resulted from torture, the subsequent court martial of three officers found them responsible only for a botched cover-up (improper interrogation and disposal of her body) and passed ‘meaningless’ sentences.⁶⁸⁷ Under further pressure, another investigation was conducted for the exhumation of the body. In February 2008, arrest warrants for four of the army officers involved in her disappearance was issued, but the army did not hand over any of them to civilian authorities.⁶⁸⁸

As in Afghanistan, Stedman’s analysis is helpful in understanding the role and complicity of international actors in consolidating impunity in the country. It is widely known that all of the most serious army abuses uncovered to date took place as the United States, the United Kingdom, and India stepped up military aid to the Nepali state, and in

⁶⁸⁷ The court martial found the colonel and two captains involved guilty of “not following the standard procedures and orders”. Each was sentenced to six months’ imprisonment. However, since they were judged to already have spent that time when confined to barracks during the period of investigation, they were released. The two captains were ordered to pay Rs.25, 000 (approx. \$335) and the colonel Rs.50, 000 (\$670) as compensation. They were also ruled ineligible for promotion or one and two years respectively. See “The Torture And Death In Custody Of Maina Sunuwar: Summary Of Concerns,” *UN Office of the High Commission for Human Rights (OHCHR-Nepal)* December 2006, p. 5. http://nepal.ohchr.org/en/resources/Documents/English/reports/IR/Year2006/2006_12_01_HCR%20Maina%20Sunuwar_E.pdf. (Accessed on January 20, 2010).

⁶⁸⁸ The NA currently holds one of the officers in detention.

particular to the RNA.⁶⁸⁹ As late as the February 2005 palace coup, this assistance was largely unconditional and was accompanied by strong political support to the state and the military. According to a 2010 ICG report, at the same time, “the UN Department of Peacekeeping Operations (DPKO) also steadily increased Nepali participation in peacekeeping operations, continuing to do so even after the palace coup.”⁶⁹⁰ Further, the report states that: “UN missions not only serve an internal patronage system (allowing the top brass to reward or punish officers by granting or denying postings) but are a major source of income and prestige for the army as a whole, and senior officers in particular.”⁶⁹¹ The stark negligence of the evidence of systematic state crimes such as the Doramba massacre and the unwillingness of the RNA to impose any internal accountability, underscore not only the accommodative politics of international backers, but also their role as enabler of human rights violations. This duality of message – one of systematic ignorance of the dire human rights situation and direct and indirect support to the Nepal military on the one hand, and relatively weaker calls for

⁶⁸⁹ Overall U.S. military aid from October 2001 to October 2004 was over \$29 million. See “US jittery over Nepal,” *Asia Times*, March 16, 2005. U.S. training expenditure increased steadily from the November 2001 state of emergency reaching its highest point from October 2002 to September 2003 at \$1,470,892. See “Foreign Military Training In Fiscal Years 2003 and 2004,” Volume I, *U.S. Department of Defense and U.S. Department of State Joint Report to Congress*, June 2004. <http://www.state.gov/t/pm/rls/rpt/fmtrpt/2004/>. (Accessed January 12, 2008). UK assistance was also substantial, some £8.9 million between April 2002 and April 2004 including helicopters. See also “Nepal: Between a Rock and a Hard Place,” *Human Rights Watch (HRW)*, October 6, 2004, pp. 89-91. <http://www.hrw.org/en/node/11973/section/4>. (Accessed February 1, 2008). India significantly stepped up its longstanding military assistance from late 2001, supplying the bulk of RNA weaponry and ammunition and being the first (after the Nepali government) to brand the Maoists “terrorists.”

⁶⁹⁰ The number of Nepali military observers, police and troops deployed in peacekeeping operations was just under 1,000 from 2001 to September 2003. It nearly doubled in October and grew to over 2,200 in December 2003. By the end of 2004, the number was 3,400, making Nepal was the fourth-largest troop contributing country in the world. It has maintained its fourth or fifth position since then and had approximately 4,300 people deployed in late 2009. See *Nepal: Peace and Justice*.

⁶⁹¹ See *Nepal: Peace and Justice*.

an end to the abuses on the other (mainly by the EU) -- translated ultimately to the weakening of both moral and political leverage of international actors for most of the duration of the long drawn out conflict.

Justice as Marginalization: Of Might and Men

The realities of context in Afghanistan and Nepal ensure that punitive punishment, particularly in local courts, will not take place any time in the future. Even if such measures do occur, serious questions will be raised about whether and how these mechanisms will meet international standards of justice, fairness, and overall due process. Nonetheless, national actors interviewed in Afghanistan and Nepal have iterated the importance of removing war criminals from political processes. A systematic process of marginalization, they have stressed, while it may not directly punish such actors, but it would at least “clip their wings.”⁶⁹²

Vetting in the Afghan Context

In Afghanistan, the closest effort at systemic marginalization has come from vetting, but its process and guidelines have not made them particularly effective. For example, the 2004 Constitution of Afghanistan (CoA) is in line with the international instruments of human rights, including the elections standards outlined both in the UDHR and the International Covenant on Civil and Political Rights (ICCPR). Stipulations for candidates for presidential or parliamentary elections include that they cannot have been convicted for crimes against humanity or any criminal act. Article 15 (3) of Afghanistan’s

⁶⁹² This was a sentiment expressed by the vast majority of national interviewees.

electoral law provides the most significant vetting provision, stating that people “who practically command or are members of unofficial military forces or armed groups cannot run for office.”⁶⁹³ This provision is a reflection of the concerns regarding candidates who are known to have committed serious human rights atrocities and/or involved with illegal militias. The provision excluding candidacy for those convicted of a crime is problematic because, thus far, both due to lack of international and national political will, and challenges of the legal system, no one has been charged for any violation of laws.⁶⁹⁴ Thus, the provision is inconsequential. The existing vetting provisions were implemented for the parliamentary elections of 2005. Even though the secretariat identified 1,100 candidates with links to illegal armed groups (IAGs), ultimately most candidates were not disqualified because there was insufficient evidence to prove culpability. There was also concern that their disqualification would pose as security threat.⁶⁹⁵ The 2010 ICTJ report identifies three specific reasons for the failure of the vetting process in 2005. First, legal criterion for candidate disqualification based on their links to armed groups was inadequate. Second, the institutions charged with running the process were under-resourced and unable to conduct thorough vetting procedures. And finally, political will of the Afghan government and the international community to ensure a fair vetting

⁶⁹³ Fatima Ayub, Antonella Deledda and Patricia Gossman, “Vetting Lessons for the 2009-10 Elections in Afghanistan,” *International Center for Transitional Justice (ICTJ)*, January 2009, http://ictj.org/static/Asia/Afghanistan/ICTJ_AFG_VettingLessons_pa2009.pdf. (Accessed January 5, 2011)

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid.

process was starkly absent.⁶⁹⁶ These weaknesses ultimately meant that many militia commanders could run for political office.

The previous chapter examined a critical belief system in Afghanistan captured by the saying: “those with blood on their hands have to stand in the back of the mosque.” This particular philosophy reflects existing international norms that aim to ensure that those complicit in human rights violations do not have a legitimate position in leadership. Although national actors interviewed for this study both pointed out that any punitive measures undertaken from by the international community given the political climate today will be seen in hostile terms, many of those pointed out that there still needs to be opportunities created to elbow out certain actors from the political process. If *A Call for Justice* can be seen as an indicator of Afghan sentiments, and indeed the Victims’ Jirga as a voice of what ‘ordinary’ Afghans want, then the single most important message that was sent over and again to the international community was to end the rule of these individuals and to stop issuing *carte blanche*. An international analyst of Afghanistan affairs passionately argued:

[I]f you could have sent a message to the Afghan population – that guy, that guy, that guy are going down. We know that they are corrupt, we know they have links to the illegal armed groupswe know that they are involved with drug trafficking and their presence in the government undermines the rule of law and we are committed to sidelining the troublemakers, perhaps we might not have a discussion of transitional justice as it stands today.⁶⁹⁷

⁶⁹⁶ Ibid.

⁶⁹⁷ Interview with independent Afghanistan analyst, Washington D.C. June 20, 2008.

The rhetoric of listening to the local but failing to deliver on the message is highly problematic because it signals not only a need to revise political calculations, but betrays a certain discomfort with concepts of justice regarded as rooted in non-western philosophy. In fact, for Afghan civil society actors interviewed, this disregard for the fundamental demands for justice amounted to an exercise in some form of perverse cultural relativism, where the need to tackle the difficult questions of accountability and justice are marginalized by what they consider as a “flawed and perhaps even a false” appreciation for local customs and cultures of reconciliation. An Afghan civil society actor bluntly accused international power holders of hiding behind the cultural façade to guise pragmatic interests that do not include delivering justice to the Afghan population:

[I]n Afghanistan, we are talking about justice and accountability, and the need to link between justice and reconciliation. Yes, the Shari’a is important, but ultimately it’s not religion nor culture nor the tribal parts that are the problem...it is the same as in any other country in the world whether it’s Muslim or not –there is corruption, there is no effective government, no judiciary... these are the problems. And Islam is neither going to help nor hurt these problems. Yes, it is a conservative Islamic country but ...listen, at the end of the day justice is justice and right is right...⁶⁹⁸

One can ask then, who are these conciliatory measures, packaged as reconciliation, intended to benefit? Certainly, it is not the Afghan population who has made their demands clear within the spaces they have been able to occupy. Perhaps, it may also be suggested that trying to locate reconciliation in a context of injustice and a culture where justice both because of religious beliefs and societal practices emphasize

⁶⁹⁸ Interview with Afghan civil society actor, Washington D.C. June 30, 2008.

on questions of equity and fairness, is a self-defeating exercise. An international Afghanistan analyst expressed his frustration with this overt focus on what reconciliation means in Afghanistan and absence of the question of what kind of justice do Afghans want, in the following passage:

[T]here has to be a message sent that people like Fahim, Sayyaf, Mohaqqiq. Say we are investigating these guys. Travel ban. Simple as that. And let it be done through the EU. We are not going to let Sayyaf travel. Sayyaf doesn't go to Brussels! You send the message and Afghans can say why can't this guy go? What has he done? And some people will be upset. Sayyaf is my guy. Why can't he go? The Europeans are ***** But there will be a lot of people who will be happy. You just had to start marginalizing them. So while I think you have to pay attention to local sensitivities and you have to recognize the Islamic context, but at the end of the day, from my experience, why is the corrupt guy there? Get rid of him! It's that simple.⁶⁹⁹

De facto impunity signifies a wretched but simple reality -- those who have exploited in the past will, given the opportunity, continue the same abuses in the present. This is particularly true in Afghanistan where warlords and militia commanders exert tremendous political and military authority and continue to undermine the country's (fledgling) rule of law. Such concerns also exist in Nepal both relating to political parties and the increasingly powerful NA. This basically means that the lines between the "past" and the "present," so carefully and cleanly drawn in the transitional justice toolkit, are not only blurred, they are often times non-existent. Additionally, this kind of dynamic also lays bare the limited extent to which standardized transitional justice packages are equipped to deal with questions of impunity, both institutionally as well as in terms of

⁶⁹⁹ Interview with independent international actor, Washington D.C., June 28, 2008.

societal practice. Both these observations should compel a deeper examination of the tensions and complexities in a given context, and inform the efforts of closing the books such that transitional justice does not remain a lofty goal with trials and commissions as mechanisms through which certain goals are reached, but rather creatively address questions of *ongoing* injustices that dominate current realities. Afghanistan's Attorney General Sabbit challenged the idea that transitional justice alone, can in Afghanistan, address questions of impunity and indeed, have the answers to some of the most pressing problems in the country:

[O]ne could postpone transitional justice and focus on the law of today and uphold justice for today. For example, consider Dostum. He killed a man in his clan and he brought in supporters to plead his cause saying he was a valiant fighter during the years of conflict. But his valiance does not mean he should not be punished for his present crime. Your past cannot erase your crimes of the present. But there is no equality before the law in Afghanistan...I receive reports of murders, rapes, land grabs by those who are affiliated with big warlords like Dostum, but they are too powerful to be arrested. But still, what is possible right now is to focus on the crimes of current days such as the drug mafia who are committing crimes today. If the rule of law is strong and criminals are arrested for what they do today, it may happen that 30-40% of the concerns of the National Act of Reconciliation and TJ could be addressed. It is therefore more of an issue of management and how you put it forward -- that's what matters. So focus on current violations would actually bring in past cases.⁷⁰⁰

Succinctly, Sabbit's argument captures a fundamental shortcoming in the transitional justice paradigm in its emphasis on punishment for extraordinary crimes. Instead, what the current context in Afghanistan urges, is a thorough examination of the link between past crimes committed during wartimes, and those being committed post-

⁷⁰⁰ Afghanistan's Attorney General Sabbit's presentation at USIP, Washington D.C June 24, 2008

Bonn and scrutinize to what extent and how, the same perpetrators are, in many cases continuing to obstruct and exploit both the political scenario and the civilian population. Such a framework, at least in the Afghan context could, in theory, contain the lofty expectations and assumptions of transitional justice, and focus attention on what in fact could be done to assist the country's effort in transitioning to some form of a rule of law state.

Nepal: The Need for Marginalization

If the urging from the Afghan population is about marginalizing certain actors, then is it the same in Nepal? As far as anyone can recall, official vetting procedures were never systematically used, if at all, in Nepal's political history.⁷⁰¹ Vetting did not figure into any official policy during the historic elections of 2007. The UN, which often leads the vetting procedures in transitional societies, did not take on a similar role in Nepal. According to some of those interviewed, including OHCHR-Nepal officials, the reason for this was that the UN was invited to Nepal particularly around the negotiations of the CPA, but were given too limited a mandate and was in too precarious a position to push for any kind of process that leading negotiators would object to. A few others have criticized this position, noting that the UN had an opportunity to negotiate its terms, and should have pushed for a stronger mandate.⁷⁰² As it stood, removing perpetrators from

⁷⁰¹ Interview with local and international civil society actors, Kathmandu, Nepal, 2009.

⁷⁰² This criticism, that the UN did not effectively negotiate for a stronger platform from where it could lay down some terms of engagement and decision-making for stakeholders was echoed by several of the human rights organizations and civil society actors interviewed.

⁷⁰² Based on recurring discussions in interviews conducted with local as well as international actors in Kathmandu, Nepal regarding OHCHR's mandate.

powerful positions was not a priority even after the elections. In fact, noted a Nepal human rights actor, “for the peace process the government 346 crime cases were withdrawn from the government -- all of these cases related to the question of impunity.”⁷⁰³ A local civil society actor observed that naming and identifying individuals in Nepal does not normally have any outcome because commissions and organizations do not have the necessary “teeth” to operationalize their recommendations and the government and its auxiliary forces are not responsive to them. A local civil society actor expressed her frustration at this continuous cycle of impunity and disregard for the recommendations of human rights organizations, national and international:

During the years of conflict, most of the disappearances were from Bardiya. OHCHR-Nepal named the perpetrators in its report, but nothing has happened. No one was even suspended from their jobs. This is the reality of the people in Nepal. No one hopes something good will happen.⁷⁰⁴

An exception to this frustrating status quo was in 2006, when under tremendous pressure, General Thapa, the Chief of Army, finally stepped down, handing over his post to General Kutuwal. Thapa’s resignation was a victory for Nepalese civil society, because of his role in the atrocities committed by state forces during the conflict. But the pressure to marginalize, or even to vet others, continues. This was effectively summarized in an interview with one civil society actor who noted, “in Nepal impunity is never punished, it

⁷⁰³ Interview with local human rights actor, Kathmandu, Nepal, July 2, 2009

⁷⁰⁴ Interview with local civil society actor, Kathmandu, Nepal, June 29, 2009

is often rewarded.”⁷⁰⁵ Such a pronouncement seems to hold true; none of those in command responsibility in Nepal during the conflict have ever faced public or legal censure. In fact, NA personnel in positions of command responsibility during the time that human rights violations were being committed at the Maharajgunj barracks have been recommended for promotion or extension. “When the scale and depth of magnitude of impunity is so immense,” observed an interviewee, “one individual’s resignation does not mean the system from above has changed...there are always others to take his place.”⁷⁰⁶

Shadow Justice

In circumstances such as Afghanistan and Nepal where impunity is the most prominent political currency, justice seems like an unattainable objective. This not only rings true with regard to the questions of wartime atrocities, but even for “ordinary crimes,” that is every day infractions of the law. Most would argue that justice has not existed in either country for a long time, if ever. The failure of the official legal system and the climate of general impunity however, has never meant that the demand for justice has gone away; rather, what has developed is a perverse sense of law and order – parallel systems of adjudication which are at times brutal and harsh, but expedient. These forms of what may be termed “shadow justice” have been manifest both in Nepal and Afghanistan. The Taliban, for example, has taken advantage of the absence of state

⁷⁰⁵ Interview with local civil society actor, Kathmandu, Nepal, July 1, 2009

⁷⁰⁶ Interview with a prominent local civil society actor, Kathmandu, Nepal, June 22, 2009

presence in many of the provinces. Their methods of “swift” justice have often included immediate killing or maiming of the offender for both punishment and deterrence. In a climate of chaos and impunity, what many Afghans have experienced therefore is the rawest of form *adalat* (justice), which some might contend is a perverse interpretation of the *Shari’a*, or at the least, a form of vengeance killing. In an in-depth interview about the prevalence of the Taliban-styled justice in the country, an Afghanistan analyst pointed out the difference between the act of democracy and the premise of justice:

[T]here is an oversimplified understanding promoted that life will get better if there is democracy, and [in reality] it hasn’t...so people supposedly have democracy, but they don’t have *adalat*. I rarely heard people say that the Taliban are my biggest problem. They know it’s the local warlords that are the nasty piece of work. People say that the reason the Taliban are here is because they have a corrupt police officer and although you and I thoroughly disagree with their method of justice, their interpretation of justice, their application of justice, they do things that are perceived as justice by Afghans. Because they immediately deal with the corrupt officer or person who had done wrong. You know in some places that resonates.⁷⁰⁷

When considering today’s realities in Afghanistan, where the promise of a post-Taliban, democratic nation has failed to manifest itself, and where the reality is dominated by the emergence and strengthening hands of warlords, corruption and a drug economy in the midst of poverty, the question of transitional justice seems too far removed. The immediate concerns instead are about the demand for ordinary justice because of ongoing injustices and acts of impunity that communities are confronted with on a daily basis. A long-term observer perhaps best summarized the blurring of the lines

⁷⁰⁷ Phone interview with an international Afghanistan analyst, Afghanistan, June 30, 2008

between past and present in an active conflict like in Afghanistan when he noted:

[Y]ou are so in conflict mode in Afghanistan... there is no transition to anything right now... if there is a transition, it's a transition away from peace to intensified war... the war that started in 1979 has not ended, it's the same war, it's the same players, some are more active than were in the past, some have changed sides, yes there are some new actors, but basically the same faultlines are there...so you can't have transitional justice in the classical sense here...for transitional justice, you need the transitional piece, and you need you a clear break from the past...in Afghanistan its not about transitional justice...it is about justice, period.⁷⁰⁸

In Nepal, years of corruption and institutionalized caste systems made access to justice virtually impossible for the poor and the marginalized. The divorce between the state-level legal system and the people have been so great historically that during the decade long conflict, it was easy for the Maoists to quickly fill the administrative vacuum in rural areas with their own ad hoc arrangements including “people’s courts” administered prompt justice not according to the law but according to “conscience.” In 2006, the BBC reported that Maoists had used this parallel justice system “to combat caste discrimination and secure equal rights for women, for instance, reducing polygamy.”⁷⁰⁹ While this parallel system of justice was severely criticized for using popular laws, harsh methods of punishment, and sometimes adjudicating on matters outside the realm of Nepali laws (e.g. family and social matters) such a practice constituted a threat to the government because such systems in their expedient delivery of justice, systematically challenged the state’s legitimacy and often times, were preferred

⁷⁰⁸ Interview with independent Afghanistan analyst, Washington D.C. July 13, 2008

⁷⁰⁹ “Parallel Justice, Maoist Style,” *BBC World News*, October 14, 2006, http://news.bbc.co.uk/2/hi/south_asia/6048272.stm. Accessed January 10, 2011.

for the deliberation of issues as widely diverse as killings and property inheritance for women.

Since the signing of the CPA, the GoN been under significant pressure particularly to the realities of ongoing extrajudicial killings, particularly those carried out by Nepal's armed forces on innocent civilians. Recent reports,⁷¹⁰ which have been issued past the period of this study also indicate that the people's courts have started making a reappearance in some areas in Nepal to deliver particularly on social justice, since the official legal system continues to be seen as being too corrupt, slow and expensive. While these courts are in violation of the CPA and there is pressure to hand over their cases to the police, their rebirth highlights the continuous demand for ordinary justice in remote areas of the country, and underscores the consequences of a continual judicial vacuum.

Achilles' Heel: The Socioeconomic Dimension of Justice

This study has thus far focused on the question of why and how the local matters in relation to the question of laws, contextual privilege and politicking, and of perpetrators and punishment. It now turns its attention to a dimension of justice that local voices claim, but neither the CPA nor the National Action Plan has paid particular attention to – the question of socio-economic justice. This notable absence is particularly glaring given the criticism that transitional justice, in its focus on retribution, rule of law, deterrence, reconciliation, remembrance and even social pedagogy, continues to neglect

⁷¹⁰ "Nepal Maoists Reactivate People's Courts," *Himalaya Times*, February 17, 2010, <http://southasiarev.wordpress.com/2010/02/20/nepal-maoists-reactivate-peoples-courts>. (Accessed January 11, 2011); See also "Maoist People's Court Harassing Politicos, Civilians," *Kantipur Online*, July 30, 2010 http://www.hotelnepal.com/nepal_news.php?id=2460. (Accessed January 11, 2011).

survivors' demands for basic economic and social rights and for development. This parochial approach is particularly problematic when considering that economic justice is one of the singular concerns for countries transitioning out conflict, which are already considered extremely poor and "underdeveloped." Indeed, if context is the singularly most important variable that demands consistent engagement and needs to occupy a central position in the transitional justice question, then it logically follows that serious attention needs to be paid to the circumstances of that context and how it informs and defines priorities, in this case, the issues of poverty and inequity.

The centrality of socioeconomic justice in defining and expanding the existing parameters of transitional justice is particularly significant when considering the sobering realities of the two case studies under consideration. The poverty levels in Afghanistan and Nepal are strikingly high. 31% of the Nepali population is estimated to live below the poverty line, but the distribution of poverty among social groups is unequal. While the highest castes i.e. Brahmins, Chetris and Newars are the smallest groups in the poverty bracket, the poverty levels amongst Dalits, Hill Janajatis and Muslims range from 41% to 48%.⁷¹¹ 36% of Afghanistan's population is below the absolute poverty line,⁷¹² and 37% just above it. Summarily, Afghanistan and Nepal are two of the poorest countries in the world. Schabas compellingly argues that given the pre-existing conditions of poverty in many of the societies emerging from conflict, survivors cannot grasp the legal concept of reparations and compensation, since their demand is not about restoring their pre-conflict

⁷¹¹ "Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal – Summary." *The World Bank and DFID*, 2006, 17-20.

⁷¹² Absolute poverty level is interpreted as the inability to attain basic consumption levels.

realities.⁷¹³ It follows then, that a transition, and a corresponding transitional justice process, opens up a unique opportunity, as Mani has argued, to create and institutionalize a new socioeconomic configuration that is far more equitable.⁷¹⁴ While capturing the full breadth of the complex dimensions of socioeconomic justice in Afghanistan and Nepal is beyond the scope of this study, this section is devoted to examining the question of compensation and/or reparations for conflict victims.

According to international law, states that violate their duty to protect their constituents have a legal responsibility to repair.⁷¹⁵ Teitel states: “transitional reparatory justice reconciles the apparent dilemma in the extraordinary context of balancing corrective aims with the forward-looking goals of transformation. [It] mediates individual and collective liability, shaping the political identity of the liberalizing state.”⁷¹⁶ Particularly since the programs for reparations that were established in Argentina, Chile and South Africa, there has been an increasing attention paid to examining the role and kinds of reparations that are offered to communities emerging from conflict. In its narrowest forms, reparations include economic and material compensation in the form of cash payments or pensions and can even include free or discounted social services such

⁷¹³ See William Schabas, “Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission,” in Koen de Feyter, Stephan Parmentier, Mac Bossuyt and Paul Lemmens, eds. *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, (Antwerp, Belgium and Oxford, UK: Intersentia, 2006), 289-308.

⁷¹⁴ Mani, *Beyond Retribution*, 2002

⁷¹⁵ Emanuela-Chiara Gillard, “Reparation For Violations Of International Humanitarian Law,” International Committee of the Red Cross (ICRC), September 2003, Vol. 85, No. 851, http://www.icrc.org/eng/assets/files/other/irrc_851_gillard.pdf. (Accessed January 12, 2011)

⁷¹⁶ Teitel, *Transitional Justice*, 119

as scholarships, housing, health benefits, skills training and provisions of sustainable livelihoods. They can also be symbolic, individual or community-based and could take the shape of public apologies, museums, memorials, commemorations, public acknowledgements of responsibility. Individualized reparation schemes, could, in the best circumstances also include medical, psychological, and legal services, monetary compensation for financially assessable losses, economic redress for unquantifiable harms restitution of lost, stolen, or destroyed property.⁷¹⁷ Irrespective of their manifestation, however, Minow insists that the “core idea” behind reparations is compensatory justice, summarily evoking the principle “wrongdoers should pay victims for losses” to wipe the slate clean.⁷¹⁸ The following section examines how, and to what extent the role of compensation and/or reparations have played out in the Afghan and Nepal contexts.

Afghanistan: *Ubi solitudinem faciunt pacem appellant* (They create desolation and call it peace)

If the formulaic prescription of a typical transitional justice framework needs to recognize the centrality of reparations, in Afghanistan, it is particularly notable that thus far little attention has been paid to the question of indemnity for Afghan survivors of almost three decades of conflict. The National Action Plan does not delve in to detailed

⁷¹⁷ See Theo Van Boven, UN Sub-Commission On The Promotion And Protection Of Human Rights, Study Concerning The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms: Final Report, UN Sub-Commission on the Promotion and Protection of Human Rights July 2, 1993, E/CN.4/Sub.2/1993/8, <http://www.unhcr.org/refworld/docid/3b00f4400.html> Accessed January 10, 2011; See also Robert E. Goodin, “Theories of Compensation,” *Oxford Journal of Legal Studies*, 9, no. 1 (Spring 1989), 56-75

⁷¹⁸ Minow, *Between Vengeance and Forgiveness*, 1998

questions of reparations and overall socioeconomic justice, and there has been no official conversation about monetary compensation and reparative measures. This neglect of the socioeconomic dimension of transitional justice particularly by international actors was clearly observed when interviewing Dr Gossman about her long-term work in documenting human rights atrocities in the country:

I don't know how many times I have taken testimony and people have said 'oh they shot my son and then they stole all my sheep' I always dismiss the sheep part and then I realized it was the source of their livelihood and the family really suffered...and then it is no longer a small thing.⁷¹⁹

Further, a nagging question has been whether survivors of indiscriminate bombings and killings since 2001 have had any access to compensation. According to the only comprehensive report on addressing victims' restitution released in 2009, the record is spotty and demonstrates both unequal distribution and lack of cohesion between the different parties involved in the conflict.⁷²⁰

Ironically perhaps, the members of the International Security Assistance Forces (ISAF) have by far had the most engagement on the issue of victims. For example, ISAF provides medical assistance in military bases, mobile medical centers, Provincial Reconstruction Teams (PRT) compounds," walk-in" medical clinics.⁷²¹ ISAF's Post-Operations Humanitarian Relief Fund (POHRF) and projects taken on by PRTs,

⁷¹⁹ Interview with Patricia Gossman, Washington D.C. June 12, 2008

⁷²⁰ E.L. Gaston, "Losing The People: The Costs and Consequences of Civilian Suffering in Afghanistan," Campaign for Innocent Victims in Conflict (CIVIC), 2009, <http://www.civicworldwide.org/storage/civic/documents/afghan%20report%20final.pdf>. (Accessed March 15, 2011)

⁷²¹ Interviews with PRT participants and international actors, Kabul, Afghanistan, 2010

historically used for natural disasters, are now used for community-based projects such as rebuilding infrastructure, providing emergency relief and other forms of non-monetary aid with funds from voluntary donations of ISAF member countries. US troop commanders have access to the US Commander's Emergency Response Program (CERP) for "community impact" projects (CIPs) in their zones of operations.⁷²² Similarly, the Canadian contingent draws on the Canadian Commander's Contingency Fund (CCF) for "quick impact" projects (QIPs)⁷²³ in the community. CIPs and QIPs projects range from building schools, developing and/or repairing infrastructure, supporting local governance and even include funds for "condolences" for conflict-ravaged communities. However, there are no common ISAF funds for compensation for victims.⁷²⁴ Neither is there a standardized ISAF policy outlining how member countries can assist civilians affected by troop activities.⁷²⁵ Instead each country's national laws or decisions of individual command structures generally guide this kind of initiative. Technically speaking most of the "compensation" payments are not exactly compensation; rather, they are voluntary, non-legally binding "ex gratia" ('out of kindness') payments for unintentionally causing

⁷²² For more detailed information, see "Chapter 4: Commander's Emergency Response Program, Commander's Guide to Money as a Weapons System Handbook," *United States Army Combined Arms Center (CAC)*, April 2009, <http://usacac.army.mil/cac2/call/docs/09-27/ch-4.asp>. (Accessed January 2, 2011).

⁷²³ See "Quick Impact Projects: A Handbook For The Military," *Department for International Development (DFID)*, <http://www.sais-jhu.edu/bin/y/l/quick-impact-military-handbook.pdf>. (Accessed December 10, 2010).

⁷²⁴ Interview with Afghan civil society actors, Kabul, Afghanistan, April 2010. Also see Gaston, *Losing The People...*

⁷²⁵ Ibid.

harm.⁷²⁶

In addition to international assistance through military forces, the 2009 CIVIC report identifies one program funded by the civilian branch of an International Military Forces (IMF) country specifically targeting the needs of conflict-affected civilians: the International Organization for Migration (IOM)-implemented Afghan Civilian Assistance Program (ACAP).⁷²⁷ The program created by the US Congress provides tailored, in-kind assistance to civilians harmed by IMF since 2001. Finally, the Afghan government has taken some steps to offer compensation to victims. The office of President Karzai, for example, has established a fund titled “Code 99 Fund” to provide monetary support (approximate \$2,000) to families who have lost a member in the ongoing conflict and who have to those with conflict-related injuries (approximately \$1,000).⁷²⁸ In addition, it promises that in cases where someone is killed, a member of the family will be sent on the religious pilgrimage (Hajj) to Mecca. Finally, the Afghan government runs two separate funds – the Fund for Martyrs and the Fund for the Disabled both through the Ministry of Social Affairs, Labor, Martyrs, and Disabled (MoLSAMD).⁷²⁹ The Martyrs’

⁷²⁶ Gaston, *Losing The People...*

⁷²⁷ See “Afghanistan Civil Assistance Program (ACAP),” *International Organization for Migration (IOM)*, September 2008 http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/afghanistan/acap_factsheet_sept08.pdf. (Accessed December 10, 2010). Also see “Afghan Civilian Assistance Program: USAID Audit Report,” Audit Report No. 5-306-10-004-P, *United States Agency for International Development (USAID)*, December 15, 2009 <http://www.usaid.gov/oig/public/fy10rpts/5-306-10-004-p.pdf>. (Accessed December 10, 2010)

⁷²⁸ Gaston, *Losing The People...*

⁷²⁹ Interviews with national and international actors in Kabul, Afghanistan, April 2010. See also, Gaston, *Losing The People...*

Fund resembles the pension system, with those killed either before or after 2001 being considered *shahids* (martyrs), enabling their surviving relatives collect monthly financial assistance.

The MoLSAMD Fund, at least in theory, is aimed at providing social solidarity with those injured during conflict and the rate of compensation varies depending on the extent of their injuries. In reality, this kind of assistance from the International Military Forces (IMF), foreign governments and the Afghan government is plagued with challenges and tempered by controversy. At the operational level, all three are limited and sometimes compromised by corruption, tribal politics, adequate delivery services and channels, security, lack of adequate information on the side of survivors' about where and how to navigate available sources, insufficient information about victims, and the challenge of determining genuine claims. Since its inception, such assistance has also been criticized for their lack of transparency, inconsistent administration, their ad hoc nature (particularly regarding ex gratia payments), lack of coordination within ISAF countries and between ISAF and other contributing partners, and most often, for existing in theory, but not in actuality.⁷³⁰

At the conceptual level, these efforts, such as those that provide medical assistance or community-based support, muddy the waters for any discussion on transitional justice, and indeed, fall outside of the National Action Plan's ambit. While it is impossible to clearly evaluate what the long-term impact will be of these programs, it is possible to assess that military forces determining, assessing and disbursing monetary

⁷³⁰ Ibid.

compensation and reparative measures cannot have beneficial long-term impact. Further, given the temporary nature of a foreign military's engagement in a conflict, uncoordinated and ad hoc "knee-jerk" responses to conflict-based claims can also undermine the authority of an already weak state that cannot deliver social services. Further, payment for damages in an existing vicious cycle of conflict also generates a dangerous precedent for creating unhealthy and unsustainable dependence on a situation out of which currently there is no clear exit strategy. Increasingly, ISAF and PRT involvement in civilian reconstruction work has also come under heavy criticism for crowding the "humanitarian space," in its deployment of militarized humanism, and subsequently usurping the roles of human rights, development and more broadly civil society actors, and obscuring the boundaries between military operations and development assistance.⁷³¹

Nepal: The Search for Compensation

The conflict in Nepal, and certainly the legitimacy of the Maoist insurgency drew heavily on the culturally and politically institutionalized socioeconomic disparity that defines Nepali society. Consequently, it was the poor and the marginalized that paid the heaviest price in the conflict -- on the one hand, the CPN-M heavily recruited from these

⁷³¹ Interview with Patrick Duplat, Refugees International, Washington D.C. June 10, 2008. This concern was also raised in interviews with civil society actors and international analysts in interviews conducted between 2008 and 2010 in Afghanistan and Washington D.C. For a deeper discussion on changing nature of the military in conflict zones and criticisms of militarized humanism, see Thomas G. Weiss, "Military-Civilian Humanitarianism: The 'Age of Innocence' is Over," *International Peacekeeping*, 2, No.2 (1995), 157-74. Tom J. Farer, "Humanitarian Intervention Before And After 9/11: Legality And Legitimacy" in J.L. Holzgrefe and Robert O. Keohane, eds. *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, (Cambridge UK: Cambridge University Press, 2003). See also Mark Duffield, *Global Governance and the New Wars: The Merger of Development and Security*, (London, UK: Zed Books, 2001)

communities and on the other, they were extensively victimized by the state security forces. In theory, at least, it would follow then, given the dire socio-economic needs of Nepal's displaced and marginalized, targeted both by Government forces (such as the Tharu population for example) and the Maoists (for bribes, recruitment, et cetera) an immediate focus for both international actors and for the GoN would be to provide in the least compensation, or reparations, to redress victims. However, almost four years since the formal end of the conflict, Nepal's record for compensation and/or reparations continue to be both spotty and fragmented at best. Through the World Bank (WB), the GoN had been offered \$44.96 billion as part of the bank's Emergency Peace Support Program to provide compensation for conflict victims. The NHRC recommended that NR 100,000 (\$1,500) or NR 150,000 (\$2,350) should be paid in cases where a person's right to life had been violated.⁷³² The Home Ministry also had a tariff and budget for the payment of compensation, but the parliament was not bound to apply the same level tariff.⁷³³ While a parliamentary probe committee awarded record amounts of compensation -- NR 1 Million (\$15,500) -- to the relatives of Sapana Gurung and the six killed during the subsequent demonstration against her killing during the conflict,⁷³⁴ this case did not generate the momentum for assisting other victims of the war.

As of the writing of the dissertation, Nepal still does not have an overall policy for

⁷³² See *Waiting for Justice..*

⁷³³ Ibid.

⁷³⁴ Army men at Belbari, Morang District, killed six people and injured approximately sixty others in April 2006 when people were protesting against rape and subsequent killing of Sapana Gurung. See "Nepal's Peace Process at the Crossroads," Situation Update 2, *Conflict Study Center*, August 2, 2006, http://www.ssronline.org/edocs/situation_update_2.pdf. (Accessed March 3, 2008).

granting compensation to conflict victims. The monetary assistance thus far has been held hostage to unequal and highly politicized relief distribution, ineffective government outreach, technical challenges, lack of recognition of human rights violations even during relief distribution, and victims' own inability to articulate their claims and their rights.⁷³⁵ In the interim, the situation of the conflict victims, who are also among Nepal's poorest and most marginalized, such as the Tharu population or the Dalits, the women have experienced little improvement and, in some instances, such as in the case of victims, their situations have worsened. The local demand for justice has, consequently centered on urgent and immediate compensatory relief. Discussing conflict victims' concerns for justice, the passage of time that has elapsed since the official end of the conflict, and the long wait for adequate compensation, a local civil society actor, passionately voiced her frustration:

Right after the conflict, the demand was very much about justice, justice against perpetrators, for the rights of victims, for the missing. As time has gone by, there is a shift – there is still a demand for justice, but there is a more pressing demand for compensation...after all, most of these victims are very poor, they need food, shelter, they need to bring up their children, they have to keep themselves alive. When that is taken care of, the other things can come....sometimes it seems like if the government could just send a letter acknowledging that someone was killed in your family they would be satisfied.⁷³⁶

While beyond the scope of this study, a fundamental concern that may be raised

⁷³⁵ Interviews with national and international actors in Kathmandu, Nepal in 2009. See Renu Kshetry, "Civil War Victims Await Compensation," IPS News, October 6, 2008, Relief Distribution Affected By False Claims: Home Ministry, Relief Web, October 23, 2008. See also "Discrimination and Irregularities: A Painful Tale of Interim Relief in Nepal," *Advocacy Forum (AF)*, 2010, http://www.advocacyforum.org/downloads/pdf/publications/Discriminations_and_Irregularities_A_painful_tale_of_Interim_Relief_in_Nepal.pdf. (Accessed October 1, 2010).

⁷³⁶ Interview with local civil society actor, Kathmandu, Nepal, July 15, 2009, 367.

in both the Nepal and Afghan contexts is whether, and to what extent immediate monetary compensation and reparations, individual and/or collective in nature, is sufficient to address the struggles of conflict victims. Some scholars and practitioners claim that there needs to be a stronger nexus between transitional justice and the broader development infrastructure. Aguirre and Pietropaoli, for example, insist “the right to development is the closest legal manifestation of the rights of marginalized people to participate in development.”⁷³⁷ In addition, they assert that transitional justice and the right to development is linked because it allows for a connectivity between development and human rights law, underscores the interdependence and universality of human rights in relation to development and third, helps create a rights-based framework for development and transitional justice for state action.⁷³⁸

Taking into account the realities in Afghanistan and Nepal, where the poorest have also constituted the largest numbers of conflict victims, such an argument certainly has strong resonance. Consider for example, the question of land in both countries. The issue of land conflict is a complex reality in Afghanistan. Land is both a homestead and a source of income, given that Afghanistan is a largely agricultural and pastoral country. Yet given illegal land possessions by warlords, and competing claims of land ownership by returning refugees and Internally Displaced Peoples (IDPs) and those who remained in the country and occupied property left behind, according to a 2009 AREU report, the highest frequency of land disputes in Afghanistan is about questions of property

⁷³⁷ Aguirre and Pietropaoli, *Gender Equality, Development And Transitional Justice*.

⁷³⁸ Ibid.

ownership rights -- relating to inheritance and that of occupation.⁷³⁹ Despite being an agriculture-based country, the feudal system in Nepal has historically denied lower caste people land ownership and ensured their continued position as “servants” who worked the land. The system of landlordism as it exists today evolved out of non-farmer elites accruing land holdings over time as a form of both security and social status. According to a 2009 UK Department of International Development (DFID) report, the land tenure system introduced in Nepal in 1951 have afforded tenants little protection other than for those with money.⁷⁴⁰ The 1964 Land Act, which terminated the practice of offering vast land grants to royal favorites, failed to address entrenched inequalities in land ownership and distribution.⁷⁴¹ In a 2001 government census, 1.3 million out of 4.2 million families in Nepal did not own land; 26% of the population (5 million) mostly belonging to members of the Dalit and other Terai communities were landless.⁷⁴² The staggering statistics not only reflect of Nepal’s poverty, but also its institutionalized caste structure, which has urged the need for land reform in the country. Expressing his frustration at the

⁷³⁹ Colin Deschamps and Alan Roe, “Land Conflict in Afghanistan: Building Capacity to Address Vulnerability,” Issues Paper Series, *Afghanistan Research and Evaluation Unit (AREU)*, April 2009, http://www.ecoi.net/file_upload/1226_1242042724_land-conflict-layout-web.pdf. (Accessed March 2, 2011).

⁷⁴⁰ See Liz Alden Wily, Devendra Chapagain and Shiva Sharma, “Land Reform In Nepal: Where Is It Coming From And Where Is It Going?,” *UK Department for International Development (DFID)*, April 2009, <http://www.landcoalition.org/publications/land-reform-nepal-where-it-coming-and-where-it-going>. (Accessed March 2, 2011)

⁷⁴¹ See “Land and Land Tenure Security in Nepal,” *Community Self Reliance Centre (CSRC)*, March 2009, http://www.csrenepal.org/CSRC%20_Ebulliten/Land%20and%20Land%20Tenure%20Security%20in%20nepal.pdf. (Access on March 1, 2011)

⁷⁴² See “Nepal: Land tenure reforms "urgently needed,” *IRIN News*, December 8, 2010.

current state of affairs and the central question of land within the broader framework of socioeconomic justice, an analyst vented:

This is a country governed by the rich for the rich at the expense of the poor. And it's very frustrating that you don't have many of the systems in place that actually vindicate the rights of the poor. There is a ton of development speak but none of these actually help the poor. There is no real system of land tenure and there seems to be no way that the actual poor can have any leverage.⁷⁴³

Certainly then, a case can be made for distributive justice within the framework of transitional justice for a context such as Nepal and even Afghanistan, where socioeconomic reconfiguration seems necessary to address some of the fundamental premises of inequity. Further, scholars such as Pablo de Greiff in his critique of a “juridical” approach to reparations that aims to re-establish the status quo ante by proportionate compensation for harms, proposes a “political” framework of reparations programs that measures their effectiveness in terms of social justice, which in contexts such as Afghanistan and Nepal would encompass perhaps distributive justice including land reform.⁷⁴⁴ Others, however, would urge caution in blending two different agendas -- that of reparations and that of development. Ernesto Verdeja for example, argues: “While most of society would benefit from an increase in development, there is a question of whether the specifically normative dimension of reparations risks subsumption under general development and distributive programs, clouding the normative distinction between reparative justice aimed at victims per se and more general state policies to

⁷⁴³ Interview with international actor, Kathmandu, Nepal, July 17, 2009.

⁷⁴⁴ Pablo de Greiff, “Justice and Reparations,” in Pablo de Greiff, ed. *The Handbook of Reparations*, (New York, NY: Oxford University Press, 2006) 451–77.

combat poverty.”⁷⁴⁵ Further, in contexts where victims were specifically targeted (in the case of Nepal, the Tharu population, or those assumed to be part of the Maoist movement, and in Afghanistan, based on ethnic identities and/or ideological or perceived ideological and/or political affiliations), they were considered, as Arendt described as “objective enemies,”⁷⁴⁶ and the crimes contained at times a markedly methodical element. For victims then, the question is not only that of financial compensation, but also the moral reaction of the state and their need for acknowledgement and recognition, which a blending of reparations and development, ultimately diffuses and renders inherently problematic. Last but not least, Verdeja reminds readers “there is an individual material component to theories of reparatory justice. This too is a form of distributive justice, insofar as it addresses the importance of redistributing resources to victims, but it places greater emphasis on the autonomy of individuals than the collective dimension... compensation can have an impact for economically destitute victims and shows that the state’s recognition of victims is not merely an empty symbolic gesture but also a commitment backed by material support.”⁷⁴⁷

In the interviews conducted in both Afghanistan and Nepal, and in the reports issued on the subject of victims’ demands including *A Call for Justice, Nepali Voices*, and the 2009 CIVIC report, the importance victims attach to the need for recognizing the crimes committed against them was a resounding theme. In Afghanistan, while victims’

⁷⁴⁵ Ernesto Verdeja, Normative Theory Of Reparations In Transitional Democracies, *Metaphilosophy* 37, Nos. 3–4 (July 2006), 457.

⁷⁴⁶ Hannah Arendt, *Origins of Totalitarianism*, (New York, NY: Harcourt Brace, 1973), 423.

⁷⁴⁷ Verdeja, *Normative Theory Of Reparations*, 458.

demands vary on a case by case basis, the 2009 CIVIC report stated that “beyond requests for formal justice, more civilians told us that some sense of redress could be achieved through a simple apology from those responsible for their loss...interviewees noted whether troops had apologized to them, publicly or personally.”⁷⁴⁸ The report also quotes Anja de Beer, the head of ACBAR as stating: “The [IMF] are not straightforward on a human level to say that they’re sorry and in Afghanistan that is important ... Compensation is important in Afghanistan -- yes, that is the whole justice system. But showing you’re sorry is also important.”⁷⁴⁹ In Nepal, victims and local human rights organizations interviewed stressed the distinction between immediate “interim relief” provided or promised and the broader scope of justice that they demand particularly relating to questions of punishing perpetrators, knowing about the whereabouts of the disappeared and sustainable rehabilitation. Otherwise, a victim’s group representative argued, it becomes “a lump sum of money being thrown at you and then the government and civil society forgetting about your every day struggles.”⁷⁵⁰ In both Afghanistan and Nepal then what emerges is that even when poverty levels are so dire, people demand to be recognized for the damages endured. It is this universal claim to human dignity that local voices continue to claim in both contexts.

⁷⁴⁸Gaston, *Losing The People*..

⁷⁴⁹ Ibid.

⁷⁵⁰ Interview with victims’ group representative, outskirts of Kathmandu, Nepal, July 16, 2009.

Where are the Women? The Gender Dimension of Transitional Justice

The question of gender cuts across the discussion of justice. Since its inception, transitional justice practices have not included the experiences and needs of women in accounting for the past. At one level criminal prosecutions, particularly in the earlier years, fell short of delivering justice for gender-based atrocities and it is only until recently that international criminal jurisprudence has begun to treat the rape of women not only as inhumane and an attack on “honor and dignity” but “with the same fervor as are the war crimes which happen routinely to men.”⁷⁵¹ At another level, the discussion of women’s involvement and their experiences during and after the war has engendered greater scholarly rigor in trying to understand how women can engage with different transitional justice mechanisms and how such efforts can actually have relevance in their lives. In *Does Feminism Need a Theory of Transitional Justice?* Bell and O’Rourke ask “where are women in transitional justice?” This question, they argue, “highlights the visible exclusions of transitional justice: women have been largely absent from forums that settle on the nature and design of transitional justice mechanisms.”⁷⁵² Furthermore, they inquire, “where is gender in transitional justice?” This question “addresses the deeper conceptual exclusion of women in transitional justice projects and asks how these projects might be reconfigured to better accommodate women’s diverse experiences of

⁷⁵¹ Rhonda Copelon, Women and War Crimes, *St. John’s Law Review* 69 (1995), 61-68.

⁷⁵² Christine Bell and Catherine O’Rourke, Does Feminism Need a Theory of Transitional Justice? An Introductory Essay, *International Journal of Transitional Justice* 1 (2007), 23.

conflict, human rights violations and post-conflict demands for justice.”⁷⁵³ Both these questions compel an incisive critique of the transitional justice discourse in Afghanistan and Nepal. They also help broaden the discussion of not only the need to recognize women’s experiences with sexual violence during the period of conflict, but also their social, political and economic experiences in the period following the official cessation of hostilities.

Applying a feminist lens to *A Call for Justice* and *Nepali Voices* as well as to Afghanistan’s National Action Plan and the CPA provisions raises serious concerns about the stark absence of women and their specific concerns. *A Call for Justice*, for example, which, while involving women in focus group discussions and in the interviews, does not include specific sections that relate to gender-based violations or the views of women on the subject. *Nepali Voices* too has been critiqued for its limited engagement with marginalized populations, particularly women, and women of lower castes, ethnicities and religious persuasions, how they discuss the questions of gender-based violations and what could constitute redress for such crimes. In the same vein, Afghanistan’s National Action Plan only makes passing reference to the question of gender-based violations and has, according to a 2009 ICTJ report, “made little substantive headway in addressing the fundamental social and political imbalances that have permitted abuses against women.”⁷⁵⁴ Nepal’s CPA makes no specific reference to women either in relation to their

⁷⁵³ Ibid.

⁷⁵⁴ Fatima Ayub, Sari Kouvo and Yasmin Sooka, “Addressing Gender-Specific Violations in Afghanistan,” *International Center for Transitional Justice, (ICTJ)*, February 2009, 15,

role as combatants or as victims and survivors of the decade long conflict. The relative absence of Afghan and Nepali women's voices in the survey of what survivors demand in the aftermath of conflict, and certainly their silence in national platforms of action is a reflection of the position and status of women and their access in both societies.

Women Among Warlords:⁷⁵⁵ Citizen and Subject

Afghan women's experiences under the Taliban are well documented. During the height of their rule, through the Ministry of Enforcement of Virtue and Suppression of Vice (*al-Amr bi al-Ma'ruf wa al-Nahi 'an al-Munkir*), particularly in the cities, they enforced decrees that regulated "moral behavior" particularly of women which included "edicts restricting movement, the denial of the right to work, beatings and other physical abuse, arbitrary detention, and a near ban on post-pubescent girls' access to education."⁷⁵⁶ Even minor infractions of the rules could lead to public beatings, threats and imprisonment.⁷⁵⁷ Deaths frequently occurred due to lack of access to medical facilities; illiteracy, unemployment, poverty among the female population skyrocketed; sexual violence was commonplace; and women were targeted for summary executions and extrajudicial killings when accused of adultery, 'immorality' and violating the strict

http://www.ictj.org/static/Asia/Afghanistan/ICTJ,Ayub_AFG_AdressingGenderSpecificViolations_pa2009.pdf. (Accessed March 15, 2011).

⁷⁵⁵ An autobiography titled *A Woman Among Warlords: The Extraordinary Story of an Afghan Who Dared to Raise Her Voice* was published in 2009 by Scribner Publishers.

⁷⁵⁶ See "The Ten Dollar Talib and Women's Rights: Afghan Women and the Risks of Reintegration and Reconciliation," *Human Rights Watch*, July 13, 2010, 16, <http://www.hrw.org/en/reports/2010/07/13/ten-dollar-talib-and-women-s-rights>. (Accessed March 10, 2011).

⁷⁵⁷ See for example, "Humanity Denied: Systematic Violations of Women's Rights in Afghanistan," *Human Rights Watch*, October 2001, 3, 6, 12-20, <http://www.hrw.org/legacy/reports/2001/afghan3/> (Accessed March 8, 2008).

edicts issued. Subsequently, the use of the rhetoric of “liberating Afghan women from the Taliban” became a politically salient way to legitimize the 2001 invasion of Afghanistan. But gender-based violence was not unique during the period of Taliban rule. During the civil war between 1992 and 1998, and particularly during the Afshar Operation⁷⁵⁸ that the Afghanistan Justice Project reports that rape was first majorly used as a weapon of war with Ittihad forces⁷⁵⁹ raping an unknown number of Hazara Shi’ite women, and Wahdat forces⁷⁶⁰ raping Pashtun women. The 2005 Afghanistan Justice Project (AJP) report notes: “every mujahideen group fighting inside Kabul committed rape with the specific purpose of punishing entire communities for their perceived support for rival militias”⁷⁶¹ thereby establishing the use of rape and sexual violence as not only a weapon of war, but also an instrument of ethnic cleansing.

An interview with an international analyst about the possibility of seeking

⁷⁵⁸ The Afshar Operation was a military operation led by Burhanuddin Rabbani’s Islamic State of Afghanistan government forces against Gulbuddin Hekmatyar’s Hezb-i Islami and Hezb-i Wahdat forces. The Afshar-based Iran-controlled Hezb-i Wahdat in coordination with the Pakistani-backed Hezb-i Islami of Hekmatyar heavily shelled the densely populated areas in Kabul. In response, the Islamic State forces attacked Afshar in order to capture Wahdat’s position and their leader Abdul Ali Mazari and consolidate parts of the city controlled by the government. For a detailed description of the Afshar Operation see “Casting Shadows: War Crimes and Crimes against Humanity: 1978-2001,” Afghanistan Justice Project (AJP), 2005. <http://www.afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf>. (Accessed January 10, 2007).

⁷⁵⁹ *Ittehad-e Islami bara-ye Azadi-ye Afghanistan* began as an attempt to bring unity amongst Islamist opposition forces in Afghanistan but it soon evolved as an independent entity led by Abdul Rasul Sayyaf and supported by financial aid from Saudi sources. Between 1993-94, it was one of the main actors, which participated in the fractional infighting for control over Kabul after the ousting of the PDPA government.

The *Hizb-e-Wahdat* (Party of Unity) was one of the main forces that emerged during the anti- Soviet resistance period in the 1980s. It was in response to a strong urge for unity among the Hazara leaders and the Shi’ite community.

⁷⁶¹ See “Addressing the Past: The Legacy of War Crimes and the Political Transition in Afghanistan,” Afghanistan Justice Project (AJP), 2005, 12, <http://66.116.195.23/blog/wp-content/uploads/2006/05/AfghJusticeReport.pdf>. (Accessed January 8, 2007).

retributive justice for sex-based crimes during wartime at even some point in the future revealed both a sense of bewilderment and a deep-rooted frustration. After all, it is questions of gender, and particularly those relating to women that irrevocably open up the rift between cultural dictates and certain notions of universalism. In nowhere perhaps is this as searing as in Afghanistan where customary laws and practices, and interpretations of Shari'a produce sharp relief to international legal standards.⁷⁶² He stated:

it gets so terribly complicated when it comes to the question of women's experiences during the conflict and the possibility of trials. Under what laws should such trials operate? Strict interpretation of the Shari'a calls for producing four male witnesses in a rape case. Who would come forward to testify for rape during conflict? Given the highly conservative culture, would women even consider coming forward to give testimonies? How would punishment be meted out for rape crimes? The whole thing is just too complicated...⁷⁶³

Even an international or a hybrid trial would not necessarily address the multidimensional complexity of such a theoretical enterprise. Lack of substantive evidence, access and limited testimonies and reluctance of survivors would inevitably be significant obstacles. Nevertheless, this overt focus on the *Shari'a*, some of those interviewed argued, could be seen to avoid specific violations committed against women during the ongoing conflicts and what women continue to experience today. Even if some

⁷⁶² A glaring tension emerges for example in Chapter 1, Article 3 of the Afghan Constitution, which states: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." See 1 (3), *Constitution of Afghanistan*, 1382. This tension has generated conflict between particularly Afghanistan's commitments to the Convention on the Elimination of Discrimination against Women (CEDAW) and practices and interpretations of the Shari'a in relation to women's rights in the country.

⁷⁶³ Interview with international analyst, Washington D.C. 2008. This issue was raised in subsequent interviews held both in Afghanistan and in Washington D.C. between 2008 and 2010.

of those trials were symbolic, and held sometime in the future, some of those interviewed believed they would serve as an acknowledgement of the specific experiences of Afghan women in almost three decades of continuous conflict.

Punitive measures for sexual violence during conflict are only one fragment of the justice when approaching the question of Afghan women. For the 48.9% of the Afghan population who are women,⁷⁶⁴ gender justice in every aspect of life continues to be a far cry from reality. While Afghan women now occupy some seats both in the Meshrano and Wolesi Jirgas, hold provincial council seats and civil servant positions, have participated as voters as well as candidates in the presidential and parliamentary elections of 2004, 2005 and 2010, overall, they continue to suffer extremely low social, economic and political status. They rank among the world's worst off by most indicators, such as life expectancy (46 years), maternal mortality (1,600 deaths per 100,000 births), and literacy (12.6 percent of females 15 and older).⁷⁶⁵ Women and girls continue to confront barriers to working outside the home and restrictions on their mobility; many still cannot travel without an accompanying male relative. Along with social and political rights, the right to education is also being eroded at a frightening rate. In 2006, only thirty-five percent of girls were in school.⁷⁶⁶ The violence directed at schools has hit girls' schools particularly

⁷⁶⁴ See "UNIFEM Afghanistan -- Fact Sheet 2007," UNIFEM, 2007 http://www.unifem.org/afghanistan/docs/pubs/08/UNIFEM_factsheet_08_EN.pdf. (Accessed March 10, 2011).

⁷⁶⁵ See "Human Rights Watch Letter to President Barack Obama on Afghanistan," *Human Rights Watch*, March 26, 2009, <http://www.hrw.org/en/news/2009/03/26/human-rights-watch-letter-president-barack-obama-afghanistan>. (Accessed March 10, 2011)

⁷⁶⁶ See "Human Rights Watch World Report," *Human Rights Watch*, January 11, 2007, <http://www.unhcr.org/refworld/docid/45aca2984.html>. (Accessed March 10, 2008).

hard. Southern and southeastern Afghanistan face the most serious threat, but schools in other areas have also been attacked. In some areas, entire districts in Afghanistan had closed all schools and driven out the teachers and non-governmental organizations providing education in response to Taliban attacks. Insecurity, societal resistance in some quarters to equal access to education for girls, and a lack of resources also mean that, despite advances in recent years, the majority of girls in the country remain out of school.

The general lawlessness and insecurity that today characterize Afghanistan continue to make women all the more vulnerable to sexual violence. Widespread poverty has increased the practice of the sale by parents of their daughters putatively as brides but in practice as prostitutes.⁷⁶⁷ Although Islamic law prohibits selling girls, ambiguity around local laws is such that according to a local Afghan jurist “nobody would ever be charged for selling a daughter.”⁷⁶⁸ The AIHRC continues to register a rise in the cases of violence against women, including that of forced marriages, rape, and self-immolation. Ten years since Bonn, violence against women remains endemic, with few avenues for redress.

In certain cases, provisions operationalized by the Karzai government have also been significantly regressive. Today, restrictions against Afghan women include curtailing educational opportunities, forcing chastity examinations, imprisoning women for refusing to marry or for leaving a marriage...and blocking redress in cases of state-

⁷⁶⁷ See for example, “Disgrace to Humanity: Afghan Girls on Sale for 100kg Wheat,” *News International*, February 10, 2002. Also see “Afghan Poor Sell Daughters as Brides,” *MSNBC*, February 23, 2003.

⁷⁶⁸ Mark A. Drumbl, Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan. *Columbia Journal of Transnational Law* 42, no. 2 (2004), 349-381

orchestrated sexual assault.⁷⁶⁹ The Vice and Virtue Patrol which established a record of arbitrary abuses, notably for beating and harassing women and girls for traveling without male guardians and for even slight infractions of stringent dress requirements, continues to operate under the new Ministry of Justice and under the aegis of the Department of Islamic Instruction.⁷⁷⁰ In June 2007, Karzai sent the Afghan parliament a proposal for reestablishing the Department for the Promotion of Virtue and the Prevention of Vice. In November 2007, parliament debated the possibility of closing the Ministry of Women's Affairs. In response to women's rights activists decrying the increasing stronghold of the warlords and expressing concern about the current efforts to "reconcile" antagonistic parties, Arsala Rahmani, a current lawmaker and former Taliban government official, reportedly has said that

Afghan women's rights activists are being close-minded and neglecting a mother's duty to always try to unite their sons. The Taliban only wants to protect women. Yes, it's for your own good, young women, that Taliban fighters burn down your schools in areas they control and force you to marry them at, oh, age 13 or 14 if they like what they imagine is under your burqas.⁷⁷¹

Such positions of national lawmakers certainly generate a hostile environment for women. Recent considerations of justice and reconciliation in Afghanistan also need to be understood within such a context. Certainly, the question of gender justice in current

⁷⁶⁹ See "Falling Back to Taliban Ways with Women: An Editorial," *International Herald Tribune*, January 21, 2003.

⁷⁷⁰ David B. Edwards, *Before Taliban: Genealogies of the Afghan Jihad*, (Berkeley, CA: University of California Press, 2002).

⁷⁷¹ See "Afghan Women Fear Loss Of Hard-Won Progress," *The Washington Post*, March 16, 2010.

efforts to jumpstart a new reconciliation process in Afghanistan underscores the deep cleavages between an official and elite understanding of what such processes would mean, and what it would mean for the voices at the margins. Interviews conducted by local human rights organizations and particularly women's rights organizations revealed serious concern at the current trend to reintegrate and reconcile antagonistic parties and encourage insurgents to surrender arms. While some women leaders expressed the importance of reconciliation to end the conflict, in general women civil society actors continue to be extremely concerned that Karzai's current efforts, supported by the international community to bring parties together for negotiations would ultimately be a step backward in the strides made by women in the last ten years. These concerns have already been raised repeatedly in different forums. Women's groups' raised expressed their reservations about the current reintegration and reconciliation strategy in the run-up to 2010 London conference.⁷⁷² Such concerns were again raised at the Dubai Women's Dialogue,⁷⁷³ which exposed the exclusion of gender in the agenda of the London Conference and the lack of women representatives in the Afghan delegation.⁷⁷⁴ For

⁷⁷² The London Conference was held on 28 January 2010. The conference aimed to move the international effort forward in three key areas: security, governance, development and regional support and garnered international support for a formalization of a reintegration strategy with financial backing, resulting in a preliminary commitment of approximately US\$160 million. For details, see Communiqué, *International Conference on Afghanistan*, London, UK, January 28, 2010, http://www.isaf.nato.int/images/stories/File/factsheets/Documents_Communique%20of%20London%20Conference%20on%20Afghanistan.pdf. (Accessed February 5, 2010).

⁷⁷³ Conducted by Afghan Women's Network (AWN) with the support of UNIFEM Afghanistan Country Office and the Institute for Inclusive Society and held on January 23-24, 2010.

⁷⁷⁴ "Women's Statement And Recommendations: Afghan Women Civil Society Leaders Meet in Dubai to Discuss Peace and Security for Afghanistan in the Context of the London Conference," January 28, 2010, <http://peacewithjustice4afghanistan.blogspot.com/2010/01/afghan-women-civil-society-leaders-meet.html>. (Accessed March 12, 2011).

advocates for Afghan women, until and unless concerns of systemic marginalization and lack of participation are adequately addressed, the justice question, beyond that of the transitional justice framework, remains an elusive project.

Nepal's Women: Faces of Marginalization

A Hindu kingdom until 2007, Nepal's socio-cultural framework infused by Hinduism has historically been a deeply patriarchal society. A verse from *Ram Charit Manas*⁷⁷⁵ best captures this with its proclamation, "drums, idiots, outcasts and women are fit only for beating,"⁷⁷⁶ reflecting women's role as second-class citizens and their vulnerability to systemic social, economic and political marginalization. Despite the fact that Nepali women constitute 50.05% of the population, traditions and cultural practices of patriarchy have ensured that there is very little scope for women to be decision-makers both in the private and public realms. Only 11 % of Nepali women have any land ownership; 72 % of women versus 48 % of men work in agriculture; and 60% of women work as unpaid family laborers.⁷⁷⁷ The Executive Director of the Feminist Dalit Organization (FEDO) summarized the conditions of Dalit women in particular when she noted:

⁷⁷⁵ Poet Goswami Tulsidas' epic 16th century Hindu poem that chronicles the life of Ram, who is worshipped as an incarnation of the God Vishnu. As cited in *Across the Lines*...

⁷⁷⁶ See *Across the Lines*.

⁷⁷⁷ Lynn Bennett, "Gender, Caste And Ethnic Exclusion In Nepal: Following The Policy Process From Analysis To Action," World Bank (WB), December 12 -15, 2005, 24-25, [Http://Siteresources.Worldbank.Org/Intranetsocialdevelopment/Resources/Bennett.Rev.Pdf](http://Siteresources.Worldbank.Org/Intranetsocialdevelopment/Resources/Bennett.Rev.Pdf). (Accessed March 10, 2011).

[W]e have had systematic marginalization and exclusion of women...and then during the conflict they were also raped and tortured... Dalit women have very few rights to begin with; they do not have access, they do not have marriage registration, they do not have citizenship, and they don't have birth registrations of their children, when then cannot go to school if she cannot produce the documents...if the husband leaves her not have access and awareness and she doesn't have marriage registration and if she doesn't she doesn't have citizenship and with children if she doesn't have birth registration for the children they cannot go to school and there is no father. If the husband leaves her, she has no right to property of the husband.⁷⁷⁸

While the decade-long conflict resulted in rape and sexual torture of thousands of Nepali women,⁷⁷⁹ the destruction of their homes and families, widowhood and rendered thousands of civilian women refugees and IDPs, the People's War also provided a unique opportunity for many women, especially from impoverished backgrounds including from the marginalized castes, ethnic groups and rural areas to voice their claims, and even actively emerge participate in the frontlines of war. The memorandum released by the United People's Front, the Maoists' political wing, released a memorandum best summarized the fundamental social disruption brought on by the Maoist ideology in its statement: "Patriarchal exploitation and discrimination against women should be stopped. Their daughters should be allowed access to paternal property."⁷⁸⁰ The Maoists also

⁷⁷⁸ Interview with Executive Director of FEDO, Kathmandu, Nepal, July 10, 2009

⁷⁷⁹ Sexual violence and rape was widely reported in the decade long People's War with a majority of these crimes being committed by state security forces, i.e. the RNA. Women were raped when accused of supporting the CPN-M or having some affiliation with them. In many instances, women were targeted because their husbands or family members had joined the CPN-M. According to the 2010 report *Across the Lines*, released by AF and ICTJ, "female CPN-M cadres were subjected to particularly brutal forms of sexual violence by security forces, and research findings indicate that rape was a common practice adopted by the RNA to punish female CPN-M cadres and sympathizers for their rebelliousness against the state and defiance of their traditional roles. See *Across the Lines*..

⁷⁸⁰ See "40 Points Demand," *United People's Front*, February 4, 1996, <http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm>, (Accessed March 12, 2011).

encouraged social reform, promoted remarriage for widows, inter-caste marriage, revoked *chaupadi*, the strict taboos concerning women's menstrual periods [and] opposed child marriage and polygamy.⁷⁸¹ Their calls to arms and the crisis situation that emerged particularly broke new grounds; women comprised forty per cent of the Maoist cadres in combatant roles, including in female-only squads and platoons.⁷⁸² Rita Marchanda summarizes this dynamic development when she stresses that the Nepal conflict created "intended and unintended spaces for empowering women, effecting structural social transformations, and producing new social, economic and political realities that redefine gender and caste hierarchies."⁷⁸³ Almost overnight it seemed centuries old patriarchal structures, traditions, norms and morals collapsed, to be replaced by a new women's agenda.

The euphoria of the conflict period however did not translate seamlessly in official efforts to end the war, in the peace processes that followed and in post-conflict governance. The negotiations between the political parties in the lead-up to the 12-point Letter of Understanding of November 2005 and subsequent negotiations for the formation of an interim government did not include a single female representative.⁷⁸⁴

⁷⁸¹ See Aguirre and Pietropaoli, *Gender Equality, Development And Transitional Justice*. Women and human rights organizations however claim that particular practices such as the *chaupadi* was not eliminated solely because of the Maoists since such groups and civil society organizations had long mobilized and advocated for such changes. They do recognize that the Maoist ban on *chaupadi* and other social practices went a long way to try eradicate such discriminatory practices.

⁷⁸² Aguirre and Pietropaoli, *Gender Equality, Development And Transitional Justice*

⁷⁸³ Rita Marchanda, Maoist Insurgency in Nepal: Radicalizing Gendered Narratives, *Cultural Dynamics* 16, No. 2-3, (2004), 237.

⁷⁸⁴ See *Across the Lines...*

Other mechanisms formed during the peace negotiations similarly had no women participants. A National Monitoring Committee (NMC) created to monitor the implementation of the 12-point Letter of Understanding only had two women among its 31 members.⁷⁸⁵ The Interim Constitution Drafting Committee, initially comprised of six men, but later included four women in response to a campaign led by women's organizations.⁷⁸⁶

Outside of the realm of politics, the socioeconomic conditions for women and their need for security have yet to be addressed. There is deep social stigma attached to their participation in the frontlines of war and they also struggle with the realities of social and economic inequity and sexual violence experienced during and after the formal cessation of conflict. A significant challenge for women has not only been the status of widowhood, but that of being family members of the “disappeared.” Married women who have lost their husbands may continue to wear the *sindhur* (the red powder in their hair that denotes marriage) and wear bangles, but without exact knowledge of the status of their partners, and conducting the rituals of death, their social status remains unclear. Without the fulfillment of these last rites for their partners, they are denied the purification rites to pass through onto widowhood. A local human rights actor explains,

In Nepal, disappearances are tied to not only emotional suffering, but also to the question of economics...so many of those disappeared belonged to the lower castes and came from the poor and marginalized communities...this means main breadwinners are now gone from the family, and women survivors, don't know if they are widows or they will find their husbands...there is a skewed power

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid.

relationship that emerges within the family they have married in to, and they remain socially, culturally and economically ostracized.⁷⁸⁷

Ultimately, these realities of gender justice raise questions about the existing framework for transitional justice in Nepal. Survivors of sexual violence committed during the conflict continue to demand compensation from the state.⁷⁸⁸ It became clear during the course of research for this study that women were overall late comers in current transitional justice activism and it was only recently that organizations such as AF, FEDO, United Nations Entity for Gender Equality and the Empowerment of Women (UNIFEM) the National Women's Commission (NWC) became involved in trying to advocate for the rights of women within the existing framework.

Thus far, there have been some fledgling improvements as a consequence of such mobilization. The proposed TRC bill as it stands for example, finally recognizes women and girls who experienced sexual violence as victims; the category of "serious violations of human rights" now includes rape and sexual violence⁷⁸⁹ and rape is included as one of the categories of crimes for which "no recommendation for amnesty shall be made to a person involved."⁷⁹⁰ Yet, the bill inherently remains problematic for women and human rights perspective in that it gives powers "to the TRC to 'cause reconciliation' for certain

⁷⁸⁷ Interview with local human rights actor, Kathmandu, Nepal, June 27, 2009.

⁷⁸⁸ See "NEPAL: Women Raped by Security Personnel During Conflict Demand Compensation," *Nepal News*, June 22, 2010.

⁷⁸⁹ Truth and Reconciliation Bill 2009 2 (j) as cited in *Across the Lines...*

⁷⁹⁰ *Across the Lines...*

crimes, including sexual violence.”⁷⁹¹ The reference to recommending amnesty still remains which again human rights and women’s rights organizations consider to be extremely problematic for victims of sexual violence. Further, the 2010 AF and ICTJ report states:

According to the Bill, recommendation for amnesty involves submitting an application for amnesty and ‘repenting for the misdeeds carried out’ in a way that is ‘to the satisfaction of the victim.’ However, the victim does not necessarily have a voice in this process, as the Commission ‘may’ consult the victim before making a decision, but such a consultation is not required. Thus, even though the Bill requires the victim’s satisfaction, it does not have in place measures to ensure that this satisfaction element is attained.⁷⁹²

Questions still remain about the appointment of commissioners, and whether statement taking, hearings, and outreach processes would be more gender-sensitive. The Disappearances Commission Bill thus far has failed to recognize the gendered dimension of enforced disappearances and women and human rights groups allege there was no consultation with women’s organizations in drafting the bill.

Conclusion

This chapter began with Plato and Kant’s understanding that knowledge of all positions from which people define justice, ethics, good and evil, provides a deeper and, indeed, truer understanding of human existence. Indeed, this same argument is underscored when Opatow contests the assumption that justice is “firm, stable and

⁷⁹¹ Ibid

⁷⁹² Ibid

unwavering” and insists, “in reality...justice is sensitive to contextual contingencies.”⁷⁹³

This chapter was an effort to illuminate challenges of the concept of justice as it pertains to the local realities and demands in Afghanistan and Nepal and illustrate how, contrary to Opatow’s claims, the pursuit of justice remains *insensitive* to the contextual contingencies.

The central premise of this chapter is simple -- in contexts of deep-rooted cycles of impunity, and in circumstances where the worst perpetrators become the most prominent actors in the transitional period, the logic of transitional justice with its focus on the “accounting for the past” becomes both lofty and moot. At best, it remains a paper commitment, and in the Afghan and Nepal contexts, far from being responsive to the voices in “autistic isolation” from which it originally derives its legitimacy.

In Afghanistan and Nepal, transitional justice for extraordinary crimes becomes an incomplete framework and roadmap, when it confronts the raw, unrelenting, unsophisticated demands for punishment and for subsistence, i.e. retributive and/or illustrative castigation and penalties, and socioeconomic commitments, which it recognizes conceptually, but falls short on delivery. As this chapter further highlighted, it fails to capture the needs and expectations of those who have paid the heaviest price in the ongoing conflict and period of reconstruction. This failure matters, because it calls into question the beneficiaries of transitional justice and who it ultimately marginalizes. Ultimately, this failure also underscores that even beyond the pressing demand for a

⁷⁹³Opatow, *Psychology of Impunity and Injustice*, 207.

response to extraordinary atrocities is the persistent claim for ordinary justice by the voiceless.

This chapter looked at four specific concerns of local justice, which emerged in both contexts. In doing so, it first recognizes that each of these questions -- retributive justice, justice as marginalization, socioeconomic demands and gender justice, are in and of themselves significant fields of in-depth study. The aim here was not to provide an exhaustive discussion of each, but merely to provide a snapshot of the most prominent expectations and needs in the Afghan and Nepal communities with regard to justice. These claims encompass the need to address the extraordinary crimes committed during conflict, as well as “ordinary” crimes and existing sociopolitical and economic inequities, which constitute injustices for those whose voices are still at the margins. These voices “autistic isolation” amidst the clamor of what elites, national and international define as the parameters of transitional justice.

The discussion on retributive justice, for instance, highlights that justice as punishment has appeal, both symbolically and tangibly, to make a break from the cycles of impunity that has so entrenched itself in both societies, apriori, during and even after the cessation of hostilities. This universal demand for “accounting,” it illustrates, is particularly significant in contexts such as Afghanistan and Nepal where today’s most powerful political and military actors (such as the warlords and the Nepali Army) continue to pose serious challenges to efforts to institutionalize a rule of law state based on democratic principles. Their presence, this section argues, is not only a reminder of the legacies of war, but also the catalyst for a climate within which “ordinary” crimes

continue to be committed without any fear of retribution and where parallel and often problematic adjudication systems emerge to fill the gap left by the state.

The practice of vetting and lustration might have only emerged recently in transitional justice literature as standard practice, but as the example in Afghanistan clearly illustrates, “those with blood on their hands, should stand at the back of the mosque” resounds with the philosophy of social ostracization and an emphasis to remove from any position of authority those who have caused human suffering. If indeed culture, the “static local” continues to be the point of reference for transitional justice packages, then the question must be raised, where, in the efforts to legitimize practices of societal healing and conciliatory measures, is the issue of accountability? Certainly, both the Afghan and Nepal contexts clearly illustrate that the local concerns about social, economic and political marginalization of those with power would constitute as justice, through ensuring that those who can abuse no longer have the means to do so, and second producing gesture made to recognize and acknowledge human suffering within the context of war.

CHAPTER 7

NEGOTIATING NARROW SPACES: NATIONAL HUMAN RIGHTS

COMMISSIONS (NHRIs)

On a warm spring day in 2010, a few weeks before the much-awaited National Consultative Peace Jirga (NCPJ), the largest recorded jirga to be held in Afghanistan for a discussion of peace and reconciliation, I was in the sunny meeting room of the AIHRC, surrounded by a group of passionate, energized civil society actors, most of whom were local, and who were brainstorming about how to put together a Victims' Jirga, a shadow jirga of sorts, for victims of the almost three decades of conflict in Afghanistan. The idea was not to just complement the NCPJ, which was already heavily criticized for being too exclusive, dominated by Karzai's supporters and disinterested in victims' demands, but also to remind the international community and Karzai's government about the "forgotten majority" -- the victims of Afghanistan's wars. The participants were all members of the voluntary Transitional Justice Coordination Group (TJCG), a network of 25 civil society organizations mobilized particularly since the passage of the amnesty law, to revive the discussion of transitional justice in Afghanistan. "With the TJCG," remarked an international actor later in confidence, "the AIHRC seems to have found a new lease of life...it has found its footing, it can put aside the differences

with other civil society actors, and take a leadership role of a kind and serve as the gathering point for mobilization and activism on transitional justice.”⁷⁹⁴

On February 11, 2010, Wahid Omar, spokesperson for the president of Afghanistan, was quoted in *Hasht-e-Sob*⁷⁹⁵ as stating: “Transitional justice is not implemented by governments.” In Afghanistan, and to a great extent in Nepal, the reality reflects this very same pronouncement -- to the extent the discourse of transitional justice is alive in both countries, in however a minimal fashion, it is because of the role of a few national and international actors which have kept the question of accounting for the past alive. This state of affairs reflects both a humbling and a complex picture of the relationship between the states in question, the priorities of the respective governments, and the politics and politicking between and among national and international actors.

In the beginning, this dissertation posed the following question: how does the domestic struggle to address wartime atrocities and ongoing injustices manifest itself, particularly given the absence of a committed state to the process of transitional justice? Two very specific national actors emerged to grapple with this query -- the AIHRC and the NHRC. These national actors, independent of NGO styled networks, associations and/or entities that rise and fall based on funding availability, location, donor decisions and leadership, occupy a unique position both for human rights programming and increasingly, for “transitional justice,” because of the scale of their operations, their unique mandates to act as a bridge between local concerns and context and their

⁷⁹⁴ Follow-up interview with international civil society actor in Kabul Afghanistan, April 10, 2010.

⁷⁹⁵ An Afghan daily circular.

respective governments and serve as an umbrella for local actors on human rights concerns.

This chapter focuses on the significance of the AIHRC and NHRC, their experiences, their challenges and their shortcomings in their ongoing efforts in transitional justice in particular, and human rights efforts in general, within very fluid and highly contentious contexts. This chapter begins with an overview of the role of National Human Rights Institutions (NHRIs) particularly in societies in or emerging from conflict. Next, it looks at the specific questions facing the AIHRC and NHRC and how they attempt to strike a sensitive and often tenuous balance between their mandate to work on human rights and interpreting their responsibilities to work on the question of accountability for wartime atrocities. In examining their contributions to the efforts of “accounting for the past,” This chapter concludes that NHRIs, despite all their imperfections are unique in linking the issues of past injustices (the *raison d’être* of “transitional justice”) to that of current injustices, thereby challenging the somewhat false dichotomy between “ordinary” and “extraordinary” crimes that impede war-torn societies’ struggle to make a transition from war to stability.

Enter National Human Rights Institutions (NHRIs): An Overview⁷⁹⁶

NHRIs are state-sponsored entities, set up under an act of parliament or by the constitution, with the broad objective of protecting and promoting human rights.⁷⁹⁷ They

⁷⁹⁶ The following contains excerpts from Tazreena Sajjad, “These Spaces in Between: The Afghanistan Independent Human Rights Commission and its Work on Transitional Justice,” *International Journal of Transitional Justice*, 3 no. 3 (2008), 424-444.

have quasi-judicial competence, and key elements of their composition are independence and pluralism.⁷⁹⁸ According to the Paris Principles,⁷⁹⁹ NHRIs are required to monitor violations of human rights; advise the government and parliament on issues related to legislation and compliance with international human rights violations; audit laws; train personnel; educate the public; report to international bodies; hold inquiries; handle complaints; relate to regional and international organizations; and assist in formulating educational human rights programs. In short, they are the “practical link between international standards and their concrete application,”⁸⁰⁰ and irrespective of their mandate, represent government efforts to “embed international norms in domestic structures.”⁸⁰¹

The International Council on Human Rights Policy (IHCHRP) reports that NHRIs are established in one of three circumstances: in countries making the transition from conflict, such as Northern Ireland, South Africa, the Philippines, Spain, and Latvia; in

⁷⁹⁷ Julie Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions*, (Stanford, CA: Stanford University Press, 2009).

⁷⁹⁸ Morten Kjærum, “Human Rights and Criminal Justice for the Downtrodden,” *Danish Institute for Human Rights*, 2003, <http://www.nhri.net/pdf/NHRI-Implementing%20human%20rights.pdf>. (Accessed February 10, 2008).

⁷⁹⁹ The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris on 7–9 October 1991, and adopted by UN Human Rights Commission Resolution 1992/54 of 1992 and General Assembly Resolution 48/134 of 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights.

⁸⁰⁰ See Fifty-Second Session of the UN Commission on Human Rights, Report of the Secretary-General on National Institutions for the Promotion and Protection of Human Rights, *United Nations (UN)*, 1997, E/CN.4/1997/41

⁸⁰¹ Sonia Cardenas, “Adaptive States: The Proliferation Of National Human Rights Institutions,” Working Paper, Carr Center for Human Rights Policy, Harvard University, 2004, 53, <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Cardenas.pdf>. (Accessed February 10, 2007)

countries where a commission is established to consolidate and underpin other human rights protections, such as Australia, Canada and France; or in countries that come under pressure to respond to allegations of serious human rights abuses, as in Cameroon, Nigeria, Togo and Mexico. Bell writes that “NHRIs signal a stamp of democratic legitimacy on the deal arrived at: they constitute part of the politically correct approach to constitutionalism.”⁸⁰²

Contemporary history is replete with examples of how NHRIs are being incorporated into peace negotiations. Both the 1995 Dayton/Paris Peace Accords and the failed NATO-led Rambouillet peace proposal of March 1999 included the establishment of a human rights ombudsman for Bosnia and Herzegovina.⁸⁰³ The Lomé Peace Agreement of 1999 included provisions for the establishment of both a human rights commission and a truth and reconciliation commission in Sierra Leone, and the Northern Ireland Peace Agreement included provisions for creating human rights institutions on a bilateral basis in both Ireland and Northern Ireland. Recent discussions about the expanding responsibilities of NHRIs have included their contributions in transitional justice processes. The Guidance Note on National Human Rights Institutions and Transitional Justice issued by the UN Office of the High Commissioner for Human Rights states that such institutions are

well placed to contribute to transitional justice processes through information gathering, documenting and archiving human rights abuses, conducting investigations, monitoring and reporting, cooperating with national, regional and

⁸⁰² Christine Bell, *Peace Agreements and Human Rights*, (New York, NY: Oxford University Press, 2000), 198

⁸⁰³ “Serbs Scorn Kosovo Peace Pact,” *Globe and Mail*, March 19, 1999.

hybrid or international judicial mechanisms, providing assistance to victims, ensuring respect for international standards, advising on legislative and institutional reforms, and conducting education and training on human rights and national reform efforts.⁸⁰⁴

Moreover, NHRIs can raise awareness about various transitional justice mechanisms and lessons learned worldwide; engage civil society and institutional actors in the transitional justice discourse; facilitate national consultations; ensure the participation of victims, women and vulnerable groups; assist in the establishment of transitional justice initiatives; and facilitate follow-up on the recommendations of various transitional justice mechanisms.⁸⁰⁵

During transitions, NHRIs may be expected to play a critical role in ensuring accountability and combating impunity by documenting and archiving past and present violations of international human rights law and international humanitarian law.⁸⁰⁶ For example, in 1998 the Komnas HAM, the Indonesian NHRI, conducted a survey of human rights abuses that took place in Aceh between 1990 and 1998. The findings of the investigation led the Komnas HAM to recommend prosecutions of those responsible, compensation for the victims, restoration of civilian institutions and an end to the culture of impunity within the military, a review of military laws, education, and reallocation of resources between the central and provincial governments.

⁸⁰⁴ “Guidance Note on National Human Rights Institutions and Transitional Justice,” *UN Office of High Commissioner for Human Rights* (UNOHCHR-Nepal), September 27, 2008, http://www.nhri.net/2009/NHRIs_Guidance%20Note%20TJ_Oct%2008.pdf. (Accessed February 10, 2007).

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid.

Particular NHRIs can promote an environment conducive to establishing transitional justice initiatives most suited to local context. Since 1999, the Northern Ireland Human Rights Commission has been involved in the investigation of conflict-related deaths in Northern Ireland. It is currently involved with the development of the Historical Enquiries Team, which is re-examining a large number of unresolved conflict-related deaths.⁸⁰⁷ In Morocco, following pressure by victims and human rights organizations, the Human Rights Consultative Council (CCDH) issued a report on 112 disappearance cases and proposed the establishment of a mechanism to provide financial compensation for victims.⁸⁰⁸ In the Philippines, the Commission on Human Rights of the Philippines (CHRP) is not only responsible for working as an oversight mechanism in the career development of the police and armed forces, but it also reviews and clears candidates for promotions. NHRIs have also facilitated legislative, administrative and constitutional reforms that further the rule of law. These examples highlight that such bodies are in a unique position to introduce human rights norms that are concomitant with universal standards of democratic values, universal human rights, pluralism and equality. This positioning allows them to engage with strategies to respond to past atrocities while also impacting on the infrastructure and policies for greater accountable governance in the future.

Despite this, the establishment of NHRIs does not automatically lead to the conclusion that it will be effective in building good governance and protecting human

⁸⁰⁷ For more on the work of the Historical Enquiries Team, see Patricia Lundy, “Can the Past be Policed? Lessons from the Historical Enquiries Team in Northern Ireland,” *Law and Social Challenges*, Vol.11, (Spring-Summer 2009), 1-55.

⁸⁰⁸ *Guidance Note on National Human Rights Institutions...*

rights. Although there is little empirical data that assesses the effectiveness of such institutions, several observations can be made from experiences “on the ground.” NHRIs may be established with the best of intentions, but the reality is that such commissions can often become a “window-dressing.” As such, they might provide opportune moments for fledgling governments who want to give the appearance that they are taking concrete steps to address human rights concerns, but in fact affect very little real change. Cardenas cynically argues: “NHRIs are being created largely to satisfy international audiences; they are the result of state adaptation. These international origins, however, have the following paradoxical effect: most NHRIs remain too weak to protect society from human rights violations at the same time that they create an unprecedented demand for such protection.”⁸⁰⁹ In reality, “the degree of success that a national institution will have in building good governance and protecting human rights depends on a number of legal, political, financial and social factors affecting the institution.”⁸¹⁰ It is within these multiple tensions, between what is ideal and what is real that the domestic struggle for long-term justice by NHRIs needs to be understood.

The Afghanistan Independent Human Rights Commission (AIHRC)

Established by the 2001 Bonn Agreement and the Presidential Decree of 6th June 2002, for the longest time, the AIHRC was, for the most part, the solitary institution claiming to lead the transitional justice movement in Afghanistan. Chaired by Sima

⁸⁰⁹ Cardenas, *Adaptive States*, 1.

⁸¹⁰ Linda Reif, Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, *Harvard Human Rights Journal* 13 (Spring 2000), 1-69.

Samar, who was then the Minister of Women's Affairs in the Interim Administration, its eleven members included five women and representatives of each of the major ethnic groups. Many international observers have lauded the AIHRC commissioners for their independence and their commitment, as many were formal civil society activists operating under difficult wartime conditions. However, observers also note that few of the members had direct experience of human rights and consequently their capacity was low.⁸¹¹ Stated a current commissioner: "...none of us were human rights experts....we were all human rights activists but had no idea how to run a professional national commission so it was really a challenge for us."⁸¹² Furthermore, their independence also meant that they lacked the political clout of the more politicized bodies with influential members.⁸¹³ Despite these concerns, the presidential decree, which established the Commission, further elaborated significantly on its mandate, making it a powerful mechanism for human rights protection. In addition, article 58 of the new Constitution of Afghanistan institutionalized AIHRC. Today's AIHRC's position is aided by quasi-judicial powers, including the ability to summon anyone living in Afghanistan, to examine such persons as witnesses and to "compel them to produce documentary or material evidence in their possession or under their control."⁸¹⁴

⁸¹¹ Rama Mani, "Ending Impunity and Building Justice in Afghanistan," *Afghanistan Research and Evaluation Unit (AREU)*, Kabul, Afghanistan, December 2003, 23, <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan016655.pdf>. (Accessed February 18, 2008).

⁸¹² Interview with AIHRC commissioner, Washington D.C. 2008, June 1, 2008

⁸¹³ Mani, *Ending Impunity...*

⁸¹⁴ Article 11, *Constitution of Afghanistan*, 1382.

In early 2002, the United Nations Development Program (UNDP) supported UNAMA and the UN Office of the High Commissioner of Human Rights (UNOHCHR) to facilitate four Afghan Working Groups, which included human rights education, transitional justice, human rights for women and monitoring and investigation of human rights violations.⁸¹⁵ This in turn resulted in six programs -- human rights education, women's human rights, children's rights, monitoring and investigation of human rights violation, research, policy and media and transitional justice.⁸¹⁶ Later on it added its program for people with disabilities.⁸¹⁷

The AIHRC has quickly positioned itself to tackle some of the most complicated human rights concerns in a country devastated by almost thirty years of protracted violence. Despite several constraints, with the cooperation of organizations such as the UNDP, AIHRC has been able to make some significant logistical strides. It expanded its operations to include its headquarters in Kabul and eight regional and six provincial offices throughout Afghanistan. The eight regional offices are situated in Bamiyan, Gardez, Herat, Jalalabad, Kabul, Kandahar, Kunduz, and Mazar-e-Sharif; and the six provincial offices are located in Badakhshan, Daikundi, Ghor, Helmand, Maimana, and Uruzgan.⁸¹⁸ As of 2009, it has approximately 646 staff members distributed throughout

⁸¹⁵ "UNDP in Afghanistan," *United Nations Development Programme (UNDP)*, 2005, 9, http://www.undp.org.af/publications/KeyDocuments/UNDP_in_Afghanistan_2005.pdf. (Accessed February 10, 2007).

⁸¹⁶ Ibid.

⁸¹⁷ Phone interview with Qader Rahimi, AIHRC Regional Manager, Afghanistan, August 17, 2008

⁸¹⁸ See "Annual Report," *Afghanistan Independent Human Rights Commission (AIHRC)*, January 1-December 31, 2009, 13.

the regional and provincial offices.⁸¹⁹ It has conducted training and workshops in women's rights, children's rights and human rights education in Kabul and in all regional and provincial offices and has ongoing production and broadcast of radio-based and TV programs on human rights. In addition, AIHRC chairs the Human Rights Advisory Group (HRAG). The Commission regularly receives complaints on human rights related issues from right to due process, land grabs, alleged use of torture to extort confessions from detainees, to abuse of power from all over the country.

Today, in the absence of government and judicial structures in many areas of Afghanistan, people commute, often on foot, to file their complaints with the institution in the hope for some government action.⁸²⁰ The commission has also been active in documenting accusations of rights violations by U.S.-led coalition forces in Afghanistan that have included alleged beatings, the detention of innocent people, damage to houses, and a lack of respect for Afghan culture during coalition raids and has been at the forefront of publicizing the incidents of "collateral damage" due to bombings by NATO and U.S. forces. Other activities have included monitoring prisons and creating sustained pressure, which led to the establishment of human rights units in the Ministries of Interior, Justice, Women's Affairs, Education, Defense and Foreign Affairs.¹ It is increasingly integrated into the human rights monitoring and investigative work of the United Nations. The AIHRC also works in close collaboration with the human rights

⁸¹⁹ Ibid.

⁸²⁰ Phone interview, with AIHRC staff, August 20, 2008.

focal points at UNAMA and the Danish Embassy and has been looked upon with favor by its international partners and many local civil society groups.

From the beginning, the place of the transitional justice project in the AIHRC mandate was very clear: “The AIHRC was created and mandated to develop a mechanism and a national strategy for transitional justice. It will also explore the traditional methods of confronting the past and promoting accountability in order to mold any transitional justice strategy to the particularities of Afghanistan.”⁸²¹ Moreover, it was required to work to ensure that national laws are consistent with Afghanistan’s human rights treaty obligations and provide “advice and information to the country’s human rights treaty monitoring practices.”⁸²² AIHRC identified the trajectory of its work to be through investigation, recording and publication of the “truth” and through the establishment of accountability for the past crimes in accordance with international law, Islamic principles and Afghan tradition.⁸²³ Accordingly, it began a two pronged approach for this project: (i) documentation and collection of human rights abuses; and (ii) a national consultation to learn the methods Afghan people support in dealing with those who committed the human rights violations.

⁸²¹“Transitional Justice: Challenging Injustice, Meeting Accountability,” *Afghanistan Independent Human Rights Commission (AIHRC)*, (undated) http://www.aihrc.org.af/tra_jus.htm. (Accessed January, 10, 2007).

⁸²² Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, June 2002, Annex I, Art. 9, <http://aihrc.org.af/Content/files/decreed.pdf>. (Accessed February 10, 2007).

⁸²³*Transitional Justice: Challenging Injustice...*

At the completion of its transitional justice consultation, the AIHRC published “*A Call For Justice*” in January 2005 with recommendations for a national strategy on transitional justice, the only comprehensive report that exists on how Afghans’ understanding of justice and their demands on the state. In December 2005, the OHCHR in cooperation with UNAMA and AIHRC organized a conference on truth seeking and reconciliation in Kabul. The main outcomes of the conference included emphatic support for a comprehensive approach to “transitional justice,” for a process of truth seeking in Afghanistan and a need for reconciliation that did not compromise the search for justice. The conference also outlined the need for administrative reform, measures to remove human rights abusers from positions of power, underscored the need to improve security conditions and create an environment conducive to other transitional justice activities. The importance of truth seeking with a focus on the role of women was also a recurrent theme. Also in 2005, AIHRC drew up the Action Plan for Peace, Reconciliation and Justice in Afghanistan⁸²⁴ in consultation with other notable international human rights and transitional justice groups.

To date the AIHRC continues to work on documentation in close collaboration with the International Center for Transitional Justice (ICTJ) and UNAMA to develop an extensive database for recording the stories of survivors, a comprehensive list of atrocities and where they were committed. The Commission has divided the time frame of the continued conflict into three distinct categories: 1978 to 1992, the period of the communist regime; the 1992-1996 period which was the time of the mujahedeen rule and

⁸²⁴ For more information, see 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. (Accessed January 5, 2007)

from 1996 to 2001 when Afghanistan was under the control of the Taliban. As of this, the commission is focusing on documenting atrocities committed during the communist period and has just begun the tedious process of analysis of the data. However a commissioner admits: “the documentation process at this stage is not a base for trial of anyone. Its aim is that no stories are left unrecorded. At a later stage there will be complimentary mechanisms to verify this. At this stage we are not judging. We are just listening and recording.”⁸²⁵

The Transitional Justice Unit of the AIHRC has been actively expanding the transitional justice constituency and the ownership of the transitional justice processes through conducting transitional justice workshops, awareness raising meetings with civil society representatives, government staff, community and religious leaders, creating radio programs, publishing stories of survivors in newspapers as well as distributing copies of the Action Plan to rights activists, civil society organizations and community based groups in many parts of the country. With the discovery of mass graves, it has been working with UNAMA and the Physicians for Human Rights (PHR) to train transitional justice staff, regional and provincial managers and members of local NGOs on documentation and other essential forensic skills for conducting exhumations. It has also been involved in constructing a monument in Kabul University to celebrate human rights and there is discussion underway for creating a museum in Badakshan where a mass grave was discovered in 2007. Last, but not the least, the AIHRC, under Key Action 2 of the National Plan, worked with the Afghan Civil Service Commission to review the

⁸²⁵ Interview with AIHRC commissioner, Washington D.C., June 1, 2008.

human rights records for persons considered for appointment and encouraged the establishment of an Advisory Panel for the Appointments, which formulates rules and advises the President on senior political appointments.

The AIHRC continues to work on different transitional justice activities and is heavily involved with the Transitional Justice Working Group, a network of 25 civil society organizations, that have mobilized over the last two years to continue raise voices of the victims. Nevertheless, there has been very little discernible progress regarding “transitional justice.” President Karzai has declared December 10 as the National Day of Solidarity for Victims while no progress has been made for a national monument at *Pul-Charki* to pay tribute to the mass killings, mass arrests and torture of students and political activists that occurred during the communist regime. The AIHRC has been involved in this front, constructing a monument in Kabul University to celebrate human rights and there is discussion underway for creating a museum in Badakshan where a mass grave was discovered recently. Despite its efforts however, no other commitments of the National Action Plan have been met.

The Nepal Human Rights Commission

In the early 1990s, recognizing the absence of an independent body to solely focus on rights based issues in Nepal and that could effectively mediate between local civil society and the government, human rights activists and some members of parliament began the long drawn out process of exploring the establishment of a NHRI. Despite little enthusiasm, by 1996, a few parliamentarians were eager to take a private bill to Parliament. Between 1995 and 1996, various human rights organizations also organized a

series of seminars to explore the implications of a National Human Rights Commission for Nepal. Those seminars were instrumental in the growing recognition among those working on separate human rights issues that a human rights commission could support the work of the existing courts and other governmental agencies. In 1997, a Nepali Congress member tabled the Human Rights Commission Act in the National Assembly as a private member's bill.

The enactment of the Human Rights Commission Act 1997 was an acknowledgement that greater statutory protection was needed for human rights in the country, beyond that being provided by the existing legislation.⁸²⁶ The Act provided access to a wide range of rights for which individuals previously had no remedy and which was a historically difficult and time-consuming process. But the NHRC was neither a substitute for the rights and remedies inherent in Articles 23 and 88, nor does it have any sort of appellate role. The Act cannot even by amendment, strip the Supreme Court of its jurisdiction, alter the role of the judiciary, or inquire in any matter “within the jurisdiction of the Military Act.”⁸²⁷ The intent of the Act, at most, is to secure Governmental accountability in case of infringement of any fundamental rights of the

⁸²⁶ Bipin Adhikari, “Building Capacity of National Human Rights Institutions: The Case of Nepal,” *Rights to Education Foundation*, Kathmandu, Nepal, 2004, 21 <http://www.nhri.net/old/default.asp?PID=82&AFD=2> (Accessed March 10, 2008).

⁸²⁷ By way of contextualization, it should be noted that the Military Act, enacted in 1959-60, has not been updated to accord with the principles contained in the Constitution of Nepal of 1990; under the Military Act’s provisions, effective command of the military is vested in the King rather than in civilian government. The Military Act has been described as “one of the most obsolete laws needing urgent democratization.” See Bipin Adhikari, “Nepal: Human Rights and Inhuman Wrongs,” *Spotlight* 23, No. 19, 5 December 2003, <http://www.nepalnews.com.np/contents/englishweekly/spotlight/2003/dec/dec05/perspective.htm>. (Accessed February 12, 2008).

people. Courts of law respond to the violation of human rights only after their jurisdiction is invoked and so the court's redress of injury to human rights is compensatory in nature. However, Article 132 of the Interim Constitutions allows the NHRC to promote, protect and respect for human rights and ensure its effective enforcement and it is structured to deal effectively with questions involving human rights with recourse to simple and inexpensive procedures. In May 2000, after years of delays and negotiations, the Commission was provided with basic facilities and space for its head office in Harihar Bhawan, Kathmandu.⁸²⁸ It has five operational divisions: 1) Legislative Assistance 2) Promotion 3) Protection and Monitoring 4) Planning, Internal Monitoring and Evaluation and 5) Operations. NHRC-Nepal has five Regional Offices established in the Eastern, Middle, Western, Middle-Western and Far Western Regions. In addition the Commission has three Sub Regional Offices.

Irrespective of the lack of a direct reference to issues related to “transitional justice,” NHRC quickly positioned itself to work in human rights in crisis given the unfolding politically volatile climate. After two weeks of the proclamation of emergency for the first time,⁸²⁹ on December 11, 2001, NHRC convened a meeting with the secretaries of security related ministries to discuss the protection human rights in times of

⁸²⁸ The Commission currently shares a building with the Ministry of General Administration of the then King's government.

⁸²⁹ On 26 November 2001, a state of emergency was declared for the first time in Nepal following the Maoists' first attack on the Army after the breakdown of peace talks. The state of emergency was renewed every three months by the Parliament until it lapsed on August 25, 2002. Since May 2002, when Parliament was dissolved, the emergency was extended through an ordinance. After a gap of nearly two and a half year and another state of emergency was declared on 1 February 2005. This political reality was a new experience for the newly established Commission, which did not have the experience to deal with human rights issues that emerged during that period.

emergency and how to facilitate victims to file complaints with the Commission. The measures included establishing a temporary complaint registration unit in their premises and a commitment toward pushing the government to follow the rule of law in all its activities during the emergency. The monitoring activities focused on the emergency situation began from the western part of the country, undergirded by the (a) decision to monitor non-derogable rights under the ICCPR and the Nepalese Constitution; (b) the investigate the excessive use of force by the security forces in the pretext of emergency; (c) organizing its leadership (d) interact with stakeholders for the purpose of minimizing human rights violation, (e) educate people as well as policy makers on human rights issues. On June 14, 2002, the Commission drew attention of the government on the issue of indecent behavior against women and their arrest and detention without observing due process. It also conducted a short-term “*Responding to Crisis Project*” to monitor human rights situation during the state of emergency.

Throughout the period of emergency, the NHRC received complaints about human rights violations by both government and Maoist forces. An overview of its strategy between 2003 and 2008 indicates attention to issues relating to the escalating conflict particularly to disappearances and the abduction of children to be used as combatants. Given the sheer number of enforced disappearances in the country and the complaints filed by victims’ families and other organizations with NHRC, in 2003 it created a public list of all enforced disappearances and launched an appeal on behalf of the disappeared requesting all concerned to “[provide] information regarding these enlisted individuals and update their present status whether they are detained, under custody, undergoing trials, released or returned home with their respective contact details,

telephone numbers and other essential information and assist NHRC in its mission of protection and promotion of human rights.”⁸³⁰

Following the massacres in Doramba in the Ramechhap district, the NHRC also launched an investigation about the actual sequence of incidents and found that the armed forces perpetrated a number of human rights violations, including the extrajudicial execution of at least 19 suspected Maoists. In response to this investigation, the armed forces’ questioned the validity of the Commission’s report launched an internal investigation.⁸³¹ In its report on the Nagi Incident of 5 July 2003, the Commission concluded that the Maoists were responsible for an explosion which resulted in several deaths and that the explosion had occurred “in contravention of the provision contained in Article 3 of the Geneva Convention of August 12, 1949.”⁸³² In particular, it raised concerns over the death of a non-combatant civilian.⁸³³ Similarly, in its report on the Zeromile Incident of August 19, 2003, the Commission identified actions constituting breaches of common Article 3 of the Geneva Conventions.⁸³⁴ While the report could not reach a definitive conclusion on whose responsibility the incident was, the Maoists were suspected of being responsible.⁸³⁵

⁸³⁰ See “Nepal: National Human Rights Commission --‘An Appeal,’” *National Human Rights Commission (NHRC)*, <http://www.rghr.net/mainfile.php/0642/810/>. (Accessed March 12, 2010).

⁸³¹ “Doramba Killings Were ‘Cold Blooded,’” *The Kathmandu Post*, September 18, 2003.

⁸³² “Human Rights in Nepal: NHRC Summary of Annual Report,” *Nepal Human Rights Commission (NHRC)*, 2003, 10.

⁸³³ *Ibid*, 10.

⁸³⁴ *Ibid*, 12.

⁸³⁵ *Ibid*, 12

In 2008, in addition to monitoring and investigation human rights violations across the country, the NHRC in coordination with the Nepal police and Nepalese and Finnish forensic experts monitored the Kapilavastu riots and its aftermath, and carried out exhumations of the cremated ruins of 49 individuals in the Shivapuri National Park, who were detained by the army during the conflict. The Commission provided recommendations to the government on compensations to victims and disciplinary actions against those who committed excesses. Currently, it is involved in the discussion around the Truth and Reconciliation Commission, the Disappearance Commission and question of reparations for victims.

These Space in Between: The Dynamics Between Government and Civil Society

An overview of AIHRC and NHRC provides an informed picture of their important contributions to the transitional justice question in their corresponding societies. However, their activities identify three specific arenas which illuminate the position, power of influence, the relationships, and the challenges such institutions have experienced and if, and to what extent, they have been able to carve a leadership role domestically in the “transitional justice” movement.

Multidimensionality of Independence and Coordination

Independence and accountability are simultaneously key objectives and key challenges for NHRIs, as they are critical components of their claims to credibility, legitimacy, accountability and, inevitably, their effectiveness. Independence poses a central theoretical and practical conundrum for such institutions, given that they are charged with multiple responsibilities: “‘downwards’ to their partners, beneficiaries, staff

and supporters; and ‘upwards’ to their funders, parliaments and host governments.”⁸³⁶

Smith identifies four different levels of independence regarding the relationship of NHRIs with their respective governments: legal and operational autonomy, financial autonomy, independence with regard to appointment and dismissal procedures, and independence concerning pluralism and composition.⁸³⁷ In each of these areas, both the AIHRC and NHRC-Nepal have experienced several tensions in trying to work closely with the Afghan and Nepal governments respectively, applying political pressure regarding key human rights issues, and trying to maintain the “independent” nature of its work.

AIHRC and the GoA

Outside of the diminishing support it has received in its work on “transitional justice,” an increasing source of tension for the AIHRC has been that “despite being its constitutional obligation, the government has failed to provide any financial support to the AIHRC ever since its establishment.”⁸³⁸ Further, while the work of the AIHRC requires it to work with political parties, it has been subjected to criticism about the “independent” nature of its work, and faces questions from some in Afghan society regarding undue influence, despite its own efforts to proceed with prudence in its working relationships. To give just one example of the challenges in balancing

⁸³⁶ Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?* *Human Rights Quarterly* 28, No. 4 (November 2006), 906.

⁸³⁷ *Ibid.*, 904-946.

⁸³⁸ Interview with AIHRC commissioner, Washington D.C. September 15, 2007. Other commissioners interviewed in the course of this research also expressed this opinion.

independence with a coordinated approach, the AIHRC has been working with the Constitutional Commission, the Civil Service Reform Commission and the Judicial Reform Commission to further the aims of transitional justice in a complementary and reinforcing way.⁸³⁹ By working in a coordinated manner, these commissions could have provided an avenue into integrating Islamic and Afghan notions of justice and legitimate authority with that of standardized practices of legal norms.⁸⁴⁰ Mani suggests: “the Constitutional Commission might have incorporated judicious measures into the constitution to ensure that certain types of people, particularly war criminals, never participate in government.”⁸⁴¹ This, she continues, “would have had the legitimacy of *Shari’a law* and also Afghan tradition, as both have numerous injunctions that ‘those with blood on their hands should stand in the back row’ as much in the mosque as in government.”⁸⁴²

This singular critical opportunity would have allowed for a synergy between local customs and practices and standardized legal procedures. It would have ensured a more robust vetting process and would certainly have gone a long way to engender people’s confidence in a state institution that is responsive to their concerns. Further, the Civil Service Reform Commission could have established certain parameters to ensure that those who profited from the years of conflict and who committed human rights atrocities

⁸³⁹ Tazreena Sajjad, *These Spaces in Between: The AIHRC and its Work on Transitional Justice*, *International Journal of Transitional Justice* 3, no. 3 (2009), 435.

⁸⁴⁰ Ibid.

⁸⁴¹ Mani, *Ending Impunity*.

⁸⁴² Ibid.

were excluded from public office and government positions. The Judicial Reform Commission could have instituted systems of lawmaking and law enforcement that acted as firm deterrents to war crimes and human rights violations. In both these cases, there were missed opportunities for integration of local norms and standardized international legal practices. Ultimately, since these institutions did not have the independence or the requisite power to adopt and implement such measures, interactions between institutions became ineffective because they were limited to consultation and discussions only.

NHRC and the GoN

In Nepal, the NHRC has had a historically terse relationship with the question of independence. While the National Human Rights Commission Act came into force in 1997, because of government delays the Commission itself was not constituted until May 2000.⁸⁴³ The political instability after 1990 elections has been mainly attributed to the reason as to why there was hardly any official progress or government effort to establish the NHRC. Certain commentators saw this delay as evidence that the then Government lacked any real intention to protect and promote human rights in Nepal.⁸⁴⁴ In the early days of the commission and indeed during 2000 and its early years, the NHRC-Nepal positioned itself as a serious investigative body, challenging both the Maoists as well as government forces on the issue of human rights violations. A former commissioner

⁸⁴³ For a more detailed discussion of the delays, see “Human Rights Commission of Nepal: A Long Road to Nirvana,” *Asia Pacific Human Rights Network*, (APHRN), New Delhi, India, 2002.

⁸⁴⁴ For more information see “National Human Rights Institutions in the Asia Pacific Region: Report of the Alternate NGO Consultation on the Second Asia-Pacific Regional Workshop on National Human Rights Institutions,” *South Asia Human Rights Documentation Center (SAHRDC)*, New Delhi, India, March 1998.

noted: “In 2000, when there were a lot of disappearances and killings, we were very mobilized and got a lot of strong support from civil society to work on human rights...the major trouble began with the killing in Doramba. We investigated that...we went, dug up and exhumed the bodies...”⁸⁴⁵ This level of engagement and confrontation was, to say the least, unsettling for the government.

In late 2003, the Nepal government announced its attention of establishing a Human Rights Promotion Center. It insisted that the role of the Center would be to complement and assist the Commission in the latter’s efforts to promote and protect human rights, but what soon became evident was that the Center was an attempt to undermine the work of the Commission through adapting many of its responsibilities. The distinguishing feature between the Center and the Commission seemed to be in the area of independence, where the former, established by an executive order, allowed for the government to exert significant control over its activities. A common allegation was that the Commission’s stance on the Doramba incident was one of the Government’s motivations for creating the Human Rights Promotion Centre.⁸⁴⁶

Nevertheless, the Commission has struggled with the notion of independence, a sobering reality given that previous commissioners had built public legitimacy for the NHRC with independent inquiries and reports such as on Doramba. The question of its independence has been met with significant cynicism from all quarters of Nepal’s civil

⁸⁴⁵ Interview with former commissioner of NHRC, Kathmandu, Nepal, July 22, 2009

⁸⁴⁶ See “Nepal Urged Not To Set Up The Cover Up Commission,” *Asian Centre for Human Rights (ACHR)*, November 14, 2003, <http://www.achrweb.org/press/2003/November2003/NEP011103.htm>. (Accessed March 14, 2008).

society, both national and international that sees the increasing politicization and the influence of the political parties in the functioning of the institution as a particular source of concern. A representative from PD noted: “NHRC is doing its little share in transitional justice but it defends itself saying it is still in its infant stage. And since the government is not committed to human rights, it becomes very difficult for the Commission to work independently [due to] political intervention.”⁸⁴⁷ In fact, the Executive Director of AF observed: “the problem lies with the fact that NHRC is not an independent organization. In fact, there are political interests and political parties dominating it so they are more inclined to their ideology than common human rights issues.”⁸⁴⁸ Such criticisms, however does not seem “very fair” to those working in the commission. In a 2009 interview, a current commissioner acknowledged the challenges but maintains: “the lack of implementation of our recommendations is not our fault. The human rights defenders may criticize the Commission, but they do not necessarily understand the kind of challenges we face. We are even limited by our rights within the Constitution—what process should we follow? What laws? There is much work to be done regarding the amendment of the bill itself.”⁸⁴⁹

The Commission has also struggled with the issue of funding. Historically, it relied on foreign donors to provide much of its financing. Indeed, over the period 2004-2008, it anticipated that 87% of its funding will need to come from money that is

⁸⁴⁷ Interview with representative of Protection Desk, Kathmandu Nepal, July 18 2009

⁸⁴⁸ Interview with Mandira Sharma, Executive Director of Advocacy Forum, Kathmandu, Nepal, July 10, 2009

⁸⁴⁹ Interview with current NHRC commissioner Gauri Prasad, Kathmandu, Nepal, July 19, 2009

“Available/Likely to be Available from External Sources.”⁸⁵⁰ In the past, the Commission received financial and organizational assistance from a variety of governments, non-government organizations and intergovernmental organizations such as the UNDP, Norway, Denmark, the OHCHR, the Danish Institute of Human Rights (DIHR), the German Technical Agency (GTZ), the Norwegian Refugees Council (NRC) and various other entities.⁸⁵¹ Inadequate funding creates very tangible problems for the Commission. Perhaps most importantly, it is unable to deal with complaints efficiently. The Commission itself has acknowledged that up to 90 per cent of complaints made since the Commission began operations are still “in the process of investigation;” the US State Department reports that the figure may be as high as 94%.⁸⁵² It has been suggested that, in addition to funding problems, these low efficiency levels may be due to the fact that the Commission is not “acting vigorously in cases brought to its attention. Indeed...the vast majority of complaints received are not acted upon at all.”⁸⁵³ Yet, it would seem

⁸⁵⁰ See “National Human Rights Commission Strategic Plan 2004-2008,” *National Human Rights Commission (NHRC)*, 32. <http://www.nhrcnepal.org/publication/doc/papers/Forward.pdf>. (Accessed March 15, 2011).

⁸⁵¹ See, for example, “The National Human Rights Commission Annual Report,” *Nepal Human Rights Commission (NHRC)*, 2000-2001, http://nhrc.nic.in/ar00_01.htm. (Accessed March 12, 2008). See also “Human Rights in Nepal: NHRC Summary of Annual Report,” *Nepal Human Rights Commission (NHRC)*, 2003, 6, 10.

⁸⁵² The NHRC estimated that as of December 2002, of the 1072 complaints, 969 were still in the process of investigation as cited in the “National Human Rights Commission Of Nepal: Government Launches Operation Scuttle,” *Asia Pacific Human Rights Network (APHRN)*, February 2004, http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/ngo-statements/ngo_nepal.pdf. (Accessed March 15, 2011). The US State Department estimated that 805 out of 861 complaints remained in the process of investigation as of March 2003. See “Nepal Country Report on Human Rights Practice,” *US State Department*, 2002, <http://www.state.gov/g/drl/rls/hrrpt/2002/18313.htm>. (Accessed March 12, 2008).

⁸⁵³ See “Human Rights and Administration of Justice: Obligations Unfulfilled: ICJ Report on its Fact Finding Mission to Nepal,” *International Commission of Jurists (ICJ)*, June 2003, Paragraph 137. http://www.icj.org/news.php3?id_article=2950&lang=enpara137. (Accessed March 12, 2008).

difficult for the Commission to act effectively or vigorously in the absence of sufficient fiscal support. Another consequence of the inadequate funding regime is that without adequate funding, the Commission struggles to pay the wages of its existing personnel and cannot attract new staff.⁸⁵⁴

The Commission's overt reliance on international sources of funding has meant, as in other contexts where local NGOs rely extensively on external funding, that it has been compelled follow the proposals of various donors. While these proposals may often be worthwhile and well intentioned, the 2004 Asia Pacific Human Rights Network report recognizes that they do not help create a policy approach for the Commission that is comprehensive and coherent in the long term.⁸⁵⁵ Rather, the result is that the Commission's policy approach may be perceived as a collection of short-term, unconnected efforts.⁸⁵⁶ Indeed, NHRC-Nepal itself has recognized the importance of securing "unconditional" external funds and has identified "impediments in the plans and programs run under the assistance of donor agencies."⁸⁵⁷ Moreover, even the programs over which the Commission has control – those funded by Government grants – budgetary constraints have meant that the Commission has been forced to adopt a "short-

⁸⁵⁴ Interview with NHRC commissioner, Kathmandu, Nepal July 10, 2009.

⁸⁵⁵ See "National Human Rights Commission Of Nepal: Government Launches Operation Scuttle," *Asia Pacific Human Rights Network (APHRN)*, February 2004, http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/ngo-statements/ngo_nepal.pdf. (Accessed March 15, 2011).

⁸⁵⁶ See "National Human Rights Commission Strategic Plan 2004-2008," *National Human Rights Commission (NHRC)*, 8, <http://www.nhrcnepal.org/publication/doc/papers/Forward.pdf>. (Accessed March 15, 2011).

⁸⁵⁷ *National Human Rights Commission Strategic Plan 2004-2008*, See also "Human Rights in Nepal, NHRC Summary of Annual Report," *Nepal Human Rights Commission (NHRC)*, 2003, 5.

term” and non-systematic approach to human rights policy.⁸⁵⁸ The Commission’s position reflects the reality of donor aid: the need for external funds to supplement the Government’s inadequate funding, which in turn limits its independence and long-term planning and creates a culture of “donor dependency.”

The Commissions and the International Community

The AIHRC occupies a unique position in Afghanistan with regard to its relationship with the international community. In the absence of a strong, vibrant and organized civil society, the AIHRC has taken on significant responsibilities regarding human rights monitoring, investigation and reporting in the country. Further, its unique mandate on transitional justice assigns special responsibilities for it to adopt, in some ways, responsibility to create constant pressure to keep the transitional justice discussion and the implementation of the National Action Plan alive in a highly volatile and turbulent climate. The AIHRC significantly relies on the international community for its work and the international community in turn, has found itself a reliable partner in pursuing work on human rights. Reiteratively, international actors interviewed about their perception and assessment of AIHRC’s involvement with “transitional justice” in particular and human rights work in general, were positive of the institution, recognizing the novelty of the institution in a context which has a very limited culture of civil society activism in the contemporary sense, which is dominated by constant security concerns and controlled by the heavy hand of warlords and militia commanders. A former Human

⁸⁵⁸ *National Human Rights Commission Strategic Plan 2004-2008*, 7.

Rights Watch employee currently working as independent Afghanistan analyst

summarized his assessment as follows:

For the longest time the AIHRC was working as a real watchdog really saying things that other organizations weren't saying. Look at the Sherpur incident where there was a land grab and people who had been living on the land for over twenty years was moved out by government officials mandated by Fahim. It produced a complete list of all of these people in the government who owned land...and [subsequently] the commissioners put themselves in a situation of vulnerability... yet right now they are under criticism for not speaking out enough and being too close to the government. It's such a difficult context to work. Who is going to provide them security? What resources do they have? In a context where there is no rule of law, how far can these people go?⁸⁵⁹

An independent consultant on Afghanistan echoed the reiterative defensive stance on behalf of the AIHRC: "given where Afghanistan came from and a human rights commission even exists...is impressive...but for it to still exist and there are lots of people...and a handful of foreign ministries and diplomatic missions in Kabul that keep that thing alive."⁸⁶⁰

AIHRC and the UN Mission (UNAMA)

A particular interesting relationship that exists is that which exists between the United Nations Assistance Mission to Afghanistan (UNAMA) and the AIHRC. The UNAMA and the AIHRC generally work in close cooperation, consultation and collaboration on a host of human rights issues, including special areas of concern. As such, AIHRC works with the UN family including the UNICEF for their work on

⁸⁵⁹ Interview with independent Afghanistan analyst, July 10, 2008.

⁸⁶⁰ Interview with independent Afghanistan analyst, Washington D.C. September 12, 2008.

children's rights and with UNHCHR for refugees who were deported from Pakistan and Iran and IDPs. Fahim Rahimi, one of the commissioners with the AIHRC stated: we do need their political support to do the work we do...but for matters of political sensitivity the UN has to take the first step. For example, the case of Abdur Rahman who was sentenced to death for his conversion to Christianity---this was a very sensitive issue for us. We could not have a very concrete stance because we would be immediately labeled as spies of the west, the American converted Muslims, weak Muslims or we are perceived to be leftists in our societies and Maoists.⁸⁶¹

To avoid painting itself in the corner, AIHRC had generally adopted a more strategic and non-provocative approach to some of the more sensitive cases, and in some of these situations, concedes a current commissioner the UNAMA has been “extremely supportive.” However, there is a degree of competition between the field staff and UNAMA, a reality that has resulted in the signing of Memorandums of Understanding (MOUs) with the UN to “avoid competition between our field staff and UNAMA and [to establish] that the AIHRC is [generally] the leader for human rights protection and monitoring and others have a supporting role.”⁸⁶²

NHRC and the UN Mission (OHCHR-Nepal)

NHRC-Nepal has recently had a terse relationship with the international community, particularly with the OHCHR-Nepal. OHCHR's initial entry into Nepal was met with strong support from all elements of Nepali society and ironically, was warmly

⁸⁶¹ Interview with commissioner Fahim Rahimi, USIP, Washington D.C. June 1, 2008.

⁸⁶² Ibid.

welcomed by the NHRC-Nepal. However, a public statement made by one of the commissioners in 2008 shed light into growing tensions between the two institutions. The contentious relationship was inevitably the result of both performing in the same space, indeed similar functions, developing partnerships with the same national and international actors for support and competing against each other to prove their own effectiveness. In 2009, as the OHCHR-Nepal's mandate was ending, there was a strong national opposition to a renewal of the mandate. A government spokesperson told the media "a majority of stakeholders seem to be at odds with the request for extension."⁸⁶³

Amongst those opposing are many members of the current government, members of NHRC-Nepal and some members of civil society. The absence of support from the Commission was mainly because the institution argued that it is a credible and strong enough institution capable of undertaking the current responsibilities of OHCHR-Nepal. In addition, the Commission also believed that extending OHCHR's mandates was a way in which the government would try to weaken it. However, key civil society actors believe that a strong NHRC-OHCHR collaboration can bring key structural changes in the human rights situation. Mandira Sharma of AF believes that a complementary role for the NHRC-Nepal and OHCHR-Nepal is essential to address the present human rights challenges, "While the NHRC needs to explore ways to challenge cases that they have investigated in the national court, the OHCHR is in a position to provide technical inputs to investigations and litigations as they have access to international experts who have

⁸⁶³ *Doramba Killings Were 'Cold Blooded.'*

worked in international tribunals.”⁸⁶⁴ The symbiotic relationship between the two institutions has been noted by many of the local civil society actors. For OHCHR-Nepal, an important indicator of its success would be how strong a national human rights institution it leaves behind. In turn, NHRC’s challenge would be to strengthen its capacity in monitoring, investigating, interviewing, promoting, reporting and human rights analysis through its collaboration with OHCHR-Nepal and its mentorship while building on its understanding of local cultures and changing political dynamics. “The current NHRC,” noted an independent journalist, “is a weak institution. It did a great job opposing the Maoist atrocities and the anarchy but in the last few years, it alone is not able to address post-conflict justice and human rights violations.”⁸⁶⁵ The need for both institutions is therefore clear--- NHRC’s responsibility to fight to protect the human rights of Nepalis, and the “OHCHR using its position and mandate to negotiate the space for human rights work, support[ing] the government’s work in bringing an end to impunity, reforming the criminal justice system and strengthening the capacity of the NHRC while maintaining a clear exit strategy for itself.”⁸⁶⁶

Legitimacy, Accountability and Popularity Among Local Actors

One of the most noteworthy features of NHRIs is the unique position they occupy between government on one hand and civil society on the other. Their public/popular

⁸⁶⁴ Interview with Executive Director Mandira Sharma of Advocacy Forum, June 10, 2009.

⁸⁶⁵ Interview with freelance journalist, Kathmandu, Nepal, July, 11 2009.

⁸⁶⁶ Jyotsna Poudyal, “OHCHR’s Challenge in Nepal, Asian Centre for Human Rights (ACHR),” New Delhi, India, November 25, 2008. <http://www.indigenouportal.com/Human-Rights/OHCHR-s-challenge-in-Nepal.html>. (Accessed March 9, 2010)

accountability is the mainstay of their support -- that is, accountability to the public at large, including to national and international nonstate actors. Such accountability helps members of the public to ascertain the independence of an NHRI and scrutinize its performance while allowing the institution itself to benefit from their experience and insight. By establishing these relationships, NHRIs can give societal groups effective channels to make their claims as “receptors” and “transmitters” in the cycle of human rights activity as they endeavor to implement international norms in practice while simultaneously filtering information from civil society back to the state. “It is this conceptual space,” Smith says, “which gives NHRIs a potentially distinctive role in society”⁸⁶⁷ In an ideal setting, this leads to the expectation that such institutions interact actively with civil society and provide societal groups with effective channels to make their claims. Further, their “official” status should also allow NHRIs access to information and documents that NGOs may not be able to obtain, as well as a closer engagement with government officials, corresponding to a greater command over respect and authority than nongovernmental bodies. Moreover, the working relationship an NHRI carves out with local civil society plays a critical role in establishing its popularity and, more importantly, its credibility and public legitimacy. Ironically, these very advantages associated with being a formal institutionalized body with significant leverage could compromise NHRIs’ relationship with local actors. Mertus acknowledges: “operating in a highly charged and deeply politicized atmosphere NHRIs not only are subject to manipulation by government actors but must also contend with the often conflicting

⁸⁶⁷ Smith, *The Unique Position of National Human Rights Institutions*, 905.

agendas of the various segments of civil society.”⁸⁶⁸

AIHRC and Local Civil Society

Mertus’ observation about local politics, their influence on NHRIs and vice versa rings true when observing the strained relationship between AIHRC and many local actors, who have in general tended to view the institution as being too “isolated,” “elitist,” “arrogant,” “monopolizing of the human rights agenda” and generally not interested in forging equitable partnerships with local actors. For several of the local actors interviewed, the AIHRC has also appeared to be one that is too close to the international community from which it derives the bulk of its legitimacy and not enough of a “nuisance factor” for the government or the warlords. These criticisms have been a mainstay, tinged with a degree of skepticism and distrust. The question of the continuing gulf between local actors and the Commission is a serious one, because it weakens the already fragile human rights community against mounting opposition to the issues of accountability and rule of law. In presuming AIHRC’s disinterest in participating in civil society events with local counterparts for example, a perceived gap is instituted between the very actors who could build the foundations of a stronger civil society movement in the country. This gap between AIHRC and local actors has not evaded the notice of international actors as well, although there is recognition that the Commission is in a “lose-lose” situation and a weak civil society does not always allow for effective forging of partnerships. The executive director of AJP notes: “The commission is seen to be too

⁸⁶⁸ Julie Mertus, *Human Rights Matters; Local Politics and National Human Rights Institutions*, (Stanford, CA: Stanford University Press, 2009), 3.

isolated by other civil society actors, unlike for example the Indian Commission which can claim they speak on behalf of a larger constituency....but perhaps, given the political climate, AIHRC may feel the need to be more isolated.”⁸⁶⁹

AIHRC, Territoriality and Competition

The issues of donor dependency, resentment toward large NGOs “parachuting” in to monopolize the agenda and the consequent turf wars and resource competition among NGOs are not new phenomena in a developing country context, and particularly in transitional societies.⁸⁷⁰ Afghanistan has not been an exception. Dictated to by donor agencies, suffering from an absence of professionalism and legitimacy of leadership, and held hostage to the volatility of the political climate and tensions with local and/or central government, among a host of other reasons, “local NGOs appear and disappear overnight.”⁸⁷¹ Those that remain are largely uncoordinated and uninformed about each other’s work. Under these circumstances, the issue of territoriality makes itself prominent, as does the constant climate of competition for resources and donor attention for mandates as well “distrust and suspicion of associations emerge and competition over

⁸⁶⁹ Raised in interviews held with international civil society actors working in Afghanistan, Washington DC, 2008.

⁸⁷⁰ See for example, Alan Fowler, “Authentic Partnerships in the New Policy Agenda for International Aid: Dead End or Light Ahead?” *Journal of Development and Change*, 29, no. 1 (1998), 137-59; Florian Bieber, “Aid Dependency in Bosnian Politics and Civil Society: Failures and Successes of Post-War Peacebuilding in Bosnia-Herzegovina,” *Croatian International Relations Review*, 8, (January-June, 2002), 25-29; Claude E. Welch, *NGOs and Human Rights: Promise and Performance*, (Philadelphia, PA: University of Pennsylvania Press, 2001; Julie Mertus and Tazreena Sajjad, “When Civil Society Promotion Fails State-building in Subcontracting Peace: The Challenges of NGO Peacebuilding,” in Oliver P. Richmond and Henry F. Carey, eds. *Subcontracting Peace: The Challenges of NGO Peacebuilding*, (Hampshire, England and Burlington, VT: Ashgate Publishing Limited, 2005); Graham Hancock, *The Lords of Poverty: The Power, Prestige, and Corruption of the International Aid Business*, (London, UK: Atlantic Monthly Press, 1989).

⁸⁷¹ This was raised in interviews conducted in Afghanistan and Washington D.C. in 2008.

mandates.”⁸⁷² Ultimately, the space is minimized for interaction and cooperation.

AIHRC’s position in the Constitution, its early recognition by the international community and subsequent prominence in the Afghan human rights community have irrefutably meant that the body has a monopoly over funding resources; further its mandate to both work on human rights issues of past and present allows it to occupy a unique position of officiousness that could, in turn a level of high handedness that translates to “arrogance” or “egotism.” The outcome inevitably is a level of resentment from other local actors. A representative of OSI asserted:

There were a lot of tensions between civil society organizations and the AIHRC, because it had become so prominent and had a profile with the international community and was at the forefront of everything that had to do with human rights and transitional justice. Some civil society organizations saw them as having a monopoly, which they were very resentful about.⁸⁷³

The skepticism about the AIHRC is not limited to the local actors within civil society, but sometimes among the very people whom they try to serve. There are anecdotes from several provinces where the local population alleges that its work in women’s rights is “radical” and “Westernized,” accusing the Commission of encouraging divorce rates among women. Others do not hesitate to connect the Commission’s work to the communists, arguing that the institution is far too politicized. One religious scholar interviewed emphasized the connection of one commissioner to the Revolutionary

⁸⁷² Expressed in interviews with international analysts and civil society actors conducted in Washington D.C in 2008.

⁸⁷³ Interview with Open society representative, New York, June 12, 2008.

Association of the Women of Afghanistan (RAWA),⁸⁷⁴ arguing that the Commission takes the same highly radicalized position as RAWA in accusing “all mujahideen [of being] war criminals, which is a serious distortion of reality.”⁸⁷⁵ There is also the perception held by some that certain members of the Commission have connections to political parties, which colors its agenda significantly.⁸⁷⁶

The AIHRC’s relationship with the Afghan government is also somewhat tenuous. Before its inception, Karzai was holding up several of the appointments for the commissioners. Although originally supportive of the Commission, increasingly the Afghan government has distanced itself from the institution, offering little support and commitment to the Commission’s human rights projects. Human rights monitors, for example, are often held up in their work and not given access to conduct their investigations. In the area of “transitional justice” particularly, where the Afghan government has remained silent, it has been an uphill battle for the Commission and other actors involved in “transitional justice” to keep the pressure on implementing any of the provisions of the Action Plan, the mandate of which, as of 2009, has expired.⁸⁷⁷

⁸⁷⁴ RAWA is a women’s organization in Afghanistan that promotes women’s rights and secular democracy. The organization aims to involve women of Afghanistan in political and social activities aimed at acquiring human rights for women and continuing the struggle against the government of Afghanistan based on democratic and secular principles and in which women can participate fully. RAWA has faced criticism from conservative quarters over the years for being a ‘radical’ organization that undermines the role of Islamic practices and principles in society.

⁸⁷⁵ Phone interview with local civil society actor and former Loya Jirga representative, Afghanistan, July 8, 2008.

⁸⁷⁶ This kind of criticism is easy to level at an institution that is required to work closely with political parties on several issues on the human rights agenda.

⁸⁷⁷ It must be noted that the Ministry of Justice has been a general exception in this regard, relying on the Commission’s research and recommendations on issues of prisoners and the state of detention centers to protect the rights of the incarcerated.

Ironically of course, tensions between the government of Afghanistan and AIHRC's unpopularity strengthens the Commission's stand with the international community and even among local actors. For example, in the protests for the amnesty law, when warlords and their supporters chanted "Death to the Commission! Death to the infidels! Death to Simar Samar!" international actors interviewed for this research recognized the continued relevance of the Commission and the polarizing effect of independent and the more aggressive commissioners, nothing that strong opposition to the AIHRC was an indication that the institution was indeed effective in opposing what was seen by the human rights community to be a big blow to the transitional justice movement. In response to the layers of criticisms about being too isolated and territorial, the Commission seems to have a levelheaded approach. A Commissioner interviewed about the institution's take on the question unpopularity with some of the local actors through reflecting on the difficult position it occupies and the expectations that are placed upon it noted that:

[S] ince the Commission enjoys a good level of support from the international community it is supposed to have a huge budget, but is not willing to provide [local NGOs] with their required financial support, so that is why they are saying the Commission is not cooperating with civil society organizations. From our side, we do not wish to be seen as a donor agency responsible for funding and 'fixing' the problems of all other NGOs, but to be honest, this misunderstanding is a reflection that we still lack a vibrant visionary civil society in Afghanistan, even in Kabul.⁸⁷⁸

⁸⁷⁸ Interview with an AIHRC commissioner, Washington D.C. May 13, 2008.

Nevertheless, the criticisms that AIHRC has been subjected to by local actors have not all necessarily fallen on deaf ears. Conversations about monopoly over the human rights doctrine, or the need for local actors “to step up to the plate” have meant some back and forth about how the Commission and the local partners could actually work together more effectively, although in human rights programming, some have questioned whether the back and forth have necessarily been genuine and have actually resulted in the AIHRC taking cues for a more collaborative fashion with its local counterparts. Nevertheless, with the establishment of the TJCG, the AIHRC has found a new and much desired venue to exercise initiative, bringing together local actors and those in the international human rights arena to brainstorm ways of keeping the question on “transitional justice” activism alive, and continuing to apply pressure on the government to not marginalize the concerns about human rights in the quest for reconciling with the Taliban and other insurgent groups.

NHRC and Nepal’s Civil Society

NHRC-Nepal’s relationship with local actors should be analyzed in terms of its relationship with a) the army and b) civil society actors. The Commission’s relationship with the military has generally been quite tenuous and this was particularly so during the conflict years. At the height of its effectiveness, the institution encountered the military several times, and was often obstructed in its work to carry out human rights investigations. Such incidents were often exacerbated when the armed forces refused to recognize that their actions constituted abuses of human rights. This was clearly illustrated for example during the Mudbhara incident, when the Commission alleged that

four school students were killed in an army operation and armed forces denied it.⁸⁷⁹

According to ensuing reports and the Commission, the armed refused to answer any of the NHRC's queries.⁸⁸⁰ The newly established Army's Human Rights Cells with the specific objective of resolving human rights issues internally, allegedly followed up with its own inquiry into the incident, but the results of this inquiry were never made public.⁸⁸¹ Generally, a skeptical attitude towards human rights, and towards the Commission, seems to pervade the armed forces. Thus Brigadier BA Kumar Sharma, of the Nepalese Army, was reported as saying that the Army "is surprised how biased the [Commission]...have been while monitoring human rights violations...how can I teach my soldiers that the [Commission] is an independent human rights watchdog body?"⁸⁸² There have also been substantial criticisms leveled at the Cells on the basis that the interests of justice and transparency are not served by internal disciplinary procedures.⁸⁸³

Notwithstanding the existence of these Cells, numerous human rights violations, ranging from extrajudicial executions to torture to arbitrary arrest and detention, continue to be perpetrated by the armed forces and recorded by the Commission and external

⁸⁷⁹ "NHRC Empowerment: An Editorial," *The Kathmandu Post*, November 26, 2003.

⁸⁸⁰ Ibid.

⁸⁸¹ Ibid.

⁸⁸² Comments of Sharma from *The Himalayan Times*, August 25, 2003 reported in the International Commission of Jurists' open letter to the King of Nepal of October 10, 2003 as cited in *National Human Rights Commission Of Nepal: Government Launches Operation Scuttle*.

⁸⁸³ See *National Human Rights Commission Strategic Plan 2004-2008*. See also "Nepal Should Abandon Plans for Civilian Militias: International Commission of Jurists Statement," *International Commission of Jurists (ICJ)*, November 13, 2003, http://www.icj.org/news.php3?id_article=3191&lang=en. (Accessed March 15, 2011).

monitors.⁸⁸⁴ The military made certain claims that the armed forces had improved their human rights record, and investigations had been launched for cases of abuses. Indeed, in late January 2004, it was announced that a number of armed forces troops had been court-martialed for human rights violations, and that 17 of those court-martialed were imprisoned.⁸⁸⁵

Living up to a Legacy: Struggles of the Current NHRC

The current Commission struggles with a poor public perception particularly among local civil society actors. Initially, during the early days of its establishment and the height of the conflict, the NHRC-Nepal had established a name for itself with its vigorous and aggressive stance on human rights issues and making public the atrocities committed by the Maoists and the army. However, on the eve of expiry of the tenure of commissioners in 2005, the then King amended the NHRC Act of 1997 and appointed new commissioners without recommendations from the committee, making the Commission a “puppet” institution and making it lose much of its edge in challenging all parties guilty of human rights abuses. While the current commission does not include all of the King’s appointees, nevertheless, NHRC-Nepal itself has been severely weakened by the absence of strong leadership, the loss of its reputation as an “independent” institution and ultimately is perceived to be a lackluster institution, a *faux* human rights

⁸⁸⁴ The Act restricts the Commission’s jurisdiction over the armed forces. However, the absence of any other recourse often forced the Commission report abuses committed by the armed forces when investigating a violation. See *National Human Rights Commission Of Nepal: Government Launches Operation Scuttle*.

⁸⁸⁵ See “Nepalese Army Court Martials 23 Soldiers,” *The Hindu*, January 30, 2004. See also Nepal “Soldiers Jailed For Abuses,” *BBC World News*, January 29, 2004,

body with no teeth. Across, the board, there was consensus among civil society actors that the institutions is not actually acting, although it insists that it has continued to submit recommendations to the government on issues of pressing human rights concerns. Criticisms about its role and engagement in the “transitional justice” process are particularly strong. A civil society actor stated: The NHRC is not that active and that is our main concern. They should be leading the efforts...they receive so many complaints which they should act investigate them, act on them...after all it is in their mandate to do so and that is where we have the problem with them.”⁸⁸⁶

The dissatisfaction with NHRC’s performance is particularly striking because of its past reputation as the institution, which did not hesitate to challenge the government on human rights abuses; its existing lack of creativity to work on pressing human rights concerns which is a stark contrast to ad hoc measures taken by past leading commissioners to investigate human rights atrocities including the Doramba incident and its current inability to grab the “gray areas” of its mandate to work on the different elements of transitional justice. In a 2009 interview with Sushil Pyakurel, a former commissioner with the NHRC, the frustration with the lack of leadership and commitment of the NHRC was palpable. He notes:

The major problem with the NHRC is that it is not taking any proactive role...they are going as if its business as usual and apathetically following an old prescription...they are not providing leadership but following civil society’s lead but that is not sufficient...this is a time of transition, yet a time of conflict and they have to take advantage of the current situation and creatively push for human rights and transitional justice... today, even with the current diarrhea crisis in Jajarkot, the commission is not there... Issuing a statement is not sufficient

⁸⁸⁶ Interview with local civil society actor, Kathmandu, Nepal, July 13, 2009.

nowadays... they have to mobilize civil society and the international community around the disappearance commission, the TRC, for transitional justice...if you have the courage to do, you can do it all.⁸⁸⁷

Pyakurel's disappointment in the current state of the NHRC merits reflection because of its past legacy as a ground-breaking human rights institution and because of the dire need for a national human rights institution to take a stand on current human rights abuses and past atrocities and continue to pressurize the current GoN to respond to victims' demands and needs. Certainly, in the best of circumstances, NHRC could, and it has in the past, acted as a national umbrella for other local civil society organizations including NGOs, connecting government action to local conditions and concerns and highlighting areas of immediate action. Today, individual organizations particularly AF and INSEC have come to the forefront of documenting, lobbying, and reporting on human rights abuses committed during the conflict and the violations of today. But as individual human rights NGOs, neither can, and should take on the roles and responsibilities of an umbrella organization that connects the government to local concerns and actors. It is this particular role that the NHRC needs to reclaim to continue to build on its human rights legacy.

Conclusion: A Voice for the Voiceless

This chapter has demonstrated how NHRIs in transitional contexts, such as the AIHRC and NHRC-Nepal face significant challenges in establishing human rights norms. The OHCHR recognizes six "effective factors" generally applicable to human rights

⁸⁸⁷ Interview with Sushil Pyakurel, former NHRC commissioner and head of Accountability Watch, Kathmandu, Nepal, July 22, 2009.

institutions: independence; defined jurisdiction and adequate powers; accessibility; cooperation; operational efficiency and accountability.⁸⁸⁸ The AIHRC and NHRC-Nepal struggle with trying to meet most of the six criteria. First, institutions tend to be defined around strategic negotiation issues rather than focus on the most coherent institutional design. This means they generally take second place to governmental arrangements in terms of negotiators' priorities, producing institutions, which are largely symbolic rather than capable of effecting real change. Subsequently NHRIs run the risk of being co-opted into formulaic and largely government driven projects rather than being able to be architects of more innovative and responsive institutions for accounting for the past. Yet individual examples from NHRIs, including AIHRC and NHRC have demonstrated that in the

Second, the lofty expectations of international actors and donors take into account the realities within which these bodies need to function, which includes fundamental questions of de jure and de facto impunity. Third, in the absence of other institutions established to address questions of the past, NHRIs could be left to take on the role of a truth commission and charged with the responsibility of documentation, while struggling to fulfill other core obligations. Finally, neither the international human rights community nor the norms by which such institutions are created promote and reflect an understanding of the cultures and religious practices of the local contexts within which such institutions work.

⁸⁸⁸ See "National Human Rights Institutions -- A Handbook On The Establishment And Strengthening Of National Institutions For The Promotion And Protection Of Human Rights," Professional Training Series No. 4, *United Nations (UN)*, 1995.

Critics might argue that human rights institutions should focus more on human rights education rather than devoting substantive resources to pursuing accountability for past atrocities. Subsequently, some suggest AIHRC and NHRC building strategic partnerships for change rather than delving into the past. Others however argue that such institutions have a unique position as a watchdog, and in the best of circumstances, can interpret their mandate to constantly confront the government to perform better, prior to, during and even after conflict. Interestingly, a national body such as the AIHRC has from the beginning addressed several of these concerns through specific programming in fields as diverse as human rights education, women's rights, rights of detainees and disability rights, working in close collaboration with local civil society organizations and informal networks. But inevitably, it is its work in transitional justice that in some ways is cutting edge, demonstrating its creativity and commitment in using its mandate. The AIHRC's current work in documenting the deaths of civilians by indiscriminate US and NATO bombings, its documentation of land grabs by warlords, its interaction with local and religious civil society actors on matters relating to the different dimensions of human rights, are examples of how it tries to position itself as both a coordinating body, a conduit and bridge between grass-roots, national and even international stakeholders in the transitional justice project in particular, but also to the larger issues of justice and human rights in Afghanistan. Its current leadership in the TJCG for example also break new grounds in a NHRI's role in transitional justice activities as it sheds light on the continuing human rights abuses in Afghanistan by political actors, insurgents and US and NATO troops. Finally, its interactions with remote communities who look to them to file their complaints and with local religious actors and informal civil society networks

explore ways in which human rights issues can be raised, discussed, introduced and prioritized in far-flung areas of the country.

The early years of NHRC clearly demonstrated its role as an avant-garde in Nepal's human rights movement as it investigated excesses of the army and the Maoists against the Nepali population. Particularly, because transitional justice is not covered in its mandate, the role of certain commissioners in taking risks to challenge the government and expose the Maoists was proof that a national institution committed to human rights promotion and protection can use its mandate effectively and creatively, particularly in circumstances where civil society is weak and/or divided to amplify the voice of the voiceless. Its complaint mechanism, at least in theory, also provides a venue for victims of human rights abuses to formally file their experiences and allows for a state-level record-keeping process throughout the conflict years and even in the post-war period.

Ultimately, both AIHRC and NHRC underscore that there is, under conditions of impunity, little distinction between concerns for human rights and justice during 'ordinary' times and during times of war. In fact, effective NHRIs have the pulse on increasing political turmoil that may result in war (e.g. NHRC) and the continuation of the flagrant disregard for the law at the cessation of hostilities (e.g. AIHRC). Nevertheless, such institutions are as good as the people who lead them, and the networks that support them. Left to volatile environments, however, their struggles can overshadow their achievements and they constantly run the risk of becoming symbolic institutions rather than ones of practice.

CHAPTER 8

CONCLUSION

Justice is a decidedly messy affair. In societies trying to emerge from conflict, the scope and feasibility of it being redeemed is far exceeded by the necessity of its delivery. Recent efforts in post-conflict reconstruction packages have included the transitional justice toolkit, which consists of measures to generate an “accounting for the past” or “close the books” on a period of violent upheaval. While initially the transitional justice platform comprised of punitive measures, today, a comprehensive transitional justice package includes not only options for trials, but also for truth and/or reconciliation commission, mechanisms for remembrance and acknowledgement of victims as well as rule of law and security sector reform. The multifaceted repercussions of conflict and the demands they generate -- institutional, legal, historical and political -- is a step in the right direction. But transitional justice has also become a lucrative cottage industry -- a highly professionalized knee-jerk response to conflicts, such that it has ushered in well-founded criticisms about what constitutes “transition,” and whether ideals and expectations are necessarily met with a neoliberal agenda on which such a package is premised.

This dissertation takes into serious account such criticisms of transitional justice processes and their affiliated mechanisms, particularly focusing on the tensions between the international approach and local context and the recent findings on truth commissions, which temper the enthusiasm around such mechanisms. It essentially argues that as the international community, i.e. the UN, and human rights and transitional justice-oriented international actors, are in a desperate scramble to

push a society in transition to account for the past, the “local” should still matter. But the existing conceptualization of the “local,” this dissertation urges, needs to be problematized further. It is urgent to unpack the meaning and understanding of the local as is now accepted and consulted by international actors to expose the tensions and hierarchies of and within the local, and to question whose version of the local is actually prioritized in the transitional justice discourse and programming.

Inconvenient Justice began with asking the following overarching question: How, and to what extent, are specific understandings of the local situated and, in fact, privileged, in transitional justice processes? It explores this query through posing five sub-questions: (1) Do current transitional justice efforts acknowledge and/or engage with the legacies of past efforts to “close the books,” or with processes that can compare to the transitional justice practices of today? (2) Considering the role and position of law in transitional justice processes, what constitutes the local legal infrastructure in both contexts? How do their existing legal provisions provide opportunities and/or function as obstacles for mobilization on transitional justice? (3) How does internal/local and external politicization around the transitional justice process impact the objectives set such packages? What do such tensions reveal about *which* local is heard and prioritized? (4) To what extent do the respective transitional justice packages address the voices at the margins? (5) How does the domestic struggle to address wartime atrocities and ongoing injustices manifest itself? And, finally, what does it expose about the friction and relationships at the local level?

Using Afghanistan and Nepal as case studies, this research looked at five specific areas, which it insists, *are* critical components which both define and inform

the local: (i) the historical context within which “transitional justice” mechanisms are implemented; (ii) the legal dimensions of justice, including de jure impunity and the limitations of, and opportunities for, local legal systems in the context of transitional justice; (iii) the political process by which the transitional justice discourse is introduced in a context and the subsequent internal/domestic and international politicking that could limit and/or direct the justice question; (iv) the importance of centrally placing the local in defining what justice is, and what priorities should be; and (v) finally as an illustration of the domestic struggle for long-term justice, the role and challenges of NHRIs which try to link local voices to national and international platforms of decision-making and try to balance their role of advocating for present human rights, while looking into past instances of abuses.

First, historical contexts and past legacies of experimentation with the different manifestations of “transitional justice” whether defined as such or not, matter. The discussion of reconciliation in Afghanistan cannot only be conducted in cultural and religious terms; the historicity of such practices, in whatever shape and form they took place, have relevance to current efforts. It follows then that reconciliation in Afghanistan is not just informed by *sulhs* and *jirgas*, but a recollection what it has meant in the Afghan context in the different periods of its history -- an overzealous focus on conciliation and appeasement and desperate bids to control terrain and political power, a cycle that is being repeated till today. Turning to Nepal’s history of sometimes well-intentioned, but always ineffectual commissions, it is small wonder that the current discussions of a disappearance commission or a TRC are subject to cynicism and distrust. For the ordinary Nepali on the street -- these

commissions fall in the same category as a long line of “paper institutions” that emerged and collapsed without any impact on the actual challenges in society; conclusively and in layman’s terms, if these commissions work, great, but there is little hope of them making a real difference in the lives of ordinary people.

Transitional justice efforts to address wartime atrocities in such contexts cannot, of course, undo the past or rewrite the legacy of past failures, but perhaps need to be both cognizant and self-reflexive of the contexts in which they attempt to institutionalize promised mechanisms, and be wary of the assumptions surrounding their lofty commitments.

A second assertion of this research is the radical dimension of transitional justice, which brings *extraordinary* crimes to *ordinary* institutions. This has the deepest significance for ordinary laws, because they might have to recalibrate their parameters of crimes and criminality. But in transitional instances, the struggle becomes centered on institutional change; the focus on rule of law reform is too often about the structures, and less about context. But even the most well intentioned legal transformations have to take into account not only the cultural, but the contextual historicity of legal/adjudication mechanisms and how they have effectively addressed, or systematically marginalized the justice needs of the people. For example, while the different forms of jirgas in Afghanistan have been a viable source of dispute resolution and sometimes even an accounting mechanism, traditional decision-making processes on matters of justice and arbitration in Nepal have been extremely hierarchical and reflective of caste and power relationships in society. Traditional customary laws in both societies have been particularly inaccessible to marginalized

communities, particularly women, people of other ethnic and/or caste groups. Further, even customary and traditional mechanisms have been subjected to political influences, challenging the assumption that such institutions are necessarily pristine, static entities that have prevailed through the times without undue internal and external political influence.

Despite the challenges and complexities of the formal and informal legal landscape, law's position, particularly in a transitional context is both retroactive -- underscoring the criminality of past excesses -- and proactive justice, i.e. creating new parameters for criminality. Law and legal institutions are seen both as regulatory mechanisms as well as opportunities to bring about societal change, particularly, in relation to impunity. In short, the blurring of the lines between past and present justice underscores that since law derives legitimacy from past events, it also inherits problems from the past. Yet it has the mandate for a better future based on the functionalist position that more laws mean better justice. It is this unique characteristic and the functional assumptions around law that serves then as a logical and possibly effective site of mobilization for rights based actors in Afghanistan and Nepal to strengthen existing laws of criminality and, as in the latter case, minimize the scope of both *de jure* and *de facto* impunity. Ultimately however, the immunity that emerging legal systems aim to challenge, through both institutional adjustments and through responding to the crisis of legal *lacunae*, does not fully capture the complexity of the societal transformations required for challenging *de facto* impunity.

Third, internal and external politicization of transitional justice processes have tremendous bearing on the goals and mechanisms sought for seeking culpability for

the past and establishing accountability for the future. Transitional justice mechanisms, in other words, do not take place in a vacuum; they are subject to contextual exigencies. These exigencies can mean calculations at the very top about what can and should be deployed *at the expense* of the local. In articulating their claims, survivors in Afghanistan and Nepal make the goals of “transitional justice” real. Their demands include punitive punishment, reconciliation and forgiveness but **not** for the worst perpetrators, a rejection of amnesty, access to basic needs (compensation and/or reparation) and acknowledgement fundamentally assert the *universal* value of justice. This universal claim to “right the wrongs,” seriously calls into question the legitimacy of the new trend within “transitional justice” of coating some of the most difficult questions (e.g. how to address the issue of perpetrators) facing societies in transition with the “dressings” of reconciliation (i.e. framing warlord/perpetrator bargaining as a process of reconciliation, claiming legitimacy from local customs and values). In other words serious questions about accountability and the power exerted by warlords and elites in political bargaining are evaded with superficial measures. Succinctly, the question of “how does the local ‘do’ reconciliation” takes precedence over “how does the local want justice to be done.” This kind of prioritization glosses over not only the structural and endemic practices, which could have contributed to the conflict, but also misses some of the opportunities to address questions of ongoing injustices.

Under these conditions, efforts at even political reconciliation, that is, the necessary role of the government and the opposition to establish the parameters of a new relationship, and indeed the kind of concessions made to the political actors

illustrated above could be seen as efforts mounting to appeasement. According to Schapp,⁸⁸⁹ political reconciliation must be both retrospective (in coming to terms with the past) and prospective (in bringing about social harmony) and, therefore, must involve striking a balance between the competing demands of these temporal orientations. Consequently, in societies divided by a history of political violence, political reconciliation depends on transforming political enmity into a civic friendship.⁸⁹⁰ In such contexts, the discourse of recognition provides a ready frame in terms of which reconciliation might be conceived. However, Schapp also recognises that political reconciliation is related to four issues: confronting polities divided by past wrongs, constitution of political association, the possibility of forgiveness within politics, collective responsibility for wrong doing, and remembrance of a painful past. Examining past and ongoing efforts at [political] reconciliation in Afghanistan point out there has neither been a concerted and ongoing engagement with each of these categories. Moreover, while reconciliatory efforts at the grass-roots level between and among community members would be critical for a “closing of the books,” the reality of such efforts taking place within a context of ongoing conflict, and perhaps even more importantly, under circumstances where illicit power structures have been consolidated, raises questions of whose reconciliation is in fact prioritized.

⁸⁸⁹ See Schaap, *Political Reconciliation*.

⁸⁹⁰ Ibid.

Today's ongoing efforts at reintegration and reconciliation in Afghanistan, that is the Afghanistan Peace and Reintegration Program (APRP)⁸⁹¹ builds off of the experiences of reintegrating and reconciling with the different antagonistic parties in the country since 2001. The APRP has received significant support and encouragement from the international community and by individuals associated with the Karzai administration. It however continues to raise concerns amongst local civil society actors particularly among women's rights and human rights organizations and groups that rights of minorities and media freedom will be sacrificed in political negotiations to accommodate the demands of the insurgency leadership. One possible scenario, feared by civil rights activists, is that verbal commitments from reconciled parties would allow Karzai to present himself as an effective leader, prompting the international community to laud the advances made in moving toward a peace settlement in Afghanistan, while in reality such a process would be an exercise for mere public and particularly international consumption and could pave the way for Afghanistan to lose the modest gains made in human rights since 2001. Questions may also be raised about the extent to which "Afghan notions of reconciliation and forgiveness" has been exploited at the grass-roots levels, to dissipate societal tensions, while raw demands of justice for the loss of family members, kidnappings, torture, sexual assault and rape, illegal land seizures and corruption continue to plague the every day lives of ordinary Afghans.

⁸⁹¹ For an in-depth analysis of the APRP see Sajjad, *Peace At All Costs?* See also Waldman, *Golden Surrender*.

On a similar vein, while national elites and international stakeholders continue their discussion of the need for “reconciliation” and the broader themes of civil and political rights in Nepal, victims’ groups are increasingly becoming vulnerable to politicization by political groups. Simultaneously, there is a deepening sense of disenfranchisement by such networks because of what they perceive as marginalization and disinterest not only by international organizations, but also by the political elites and elite civil society organizations in the capital. Specific mechanisms for transitional justice that have been proposed and the efforts behind institutionalizing them are notable in trying to address some of the specific concerns of war crimes accountability, but also reflect their limitation to tackle what is commonly understood as the real, ongoing injustices in Nepal -- impunity and socioeconomic inequity, which have existed prior to, during and even after a decade long conflict. The glaring incongruity of a TRC and its relevance in the Nepal context serves as a reminder that the practice of foreign implants, with acquiescence and support of certain aspects of the local (i.e. primarily those who wish to maintain the status quo of power and authority) continues to be a hallmark for transitional justice practices, and a source of scepticism among local actors about the potential and relevance of such an import.

Each of these factors outlined above underscores the fourth assertion- the local still matters. In a discussion of transitional justice the audience has increasingly become its scholars and practitioners; and such professionalized mechanisms have become performances for external consumption. To the extent that the local is included, it is a subjective interpretation of the local, offered by local stakeholders,

who, it can be assumed, may have their own interests in what approach is adopted in a transitional justice process. Furthermore, in transitional justice discourse and programming, the understanding of the local has been limited to a society's culture and traditions in its more static sense, which I define as the "static local" rather than taking into account the dynamic nature of the local, informed and influenced by constant engagement with external forces and grounded in its historical experiences – the "dynamic local." This study essentially argues that it is the focus on the static local and privileging of certain elite actors that simplifies the complex and kinetic nature of realities on the ground. This limitation, this study argues, is particularly important because thus far there has been greater attention paid to the "static local" in term of culture and traditional practices, but there has been less attention, if any paid to the "dynamic local" which constitutes historical experiences and changing sociopolitical dynamics within a given society which can also influence how transitional justice programming maybe conceived and operationalized. Subsequently, this study urges that the local must be understood as an inter-subjective concept, and urges that historicity, political negotiations and local politicking, victims' demands are engaged with more extensively in grasping the complexity and evolving nature of the local.

What if then the dynamic local became the center for debating and discussing the parameters of "transitional justice" rather than being at the margin of reference? What would justice look like then? Certainly, in non-western societies, Baxi's argument that the "omniscience of western liberal thought in the design and propagation of human rights has led critics to identify 'rights' as having [strictly] a

western derivative, motivated by western politics, used for furthering foreign policies and globalised through international law”⁸⁹² should be taken seriously. So should his observation that “overall, human rights discursivity was and still remains, according to the narrative of origins, the patrimony of the West.”⁸⁹³ Certainly, several scholars have applied his logic to assert, that for example, prosecutorial measures against well-known perpetrators, could have resulted in bringing to the forefront resentment and skepticism regarding western legal norms not only within Afghanistan but also among at least a constituents of the Islamic world.⁸⁹⁴ This view while important to consider, however, it maybe concluded does not capture the full picture nor does it acknowledge the depth, complexity and breadth of the multi-dimensional aspects of justice in a context such as Nepal and certainly not in Afghanistan. Rather, it allows for a reification of a singular “Muslim/Afghan” culture, and continually stresses the differences between “western” paradigms of justice and of local contexts without focusing attention on certain universal claims of the local. In asserting this, one can draw heavily on Drumbl’s argument that there is limited benefit in revering the local to contain the dominant discourse and promoting pluralistic discourse and seeing it as

⁸⁹² Upendra Baxi, *The Future of Human Rights*, (New Delhi, India and New York, NY: Oxford University Press, 2002), 24.

⁸⁹³ Ibid

⁸⁹⁴ Abdullahi A an-Na’im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, (Syracuse, NY: Syracuse University Press, 1990); David A. Westbrook, “Islamic International Law And Public International Law: Separate Expressions Of World Order,” *Virginia Journal of International Law*, 33 (1993), 819-832; Nabil Hilmy, “Historical Development Of Human Rights And Its Influence On Some Aspects Of Islamic Law,” *Africa Legal Aid Quarterly*, (2000), 14-17.

an end in itself.⁸⁹⁵ Instead, perhaps the goal should be how to try address some of these universal claims such that transitional justice packages do not remain intellectual and/or elite-controlled exercises that seem far removed from local demands and realities.

Taking Baxi's argument seriously would suggest that the very assumption that retributive measures would bring about anti-western hysteria in Afghanistan and the Muslim world, has legitimized the "looking away" approach. This is particularly apparent regarding the questions of amnesties, *carte blanche* to the worst perpetrators and contributed to the focus on the reconciliatory dimensions in the Afghan culture. It follows then that if the West has the monopoly of human rights and retribution, than non-western states are left with the reconciliatory dimension, which can be exploited in any transitional context. In other words, such an assumption suggests there are no cultural roots for accounting and penalizing in non-western contexts. Carried to its logical extreme, the argument crudely boils down to: the West does justice, the East does reconciliation.

Viewed in this light, the ludicrousness of this statement issues a warning with regards to the developments in Afghanistan, and in Nepal. The demand for justice is raw, and it is real. Correspondingly, the societal costs of amnesties and manipulated reconciliatory efforts have severe consequences, manifest in increasing political instability, growing inconfidence of civilians in governance structures and increasing fear and apprehension about personal security. In other words, the manifestations of

⁸⁹⁵ Drumbl, *Atrocity Punishment and International Law*, 13.

McSherry and Molina's psychological impunity, brought about as a consequence of hierarchical and horizontal networks that emerge in a culture of *non*-accountability, become a collective experience.

The components of a comprehensive transitional justice package does not begin and end with retributive punishment, nor with removing culpable individuals from the centers of power, or marginalizing their spheres of influence, or acknowledging the demands of survivors. It is a sum total of all these demands. However, the fluidity and non-linear period of transitions clearly indicate that these activities are not necessarily "closing the books" or "accounting for the past" but rather responding to the realities of the present. Perpetrators do not begin and end their reign with the beginning and end of a conflict. Socioeconomic realities – that of poverty, of gender discrepancies, of lack of access to health, legal and political systems is not necessarily a product of war; in Afghanistan and Nepal, these are ongoing injustices and therefore constitute ongoing justice claims. This dissertation argues that failure to deliver on these platforms matters, because not only do they impact the efficacy of transitional justice promises, but give birth to a cycle of distrust and reflect failures of the international community to deliver on the promise of making that break between the past and the present.

Ultimately, the study urges a deeper understanding of what it proposes as being the "dynamic local" such that current efforts to understand the local in transitional justice practices does not remain contained and restrained by the parameters of culture. While culture itself is an ever-evolving concept, its link to certain fundamental traditional practices allow current efforts to "consult the local" to

remain limited within the sphere of cultural practices, particularly relating to issues of reconciliation. The findings of this dissertation does not advocate for a retraction of such efforts. Rather, it cautions against an overt reliance of a static understanding of cultural and traditional practices. It insists the dynamic dimensions of the local—relating to law, legal systems and legal customs, politicking and politicization around whose version of transitional justice and justice in general is prioritized and legitimized, and which “voices in autistic isolation” that is, “absent while in the middle of the action”⁸⁹⁶ remain sidelined require even further exploration. In such an examination the local should not be merely subjects of study, but become the venue through which scholarship continues to understand the depth and complexity of the aftermath of conflict.

Who takes up the burden of keeping a discussion of transitional justice and, even more importantly, the question of accounting for atrocities alive? Certainly, international civil society actors play their part, indirectly as partners and donors, as does the human rights community in each context. But institutionally, both in Afghanistan and Nepal, a domestic rebuttal has come in the form of NHRIs. These institutions either through direct deployment of their mandate, or creative interpretations of it, have, at least in theory, become the link between a country’s past and its present. Of course, NHRIs involvement in wartime atrocity questions is not without criticism. The highly precarious position AIHRC occupies between the

⁸⁹⁶ Dianne Otto, Roberto Aponte-Toro and Anthony Farley, *The Third World and International Law: Voices from the Margins*, *American Society of International Law* 94 (April 5-8, 2000), 51.

government and civil society has raised questions about its independence; Nepal's NHRI has recently seen a decline in its level of activism and effectiveness, given its vulnerability to politicization and government (and monarchical) manipulation. In both instances, while trying to serve as the bridge between the national government, the international community and the local voices at one hand, and trying to balance the ongoing demands for justice with that of transitional justice, NHRIs also are entrapped in the local elite circle. Nevertheless, advocates of NHRIs see their position as a watchdog, and in the best of circumstances, offer that they can interpret their mandate to constantly confront the government to perform better, prior to, during and even after conflict. Moreover, NHRIs are, in theory, different from rights-based or other civil society institutions and from more fluid groups and networks in terms of their structure, their reach, and ultimately their mandate. Their specific function to serve, in the best of circumstances, as umbrella institutions with leverage to challenge their respective governments, while simultaneously branching into other areas of justice related work -- human rights education, rights of the disabled, penal code reform, socioeconomic rights (AIHRC and NHRC) and engaging with religious and cultural leaders (as in the case of AIHRC), serve to connect transitional justice demands within the framework of broader ongoing justice demands in a fluid, conflictual and highly hostile environment. Ultimately however, the challenges of such institutions is how to not only maintain their level of independence from the different political dynamics at play, but constantly deliver on the mandate such that they continue to be seen as legitimate and committed conduits of justice delivery in their respective contexts.

The goals of “transitional justice” cannot be too lofty if they are meant to be effective. Certainly, the normative assumption that the past must be accounted for has some merit. Nevertheless, transitional justice remains the domain of the elite. Lars and Waldorf argue, “[s]urvivors are in any case unlikely to get what they ask for if it contradicts international legal norms.”⁸⁹⁷ Going forward, however, perhaps this defeatism can be challenged. Certainly, all the demands of survivors have yet to be addressed and may not be all be met. But neither should refuge be sought in doing too little, assuming that the justice question is too much. At the least, there should be greater introspection about whether reconciliation at the sake of justice is the right way forward, even if that reconciliation comes dressed in its cultural fineries. After all, the challenge is no longer simply to recognize the local, but to move beyond seeing it as a static entity informed and contained by cultural, religious and traditional practices, critically question whose interpretation of the local is infused in transitional justice packages, and engage with it as the dynamic center, influenced and shaped by historical experiences, external influences and a diverse articulation of a complex set of demands and needs emerging from a diverse locale. In short, there is a need to constantly grapple with the idea that culture matters, but context endures.

The question then should be how to do justice better, and better by victims’ standards could perhaps open the next ground of analysis, debate and scholarly research. Certainly, there needs to be an understanding and acknowledgement that transitional justice alone does not address questions of impunity. In fact, a rhetoric of

⁸⁹⁷ Lars and Waldorf, *Localizing Transitional Justice*, 4.

reconciliation without engaging with all its dimensions including that of justice claims or meeting the standards of political reconciliation, ultimately reinforces a culture of impunity. It is this endemic practice that constitutes the ultimate act of injustice against survivors. Until scholars, practitioners and policy-makers are willing to truly engage with the hard questions of justice, and assess areas of contention without necessarily either subduing or silencing them, particularly in the name of reconciliation and commissions, transitional justice will continue to be a goal, and one that is too ambitious and, at times, could become dangerously irrelevant.

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