

Impunity and insurgency: a deadly combination in Afghanistan

Norah Niland*

Norah Niland worked in Afghanistan (1999–2002) as UN Senior Human Rights Advisor and, more recently (2008–2010), as Director of Human Rights, UNAMA and Representative of the UN High Commissioner for Human Rights.

Abstract

The judgement of key decision-makers to ignore the critical problem of impunity – the lack of accountability for egregious human rights violations – contrary to the wishes of the vast majority of Afghans has had devastating, if predictable, consequences. Disillusionment with the continued abuse of power, along with the steady increase in war-related casualties, is a significant driver of the escalating insurgency. Experience over the past nine years highlights an urgent need to address the strategic issue of systemic and structural injustice. It is not realistic to envisage an end to armed conflict and the development of democratic and accountable state institutions while impunity reigns.



The ramifications of failing to address the problem of impunity in Afghanistan were immediate and far-reaching and were compounded by the US-led decision to prioritize, and prosecute, the Global War on Terror with the aid of notorious warlords. This article examines how unbridled impunity undermined the safety and wellbeing of Afghans. It reviews how continued human rights violations fed a long list of grievances that were exacerbated by the rising toll of civilian casualties and the absence of measures to hold those responsible to account.

* The views expressed in this article are those of the author.

Decades of violence and deprivation, coupled with lacklustre attempts to build the essentials for a sustainable peace – security, rule of law, respect for human rights, accountable governance, and economic opportunity – have profoundly shaped Afghan perceptions of what constitutes ‘good governance’. Afghanistan’s complicated evolution as a nation-state has been determined by its geostrategic significance at the crossroads of Central Asia. The emergence of a modern state has also been influenced by Afghan political culture and ever-changing divisions and alliances; this reflects a complex ethnic mosaic and a long history of those with leverage attempting to concentrate, control, or contest the accumulation of socio-religious, political, or economic power.

Afghanistan’s endeavours to develop centralized, legitimate, and effective governance capabilities have faced many hurdles. Inhibiting factors included geography, topography, abysmal levels of poverty, and very low educational levels, as well as tensions within and between different sets of stakeholders that include a profound rural–urban divide. The attempts of King Zaher Shah in the early 1960s to pursue a more open, inclusive, legitimate and viable nation-state came to grief when his cousin, Daoud, engineered a coup in 1973, declared Afghanistan a republic, and pushed modernization. The subsequent turmoil led to the Soviet invasion of 1979 and the eruption of armed violence that has impacted greatly on the lives of Afghans and the political culture of their country since then.

There are different views as to whether Afghans ever had a functioning state system. When the Taliban emerged in the mid-1990s, Afghanistan quickly became a pariah state, thereby adding to the misery of the long-suffering population. Taliban collaboration with extremists came to the world’s attention on 11 September 2001, the day Afghanistan came to be associated with Al Qaeda and was branded a threat to global peace and security. A few weeks after the deadly events of 9/11, the United States (with the support of various allies) launched Operation Enduring Freedom to destroy Al Qaeda’s infrastructure, track down Osama Bin Laden, and remove the Taliban regime. Shortly before, the Bush administration signalled a central role for the United Nations when it indicated that the US would support a ‘political transition and a UN-coordinated reconstruction program in Afghanistan’.¹

The UN quickly brought together a number of Afghans, most of whom already constituted groups with political agendas or aspirations, and convened a meeting in Bonn. Participants included the Northern Alliance, which enjoyed US military and financial backing, and Afghans associated with the former king Zahir Shah, known as the Rome Group.² The UN Secretary-General’s Special Representative for Afghanistan, Barnett Rubin, who was an adviser to Lakhdar

1 Barnett Rubin, ‘Crafting a constitution for Afghanistan’, in *Journal of Democracy*, Vol. 15, No. 3, July 2004, p. 6.

2 Two other groupings, ‘Peshawar’ and ‘Cyprus’, so named after meetings in these locations, also took part. A small number of civil society activists met in a parallel gathering but were not directly involved in the Bonn negotiations.

Brahimi and who organized and chaired the Bonn talks, noted that the meeting 'did not represent the people of Afghanistan, either directly or indirectly'.³

The Bonn Agreement was finalized with record speed in nine days. Both it and its implementation suffered serious deficiencies from the outset. The Bonn meeting was dominated by a number of notorious power-holders long despised by the majority of Afghans. Many of these well-known warlords had just been resuscitated by the United States and installed in their former fiefdoms to help prosecute the Global War on Terror launched on 7 October 2001. Importantly, the meeting did not include numerous key stakeholders, such as representatives of victims of the war, women's groups, human rights advocates, and a sizeable chunk of the Pashtun community, particularly those associated with the Taliban and rural norms.

Bonn did not produce a peace accord in the sense of an agreed understanding of future power-sharing arrangements among different Afghan stakeholders. In the Afghan context, a peace consolidation agreement should have been inclusive and designed to undo the structural problems that had led to crisis and conflict. Instead, the Bonn agreement reinforced the very tendencies and personalities that were central to decades of armed violence and the crisis of governance that Afghanistan needed to overcome.

Since the end of the Cold War, the international community has launched numerous post-conflict transition or recovery initiatives. The UN has gained much experience and many insights in the process.⁴ Unfortunately, since measures 'taken during the negotiation of peace agreements have important implications for, and are intrinsically related to, longer-term state-building and development',⁵ it would appear that not many lessons were applied in Bonn.

Experience also shows that sustainable recovery is a long-haul endeavour. There are no quick fixes for fashioning a legitimate and effective state system in the wake of armed conflict. However, it is vital that post-ceasefire peace-building does not postpone or impede immediate peace dividends, the priority invariably being the safety of individuals and groups. Peace processes that are geared to helping countries recover from the trauma, hardship, and causes of war must seek to re-define and transform relationships between different sets of stakeholders and generate new patterns and structures of societal organization. Critically, efforts to bring about constructive social and political change must enjoy the confidence and engagement of those who have most to gain from a peaceful transformation geared to the creation of just, credible, and effective institutions.

Priority needs to be given to the fabric that holds a society together. In war-torn settings this fabric needs to be redesigned and re-woven so that the past is

3 B. Rubin, above note 1, p. 7.

4 'Scores of UN officials have first-hand knowledge of the discouraging frequency with which negotiated settlements re-erupt into armed conflict, and it has been widely observed that countries return to violent conflict within five years of the successful negotiation of a peace settlement nearly 50% of the time'. Thomas J. Biersteker, 'Prospects for the UN Peacebuilding Commission', in *Disarmament Forum*, 2007, No. 2, p. 37.

5 *Ibid.*

not repeated and the nation develops peaceful means of sharing power, managing resources, and resolving disputes.⁶ In other words, the technical aspects of peace-building are secondary to building an inclusive political culture. War-torn societies need to build an environment that is conducive to respect for human rights and to establish a 'rule of law' that is fair, credible, and accessible. Such resources are critical in breaking cycles of fear, violence, and deprivation.

Bonn was wrong: the strategic significance of impunity was ignored

In late 2001, after two decades of armed conflict, Afghans were weary of war. They were desperate for peace. They were reassured that the global community would invest in building a peace strong enough to address the root causes of violence, and robust enough to resist threats by disruptive internal or external elements. Afghans had high expectations, but these aspirations faced huge challenges in the Bonn state-building project. The Bonn process was built on an agreement hammered out among a handful of politicians and former commanders with vested interests and an implementation process skewed in favour of these same power-holders. In addition, the United States had prioritized hunting down Al Qaeda and its Afghan allies in a manner that strengthened abusive Afghan authorities.

To move forward, Afghanistan needed a framework that allowed those in favour of a new, inclusive, and just order to participate in, and shape, the state-building process. The opposite occurred: Afghans who argued for accountable governance were marginalized and mostly found themselves on the periphery of decision-making fora. Commenting in 2009 on the issue of participation, Lakhdar Brahimi said:

We are now paying the price for what we did wrong from day one ... the popular base of the interim administration put together in Bonn under President Karzai was far too narrow. We all vowed to work hard to widen that base once we returned to Kabul. Unfortunately, very little was done.⁷

The provision of cash, guns, and political support to individuals and their power structures associated with egregious human rights violations effectively stacked the deck against those pushing for freedom from the tyranny of violence, lawlessness, and widespread poverty. Arrangements to fill the power vacuum that was inevitable as the Taliban regime was dismantled, including the prioritization of the Global War on Terror over the safety and wellbeing of Afghans, accentuated both the problem and the perception of bias.

6 A positive example is that of Nelson Mandela, who was conscious of the need to challenge stereotypes and convince adversaries that post-apartheid South Africa could live well as the 'Rainbow Nation'.

7 Barbara Crossette, 'Lakhdar Brahimi: Afghanistan's future', in *The Nation*, New York, 23 March 2009, available at: <http://www.thenation.com/article/lakhdar-brahimi-afghanistans-future> (last visited 29 October 2010).

Many Afghans were concerned that arming and funding the men with guns, and their 'legitimization' through the Bonn process, would thwart efforts to end violence and hinder the realization of a genuine reconciliation process that could only proceed with a dedicated commitment to human rights and a society governed by the rule of law. Various studies bear testimony to an overriding pre-occupation with insecurity and the widely held view, among Afghans, that the root causes of violence had to be addressed in order to break the patterns of the past and develop a different system of governance.

Afghan perspectives and preoccupation with insecurity and injustice

The collapse of the Taliban regime and the promises of the Bonn state-building project convinced many Afghans that peace was within reach. A survey conducted in April 2002 found a surge of hope and anticipation of better days, although many Afghans remained concerned about the distribution and misuse of power. 'People are tired of war and violence. They are ready to embrace human rights and turn away from guns but the leaders won't let them. This has to be the job of the UN', said a refugee eager to return home.⁸

A survey in 2003 by a coalition of NGOs, both Afghan and international, found that security issues were the top concern: participants 'consistently talked about being tired of the long years of war, and the negative effects of the conflict on their lives'.⁹ Afghans raised concerns 'about the threat to potential long term peace including ... impunity for commanders and warlords'.¹⁰ Commenting on the need for justice, a woman in northern Afghanistan noted: 'courts do not solve our problems properly because of corruption and powerful armed men'.¹¹

'A Call for Justice', an extensive survey covering thirty-two of Afghanistan's thirty-four provinces undertaken by the Afghanistan Independent Human Rights Commission, captures perceptions and views of a broad cross-section of Afghan society. Respondents were critical of the role of the international community, noting that, if it had 'seriously addressed injustice, security would be assured today'.¹² Security was identified as the most urgent concern by most participants and was frequently linked to justice issues; a woman in eastern Afghanistan said that 'justice is very important but security and justice are inter-related'.¹³

In 2009, an Oxfam assessment of Afghan perceptions of the costs of war found a great deal of dismay over the continued insecurity and impunity. A woman in Dai Kundi underlined that the government should 'start paying

8 Centre for Economic, Social and Cultural Rights, *Human Rights and Reconstruction in Afghanistan*, New York, May 2002, p. 1.

9 The Human Rights Research and Advocacy Consortium, *Speaking Out: Afghan Opinions on Rights and Responsibilities*, Kabul, November 2003, p. 8.

10 *Ibid.*, p. 16.

11 *Ibid.*, p. 30.

12 Afghanistan Independent Human Rights Commission (AIHRC), *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*, Kabul, January 2005, p. 13.

13 *Ibid.*, p. 17.

attention to its people'; many respondents called for accountability, noting that the government 'should not appoint warlords'.¹⁴

Significantly, the Bonn Agreement did not address the central problem of impunity and shied away from the need for accountability. A handful of power-brokers responsible for acts that could be classified as war crimes were antagonistic to any reckoning with the past. A draft paragraph forbidding an amnesty for war crimes was deleted in the final negotiation session in Bonn. This in effect meant that a *de facto* amnesty was established, making it extremely difficult to counter impunity. It also meant that it would be extremely difficult to ensure that power would not be usurped by those best known for their infamous deeds. Reflecting on the Bonn process in 2007, Lakhdar Brahimi concluded that it was flawed, as the overall arrangement was not premised on a genuine reconciliation process that would have enabled Afghans to deal with deeply engrained patterns of abuse.¹⁵

Green-lighting impunity

The Bonn Agreement was a disappointment to many Afghans, who were perturbed about the message it conveyed about impunity. Over time, the green-lighting of impunity has become routine. It has been reinforced, for example, at the many international conferences held on Afghanistan, at which the status quo that emerged from Bonn has been endorsed and strengthened. Concrete measures that were needed to make a transition from abusive power structures to systems where no one was above the law never materialized.

The first months of the new Karzai-led interim administration faced many challenges, including a well-documented pattern of human rights violations in northern Afghanistan, where an array of local commanders held sway. The abrupt demise of the Taliban regime meant that Pashtun communities, who form part of an ethnic mosaic in the north, were particularly vulnerable to attack as new power structures emerged. In sharp contrast to the period when the Taliban regime was ensconced in Kabul, the UN was reluctant to raise the subject of such human rights violations, even when Afghans in the new administration requested the UN to use its moral authority to help counter such violence.¹⁶ UN silence on human rights violations became for some time the established pattern in Kabul.

The UN Secretary-General's last report (6 December 2001) before the establishment of the United Nations Assistance Mission in Afghanistan (UNAMA) stressed the urgent need to address protection issues, and indicated that it planned

14 Oxfam, *The Cost of War: Afghan Experiences of Conflict, 1978–2009*, Kabul, 2009, p. 26.

15 Lakhdar Brahimi, 'State building in crisis and post-conflict countries', contribution to the 7th Global Forum on Reinventing Government: Building Trust in Government, Vienna, Austria, 26–29 June 2007, p. 13.

16 Norah Niland, 'Justice postponed: the marginalization of human rights in Afghanistan', in Antonio Donini, Norah Niland, and Karen Wermester (eds), *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan*, Kumarian Press, West Hartford, CT, 2004, p. 75.

to bolster its overall capacity in this regard.¹⁷ Yet his report a few months later (March 2002) had little to say on the actual human rights situation. Significantly, there was no mention of the protection crisis then unfolding in northern Afghanistan.¹⁸

UN Security Council Resolution 1401 (March 2002), which brought the UN mission into being and identified its centrality to the implementation of the Bonn process, made no reference to human rights. In early 2002 the UN opted for an integrated peace-building model in line with the 'Brahimi Report'.¹⁹ This model reflected the assumption that a 'coherent' or 'integrated' approach that maximized synergies between different interventions was best suited to building peace. However, the 'human rights and humanitarian protection functions of the original humanitarian office were curtailed and transferred to the political wing of the mission'.²⁰ As a result, human rights concerns were marginalized and made subordinate to a peace-consolidation agenda that was indifferent to the justice deficit and the aspirations of the vast majority of Afghans.²¹

The Emergency Loya Jirga (June 2002) compounded the failures of the Bonn Agreement. Its stated aim, as set out in the Bonn Agreement, was to create a broad-based and representative transitional administration that would pave the way for the establishment of a new state system, including a revamped constitution and presidential elections slated for October 2004. A dedicated effort was made to have a representative Jirga, but the process was marred by intimidation that distorted the selection process. The Jirga itself was hijacked, under the eyes of the UN, by known warlords; in flagrant breach of established procedures, individuals who

17 Report of the Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security*, 6 December 2001, UN Doc. A/56/681-S/2001/1157. In mid-2001 the UN Coordinator's Office decided to recruit dedicated protection staff, who began to arrive at the end of 2001. However, these staff were subsequently absorbed into the UN Assistance Mission to Afghanistan (UNAMA), which did not prioritize issues relating to the protection of civilians and incorporated human rights officers into the political team.

18 Report of the Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security*, 18 March 2002, UN Doc. A/56/875-S/2002/278. Well-documented reports had been produced by aid agencies concerned about targeted attacks on Pashtuns, the arming and abuse of internally displaced persons (IDPs), and inter-factional fighting; these reports also dealt with the role of General Dostum, regional power-broker, who returned to Mazar in late 2001. Karzai sent a ministerial team to investigate; this team subsequently asked senior UNAMA personnel, including the Deputy Special Representative of the Secretary-General, to speak out on human rights violations and to warn that warlordism and impunity would not be tolerated. However, UNAMA was of the view that these were Afghan issues that Afghans had to solve. See N. Niland, above note 16, p. 75.

19 In 2000, the UN Secretary-General, Kofi Annan, launched a review of UN peace operations to produce recommendations for improved peace initiatives. This panel was chaired by Ambassador Lakhdar Brahimi and led to *The Report of the Panel on UN Peace Operations* (commonly known as the 'Brahimi Report'), 21 August 2000, UN Doc. A/55/305-S/2000/809.

20 Alex Costy, 'The dilemma of humanitarianism', in A. Donini, N. Niland, and K. Wermester, above note 16, p. 148.

21 Human Rights Watch called on UNAMA to increase human rights monitors and go public about human rights problems, noting that warlords were to blame for many of the problems that thwarted effective implementation of the Bonn Agreement, but that the international community was also at fault for not helping those Afghans 'who are trying to make the agreement a success'. Human Rights Watch, *Afghanistan's Bonn Agreement One Year Later*, New York, 2002.

were not eligible or had not been selected were allowed into the proceedings.²² Closed-door negotiations, rather than transparent voting, determined the composition of the transitional government, and many legitimate participants expressed great disappointment about the overall process and outcome.²³

The Emergency Loya Jirga showed that the international community was more interested in comforting rather than confronting widely reviled individuals who had amassed power through the barrel of a gun. The view that warlords should be embraced and ‘legitimized’ was voiced by Mr Karzai in an interview during the Jirga, when he said that ‘justice is a luxury for now; we must not lose peace for justice’.²⁴ Notwithstanding widespread concern and alarm among Afghans about the manipulation and distortion of the Jirga process, Mr Brahimi noted a short while later that, in politics, ‘choices have to be made’; he added that ‘our responsibility to the living has to take precedence’ over accountability for the dead.²⁵

The institutionalization of abusive power structures, policies, and practices has been one of the defining features of the Bonn-led state-building process. The *de facto* promotion of impunity is a significant reason for the failure to make peace a realistic possibility in Afghanistan. The reverse transition that is now under way, as instability and the insurgency gain momentum, can be attributed in part to the short-sighted polices that prioritized the Global War on Terror over building the rule of law and a viable state structure. Similarly, the same kind of tunnel vision ignored the significance of impunity and continued human rights violations, and the message this sent to perpetrators and advocates of accountability.

The UN mission was seen to perceive human rights ‘as a distraction from, or threat to, the more important priority of security’ and to be fearful of offending human rights violators ‘who were key parties to the Bonn Agreement and whose continued cooperation was deemed vital for the political process’.²⁶ In 2003, UN mission personnel were of the view that ‘human rights observers serve no purpose when there is no state authority to fulfil human rights obligations’.²⁷ Of course, in the immediate post-Bonn Afghan context, it should have been obvious that state-building required stability and that human rights violations were a key factor in destabilization and the erosion of state authority. Nowhere is there evidence that a sovereign state can be built on a foundation of impunity. The legitimacy of any

22 Others also ‘attended, in violation of the *loya jirga* procedures, including the governor of Kandahar, Gul Agha Sherzai, the governor of Nangahar, Haji Abdul Qadir, and Ismail Khan. Zalmay Khalilzad, the U.S. special envoy to Afghanistan, and Lakhdar Brahimi, the special representative of U.N. Secretary-General Kofi Annan, pressured the Afghan *loya jirga* commission to allow regional governors and military commanders to attend’. Human Rights Watch, *World Report 2003*, p. 192, available at: <http://www.hrw.org/wr2k3/asia1.html> (last visited 21 December 2010).

23 *Ibid.*

24 Lyse Doucet, interview with Hamid Karzai, BBC HardTalk programme, Kabul, 14 June 2002.

25 ‘Transcript of the press conference by the Special Representative of the Secretary-General for Afghanistan, Lakhdar Brahimi’, Kabul, 27 August 2002, available at: <http://www.un.org/apps/news/infocusnews.asp?NewsID=212&SID=1> (last visited 29 October 2010).

26 Rama Mani, *Ending Impunity and Building Justice in Afghanistan*, Afghanistan Research and Evaluation Unit (AREU), Kabul, December 2003, p. 14.

27 *Ibid.*

state exists only insofar as it enjoys the trust and confidence of the people whom it is, in principle, designed to serve.

Beyond Afghanistan, at the international level, UN human rights mechanisms failed to influence the blinkered political agendas that held sway in Kabul and other capitals. UN Special Rapporteurs presented useful reports and recommendations, including that of Asma Jahangir concerned with extra-judicial, summary, and arbitrary executions; she called, in 2003, for a commission of enquiry into Afghanistan's history of killings. Under pressure from the Bush Administration, the UN Human Rights Commission rejected this proposal.²⁸

Only after completing his assignment in Afghanistan did Mr Brahimi conclude that, in the absence of strong institutions embodying the rule of law, 'human rights will remain elusive and confined to the realm of high-minded international rhetoric rather than reality'. He went on to say that, in Afghanistan, 'the judicial reform process was largely neglected, and I must confess that I personally bear a large part of responsibility for that'.²⁹

The UN Assistance Mission in Afghanistan did eventually change tack on human rights and established a dedicated capacity throughout the country that improved its ability to promote and support efforts to ensure that they are duly respected. However, the United Nations has not been able to mobilize the necessary political will among its member states to tackle impunity.

Despite huge constraints, human rights agencies in Afghanistan have made significant strides in recent years in making their presence felt. The human and security costs involved in the erosion of respect for fundamental norms have been widely publicized and debated. A nationwide consultation, 'A Call for Justice', by the Afghanistan Independent Human Rights Commission in 2004 found that more than 75% of Afghans considered that accountability processes were needed to end a long history of violence.³⁰ This groundbreaking consultation led to the development of an 'Action Plan on Peace, Justice, and Reconciliation', which was adopted by the government and launched officially by President Karzai in December 2006. This plan, however, has effectively fallen by the wayside; outside human rights circles it garners little attention.

Beyond Afghan political circles, manifestations of concern about human rights by those who literally and metaphorically call the shots in Afghanistan have mostly been rhetorical. The US and its allies have been content to provide technical support to strengthen Afghan human rights institutions and capabilities while simultaneously using their political muscle to back personalities, policies, and practices at odds with core human rights principles. On the specific issue of impunity, Afghanistan's partners have been more a part of the problem than the solution.

28 Author's own records. See also Patricia Gossman, 'The past as present: war crimes, impunity and the rule of law', paper delivered at the 'State Reconstruction and International Engagement in Afghanistan' symposium, 30 May–1 June 2003, London School of Economics and Political Science and University of Bonn, p. 1.

29 L. Brahimi, above note 15, p. 15.

30 AIHRC, above note 12, p. 17.

In early 2010 it became known that Afghan authorities had adopted legislation providing a blanket amnesty for egregious human rights violations and effectively denying victims the possibility of justice and redress.³¹ It also reinforced the message that powerful perpetrators were immune to prosecution. When the Amnesty Law came to light, it was met by a deafening silence; only human rights entities and the UN publicly raised concerns, thereby indicating that political expediency remains the preferred option of Afghanistan's external collaborators.³² The constant green-lighting of impunity diminishes prospects for the emergence of an alternative to both the structural and the armed violence that are major drivers of the insurgency.³³

Injustice and alienation

Afghans have an innate sense of justice.³⁴ Traditionally, the minimum that Afghans expected from their rulers was that they be good Muslims, preside over a just order, and ensure security. Given this yardstick, the state-building project in Afghanistan should have been revisited after the Emergency Loya Jirga and corrective action taken. Lakhdar Brahimi, one of the chief architects of the Bonn Agreement, advocated such a review in mid-2003 but 'nobody was listening' and the US was then preoccupied with Iraq.³⁵

Meanwhile, disenfranchised Afghans – who in principle should have been the most important stakeholders in efforts to craft a durable peace – had, by 2003, a growing list of grievances that were mostly ignored. There was little empathy with, or concern for, Afghan anxiety about the intertwined issues of impunity, insecurity, lawlessness, and criminality and how these fed a growing sense of injustice and alienation from the state.

Security, or the lack thereof, was the prime concern of Afghans, who were vocal and emphatic on this point whenever they had an opportunity to make their views known. For Afghans, security means being free from direct physical harm. Being secure also means being free from abusive and predatory practices. This is particularly the case when abuse is systemic and the source of political or economic marginalization that is detrimental to individuals or particular groups. Threats to

31 Author's personal records.

32 *Ibid.* See also Jonathon Burch, 'U.N. calls for repeal of Afghan amnesty law', in *Reuters*, 25 March 2010.

33 The term 'structural violence' refers to the underlying causes of conflict or fault lines in a society that 'normalize' harm such as discrimination or exclusion. It has been defined as 'entrenched socioeconomic conditions that cause poverty, exclusion and inequality': Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor*, University of California Press, Berkeley, 2003, p. 40.

34 A survey conducted by the AIHRC found that 'Afghans believe justice to be a general medium through which to improve specific aspects of their life. Justice for many also meant upholding of basic human rights, including the freedom of expression, the freedom to participate in elections and the elimination of discrimination on the basis of race, language and gender. Many also associated justice with the promotion of economic equality'. AIHRC, above note 12, p. 14.

35 B. Crossette, above note 7.

one's dignity and sense of personal honour and integrity are equally of concern, as are acts of intimidation or discrimination.

Injustices and grievances run the gamut from the seizure of personal land, through bribes for government services, to selective poppy eradication that favours some and disadvantages others. A strong feeling of being wronged is associated with the manipulation and marginalization of particular tribes to their political and economic disadvantage.³⁶ Arbitrary detention, including that which is conflict-related, is a source of great dismay and unhappiness; powerful commanders and those with personal animosities can manipulate dysfunctional systems to have rivals imprisoned.³⁷

Corruption is rampant: Afghanistan now ranks as the second most corrupt nation in the world, just ahead of Somalia. Examples of corruption range from 'public posts for sale and justice for a price to daily bribing for basic services'.³⁸ Afghans paid nearly \$1 billion in bribes in 2009; corruption in the country had thus doubled since 2007.³⁹ The dismissal of Mr Faqiryar, Deputy Attorney-General, in August 2010, shortly after he attempted to prosecute a senior member of Mr Karzai's inner circle, is illustrative. As noted by Mr Faqiryar, the law in Afghanistan 'is only for the poor'.⁴⁰ He could have added that the law is only for those who are poorly connected.

Widespread fraud – one-third of the votes had to be discounted – and a surge in violence made a mockery of democracy in the 2009 presidential elections.⁴¹

36 Manipulating, manufacturing, or aggravating tribal differences has been very destructive and deadly on occasion. According to the study by General Stanley McChrystal, former Commander of ISAF and US troops in Afghanistan, which formed the bedrock of his counter-insurgency doctrine, the Taliban 'consistently support weaker, disenfranchised, or threatened tribes or groups'. COMISAF Initial Assessment (Unclassified), 30 August 2009, pp. 2–7, available at: http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf?sid=ST2009092003140 (last visited 29 October 2010).

37 A survey conducted by the United Nations Development Programme (UNDP) in 2005 found that '76% of people interviewed' considered the judiciary 'the most corrupt institution in the country'. UNDP, *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition: Rule of Law and the Search for Justice*, Kabul, 2007, p. 61. The Oxfam *Cost of War* study (above note 14) noted that almost 30% of respondents 'reported one or more family members imprisoned at some point since 1979' (p. 16). The Integrity Watch Afghanistan (July 2010) report found that Afghans were of the view that the judiciary and the police are the two most corrupt institutions in the country. Integrity Watch Afghanistan, *Afghan Perceptions and Experiences of Corruption: A National Survey 2010*, Kabul, p. 11.

38 With reference to Transparency International's annual Corruption Perceptions Index (CPI) (November 2009), Al Jazeera noted that government corruption 'along with the exploding opium trade – which is also linked to corruption – contributes to the downward trend in the country's CPI score'. Al Jazeera, 'Afghanistan corruption "worsening": Transparency International ranks country second-worst for public sector corruption', 17 November 2009. See also Transparency International's annual Corruption Perceptions Index (November 2009), available at: http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (last visited 29 November 2010).

39 An Integrity Watch study on Afghanistan found that the average value of bribes paid in 2009 was \$156. The study showed that almost a third of civil servants indicated that they had been forced to pay a bribe to obtain a public service, while 13% of households said that they had paid bribes to secure their own sources of income. Integrity Watch Afghanistan, above note 37, pp. 10 and 12.

40 Dexter Filkins, 'Inside Corrupt-istan: a loss of faith in leaders', in *New York Times*, 4 September 2010.

41 'The fact that candidates with problematic backgrounds and a record of abuse were allowed to run helped undermine the democratic process and the idea of democracy itself; this study on local

This was compounded when, a year later, a financial crisis that threatened to cause the collapse of the Kabul Bank revealed that it had poured millions into Mr Karzai's re-election campaign; two of the bank's main shareholders are brothers of the President and of his Vice-President, Marshal Fahim.⁴²

The situation of women and girls, although some gains have been made, remains precarious. Deeply entrenched prejudices and discrimination are accentuated by domestic and other violence including rape and widespread intimidation to deter women from working outside the home. Presidential pardons have been dispensed for convicted rapists and drug traffickers.⁴³

Injustices are closely linked to poverty and powerlessness and the inability of many Afghans to carve out a dignified life. Afghans suffer some of the worst socio-economic indicators in the world, with life expectancy for women no more than forty-four years. Grievances linked to widespread grinding poverty are all the more acute when juxtaposed with the profits associated with the \$2 billion private security industry that helps maintain the supply lines for foreign military forces. Private security companies thrive on lawlessness and insecurity and are a major destabilizing factor, given the rivalries and power play involved in the pursuit of lucrative contracts. Such companies are often the fiefdoms of the thuggish commanders who gained prominence in previous eras of fighting.⁴⁴ Immune from prosecution, they retain their affection for impunity that is shaping and aggravating an increasingly divisive, predatory, and violent political culture.

A US Congressional study found that 'warlords thrive in a vacuum of government authority, and their interests are in fundamental conflict with U.S. aims to build a strong Afghan government'.⁴⁵ It may well be that Mr Karzai agrees and is concerned about the growing number of power structures in competition with his own administration. In August 2010 he announced that he planned to close down private security companies because they 'are not working for the

perceptions found that positive UN commentary on the elections, despite widespread fraud "seems to have created a sense of disillusionment with the political process as a whole and the independence of the UN". Marika Therios and Iavor Rangelow, 'Field notes from Afghanistan: perceptions of insecurity and conflict dynamics', Working paper 01/2010, London School of Economics, April 2010, p. 5.

42 Adam B. Ellick, 'Karzai family political ties shielded bank in Afghanistan', in *New York Times*, 7 September 2010. The same article notes that 'General Fahim is also suspected of involvement in serious human rights violations during the 1990s, according to several advocacy groups. In particular, he was a key commander during the Ashfar massacre in 1992 in Kabul when an estimated 800 ethnic Hazaras were killed and raped'.

43 Office of the United Nations High Commissioner for Human Rights (OHCHR) and UNAMA, *Silence is Violence: End the Abuse of Women in Afghanistan*, Kabul, 8 July 2009, p. 23. The report records a long litany of pain and recounts the efforts of Afghan non-governmental organizations and others to challenge deeply engrained discrimination against women and girls.

44 An investigation undertaken by the US House Subcommittee for National Security concluded that the major players involved are 'warlords, strongmen, commanders and militia leaders who compete with the Afghan central government for power and authority'. Dexter Filkins, 'US said to fund Afghan warlords to protect convoys', in *New York Times*, 21 June, 2010. See also 'WARLORD, INC. extortion and corruption along the U.S. supply chain in Afghanistan', Report of the Majority Staff, Rep. John F. Tierney (Chair), Subcommittee on National Security and Foreign Affairs, US House of Representatives, June 2010, pp. 1–2.

45 D. Filkins, above note 44.

benefit of Afghan national interests'.⁴⁶ Mr Karzai has repeatedly made the point that Afghan corruption pales in comparison with that of outsiders, whose budgets far exceed the cash flow available to Afghan authorities and individuals.

A UN human rights report noted that a 'growing number of Afghans are increasingly disillusioned and dispirited as the compact between the people, the Government, and its international partners is widely seen to have not delivered adequately on the most basic fundamentals including security, justice, food, shelter, health, jobs and the prospect of a better future'.⁴⁷ Such disillusionment with the inability of the state to deliver on the fundamentals of security and justice runs deep. The combination of disappointment over and revulsion against the Karzai regime and its international backers is a powerful incentive in the growing insurgency that is increasingly assuming the characteristics of a civil war. As power and patronage become concentrated in the hands of the few, Afghans are obliged to choose between the Karzai model of governance and that of the armed opposition.

Numerous recent studies have shown that injustice is a major driver of alienation and growing dissatisfaction with the government, which is heavily dependent on the international community for its survival. Research that included some 500 interviews found that Afghans consider corrupt and unjust government to be among the main reasons for the insurgency; a tribal elder in the south-east said that the

lack of clinics, schools, and roads are not the problem. The main problem is that we don't have a good government ... There is a growing distance between the people and the government, and this is the main cause of the deteriorating security situation.⁴⁸

A study commissioned by General Stanley McChrystal, former Commander of ISAF and US troops in Afghanistan, noted that the Taliban established ombudsmen 'to investigate abuse of power in its own cadres and remove those found guilty'.⁴⁹

A study in Kandahar, the heart of the insurgency and Taliban home turf, concluded that the population 'sees the government as an exclusive oligarchy devoted to its own enrichment and closely tied to the international coalition. Anti-government sentiments are exploited and aggravated by the Taliban'.⁵⁰ A study funded by the British Department for International Development found that 'the failure of the state to provide security and justice' together with 'perceptions of the government as corrupt and partisan' are influential drivers of the insurgency.⁵¹

46 Associated Press, 'Karzai: shutter private security companies', Kabul, 7 August 2010.

47 OHCHR, *Human Rights Dimension of Poverty in Afghanistan*, Kabul, March 2010, p. 20.

48 Andrew Wilder and Stuart Gordon, 'Money can't buy America love', in *Foreign Policy*, 1 December 2009.

49 COMISAF Initial Assessment, above note 36.

50 Carl Frosberg, *Politics and Power in Kandahar*, Institute for the Study of War, Washington, DC, April 2010, p. 51.

51 Sarah Ladbury and Centre for Peace and Unity (CPAU), *Testing Hypotheses on Radicalization in Afghanistan: Why Do Men Join the Taliban and Hisb-i-Islami?*, independent report for the Department for International Development (DFID), Kabul, 14 August 2009, p. 7.

Injustice, driven by impunity, and the insecurity that this engenders are a boon to the armed opposition, particularly the Taliban.⁵² The Taliban are not loved for their harsh and repressive policies, but their tough approach to criminality and their ability to impose order on the basis of their interpretation of Shari'a law has helped them regain lost ground, particularly in Pashtun areas.⁵³ In areas controlled or dominated by the Taliban, their brand of justice, including their role in the local settlement of disputes, is one of their first priorities. A member of the British Provincial Reconstruction Team (PRT) in Helmand concluded that the Taliban control of the justice system allows them to gain 'influence and support which tends to undermine the links between communities and government'.⁵⁴ Another member of the team noted that Taliban courts were 'the only effective and trusted tribunals of justice. Above all, unlike the state courts, their decisions are not dependent on the ability to pay bribes and will be enforced'.⁵⁵ Of course, this does not mean to say that Taliban courts dispense justice in line with international standards or that such courts are better than other traditional dispute resolution mechanisms or the state system, particularly when women and girls need redress; the point is that justice or the lack thereof is a game-changer for many Afghans.

Concerns about the destabilizing role of corruption, injustice, and disreputable governance were echoed by General McChrystal. One of his conclusions was that 'widespread corruption and abuse of power exacerbate the popular crisis of confidence in the government and reinforce a culture of impunity'.⁵⁶ However, while the consequences of corruption and predatory governance are now better understood in key decision-making circles, this has not been translated into a commitment to tackle *systemic* injustices that goes beyond a scattering of piecemeal initiatives.⁵⁷

52 A NATO team working on alternative options to combat corruption concluded that US-led efforts to date 'have done little to erase the nickel-and-dime bribes Afghans have to pay to drive down a highway, or see a government doctor – the daily shakedowns that drive the people into the arms of the insurgents, who provide similar services without the graft'. This team concluded that militants are seen to provide 'cleaner' government in areas they control. See Kimberly Dozier, 'US strategists seek Afghan fixes outside the box', in *Associated Press*, 25 September 2010.

53 The reality of the Taliban rise to power is more complex than their founding myth of banding together to end pervasive rape and predation; their repressive rule and massive human rights violations are well known. However, as violence has taken hold, many welcome the Taliban resurgence. Speaking to a disgruntled resident of Kabul in 2006, Kate Clark, then with the BBC, was told that 'from the point of view of security, the Taliban were good', whereas in the current regime bribery was noted to be terrible and 'as for security, you can't reach home if you have money on you'. Speaking to an elderly respondent, Clark was told: 'These days, the officials suck your blood. Even governors take bribes just for doing something legal. The Taliban beat women and there were restrictions, but at least there was no bribery'. Stephen Carter and Kate Clark, *No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan*, Chatham House, London, December 2010, p. 20.

54 Frazier Hirst, *Support to the Informal Justice Sector in Helmand*, DFID Internal Report, April 2009.

55 Frank Ledwidge, 'Justice and counter-insurgency in Afghanistan: a missing link', in *Royal United Services Institute Journal*, Vol. 154, No. 1, February 2009, pp. 6–9.

56 COMISAF Initial Assessment (Unclassified), above note 36.

57 The 'government-in-a-box' formula that was part of the counter-insurgency campaign to re-take Marjah in Helmand is illustrative; new government officials were appointed but have largely proved ineffective in strengthening the legitimacy of the Kabul administration.

Reform that leads to credible and sustainable change requires a long-term commitment and an approach that eschews alliances with law-breakers who have grown richer and more ruthless while destabilizing the country. Reflecting on the failure to achieve justice, a professor at Kabul University commented a few months ago that without ‘a fundamentally strong judicial system we cannot find our way to justice’. He added that progress is unlikely without ‘all the key parties buying into the idea of the rule of law and then implementing it. And we haven’t seen that really since 2001’.⁵⁸

Insurgency, civilian casualties, and impunity

Two of the most striking consequences of disillusionment, driven by injustice and diminishing confidence in the Karzai administration to restore order and the rule of law, are the spread and intensification of armed conflict and its ramifications for civilians. The recognition that the killing of Afghans is changing the narrative of the war is one of the few issues on which there is consensus across the political spectrum in and outside Afghanistan. The armed opposition, and the Taliban in particular, have been adept at defining the presence of US and other foreign soldiers as an occupation army that disrespects Afghans and their culture. US military and civilian decision-makers have identified the importance of protecting civilians as central to reversing trends in which the insurgents have the momentum. President Karzai has repeatedly articulated his grief and anger at civilian deaths; he is also increasingly of the view that the US-led counter-insurgency is failing and is counter-productive. Meanwhile, the UN has repeatedly called attention to the need to protect civilians. Antagonism to the war is widespread in areas that are most directly affected. Many Afghans are of the opinion that the very nature of the international engagement in Afghanistan led to the resurgence of the armed opposition and intensification of the war that, in turn, has allowed impunity to flourish.

Now moving into its fourth decade, war in Afghanistan has been devastating for Afghans and their society. According to a survey by the International Committee of the Red Cross, almost all Afghans – 96% – have been affected either directly or indirectly as a result of the wider consequences of war, while almost half (45%) indicated that a family member had been killed, 43% said they had been tortured, and a third (35%) had been wounded.⁵⁹ Over time, the war has changed, in line with evolving external and internal political realities, giving rise to new dangers and protection challenges. Expectations of peace in the wake of the Bonn

58 Abubakar Siddique, ‘Weak judiciary pushes some Afghans to Taliban’, in *Radio Free Europe/Radio Liberty*, Kabul, 13 December 2009.

59 ICRC/IPSOS, *Our World: Views from the Field: Afghanistan*, opinion survey and in-depth research, Geneva, 2009, pp. 11–12.

Agreement and rapid demise of the Taliban regime were tempered by the continued loss of life during the B-52 bombing campaign.⁶⁰

Despite the fragility of the peace process, the UN, as mentioned above, decided in 2002 to de-prioritize protection concerns and to wind down its humanitarian infrastructure. The dismantling of its humanitarian co-ordination capacity greatly undermined the ability of the UN to intervene proactively when lives were threatened. This was particularly important in terms of the vital back-channel communication networks that had been developed during the long years of conflict to facilitate interaction with, and influence the actions of, all the warring parties.

It was not until 2007 that the protection needs of war-affected communities began to receive dedicated attention from humanitarian and human rights personnel. This initiative came up against numerous constraints, including the widely held perception that the UN was partisan and closely allied to counter-insurgency programmes.⁶¹ The majority of donor UN member states were themselves belligerents pursuing agendas that conflicted with those of the armed opposition. This polarized situation greatly restricted the ability of many protection staff to promote compliance, by the different warring parties, with humanitarian law and human rights standards.

The spread and intensification of armed conflict has resulted in a growing number of civilian casualties, which has, in turn, provoked questions about the rationale for this war. At the end of 2008, systematic monitoring by UN human rights staff found that the civilian death toll had jumped by almost 40% to 2,118, against a total of 1,523 deaths the previous year; 55% of these deaths were attributed to the armed opposition and 39% to pro-government forces, while the remaining 6% were not attributed and were mostly the result of crossfire incidents.⁶² Human rights staff recorded a total of 2,412 civilian deaths in 2009, an increase of 14% on the preceding year; 67% of these deaths were attributed to insurgents and 25% to those attempting to counter them.⁶³ The first six months of 2010 saw an increase of 21% over the same period in 2009, with 1,271 deaths recorded; 72% of these deaths were attributed to the armed opposition and 18% to pro-government forces.⁶⁴

60 There were between 1,067 and 1,201 civilian deaths, as a result of the bombing campaign, in the five-month period from 7 October 2001 to 28 February 2002, according to David Zucchino, 'Afghanistan: US airstrikes were highly accurate but hundreds of villagers still died. Now some survivors want compensation', in *Los Angeles Times*, 2 June 2002.

61 Afghanistan is 'the only complex emergency where the political UN is fully aligned with one set of belligerents and does not act as a [*sic*] honest broker in "talking peace" to the other side', says Antonio Donini, who also noted that the 'UN Secretary General and his Special Representative for Afghanistan (SRSG) have publicly and repeatedly welcomed the military surge and the prosecution of the war'. Antonio Donini, *Afghanistan: Humanitarianism Unraveled?*, Feinstein International Centre, Tufts University, Medford, March 2010, pp. 3–4.

62 UNAMA, *Annual Report on Protection of Civilians in Armed Conflict, 2008*, Kabul, January 2009, p. ii.

63 UNAMA, *The Protection of Civilians in Armed Conflict, Afghanistan, 2009*, Kabul, 13 January 2010, p. i.

64 UNAMA, *Afghanistan: Mid Year Report 2010: Protection of Civilians in Armed Conflict*, Kabul, 10 August 2010, pp. i and ii.

The armed opposition, which has consistently been responsible for the largest, and growing, proportion of civilian war dead has issued fatwas to its own fighters to limit the number of casualties. International forces have taken specific and effective measures, such as restricted use of air strikes, to lower casualty rates. General McChrystal made reduced casualties and safety of civilians a central feature of his revamped counter-insurgency campaign.

The armed opposition has been able to avoid significant censure among Afghans for its responsibility for the large proportion of deaths resulting from its military activities.⁶⁵ The Taliban have successfully managed to depict the conflict as a war of lethal occupation, and a huge swathe of Afghan society has taken great exception to killings at the hands of foreign forces. At the same time, the death of fellow Afghans as a result of suicide attacks and improvised explosive devices – the weapons of choice of the armed opposition, accounting for 43% of all war-related killings in the first half of 2010 – has received much less attention in the court of public opinion.⁶⁶ Clearly, intimidation is a critical factor; in the first half of 2010, ‘executions and assassinations [Anti-Government Elements] increased by more than 95%’ compared to the same period in 2009.⁶⁷ However, it appears that other factors are also involved in shaping public perceptions, including the changing narrative of the war and deep-seated anxiety as threats to lives and livelihoods multiply.

To a significant extent, Afghans who are most directly affected by the conflict have rejected the rationale for war-making; they have frequently underlined their support for a negotiated end to violence. A survey funded by the US army and conducted in districts not under Taliban control in Kandahar found that 94% of those interviewed favoured negotiations over military confrontation and 85% regarded the Taliban as ‘our Afghan brothers’.⁶⁸ Many Afghans are concerned that the mere presence of international forces in their neighbourhood acts as a magnet for insurgents intent on countering counter-insurgency measures. Meanwhile, a survey in south-eastern Afghanistan at the end of 2009 found that, ‘regardless of the region, province, education level or political views, in many cases Afghans blamed international forces as much as insurgents for the increase’ in casualties.⁶⁹ Afghans

65 The Taliban proposed the formation of a joint commission to investigate civilian casualties after the UN mid-2010 report on casualties came out; they have frequently rejected the conclusions of such reports, as did ISAF in 2008. On this occasion, it appears that the Taliban may be concerned about their association with the growing number of casualties attributed to the armed opposition, but it is not the first time that they have called for a similar body.

66 UNAMA, above note 64, p. ii. It is worth noting in this regard that a survey commissioned by the US army in Kandahar found that 58% of respondents said the ‘biggest threat to their security while travelling were the ANA [Afghan National Army] and ANP [Afghan National Police] checkpoints on the road and 56% said ANA/ANP vehicles were the biggest threat’. See ‘Ninety-four percent of Kandaharis want peace talks, not war’, in *Inter Press Service*, 19 April 2010.

67 UNAMA, above note 64, p. 6.

68 *Inter Press Service*, above note 66.

69 David Nakamura (quoting Erica Gaston of the Open Society Institute), ‘Afghans blame civilian deaths on US despite spike from insurgent violence’, in *The Washington Post*, 14 August 2010.

also feel aggrieved that ‘foreigners are ensconced behind fortified walls and bullet-proof vehicles while residents are out in the open’.⁷⁰

Antagonism to the presence of international forces that are dominated by the US military has increased over time. This can be attributed, in large part, to the intensification of the war and its cost to civilians. The death of Afghans as a result of air strikes has been hugely emotive and contentious, even as the US military leadership introduced directives to restrict the use of such tactics in areas where civilians are concentrated. The continued use of search and seizure operations, undertaken at night, is greatly resented. Night raids are widely perceived as offensive to Afghan cultural norms; such raids usually involve forced entry to a family’s compound, including areas where women and children are sleeping. Raids frequently occur on the basis of false or concocted information. Also, it is often difficult for families to ascertain the whereabouts of their detained relatives. Even though some of the issues surrounding detention, including the role of the infamous Bagram Theatre Internment Facility in the Global War on Terror, have been addressed or ameliorated, the absence of standard due process guarantees exacerbates the problem of night raids.

According to the UN, at least ninety-eight civilians were killed in night raids in 2009.⁷¹ The Special Operations Forces (SOF), who mostly carry out night raids, routinely indicate that those killed are insurgents; in many instances this has proved not to be the case.⁷² An example is that of a botched pre-dawn raid in Gardez in February 2010, when two male government officials, two pregnant women, and a teenage girl were gunned down while attempting to explain that they were not insurgents. A few hours after this incident, General McChrystal’s office issued a statement claiming that the raiding party had been attacked.⁷³ Traumatized witnesses were adamant that no one tried to resist the SOF. All of those taken in for questioning were subsequently released without charge. The family refused to accept monetary ‘compensation’ offered by the US military, insisting that the perpetrators should be brought to trial.⁷⁴

The growing level of animosity to the actions of pro-government forces can also be attributed to the fact that they are rarely, if ever, held to account when Afghans are killed or harmed in very questionable circumstances. Afghans are often

70 *Ibid.*

71 UNAMA, above note 63, p. 20.

72 General David Petraeus, who succeeded General McChrystal as the Commander of ISAF and US Forces Afghanistan in mid-2010, explained in August that SOF units, in a ninety-day period from May through July, had captured 365 ‘insurgent leaders’ and 1,355 Taliban ‘rank and file’ fighters and had killed 1,031. Commenting on these figures, Gareth Porter noted that there is a direct correlation ‘between the stepped-up night raids in Kandahar province and a sharp fall-off in the proportion of improvised explosive devices (IEDs) being turned in by the local population’, which tends to indicate that the effects of night raids go beyond capture or kill statistics. Note that both acts – i.e. being killed in night raids or being captured and detained somewhere – are of concern to Afghans. Gareth Porter, ‘New light shed on US’s night raids’, in *Asia Times*, 16 September 2010.

73 Gareth Porter and Ahmad Walid Fazly, ‘McChrystal probe of SOF killings excluded key eyewitnesses’, in *Inter Press Service*, 6 July 2010.

74 UNAMA, above note 64, p. 18.

left in the dark as to who exactly is responsible for the harm endured or what motivated particular incidents. During a visit to Afghanistan in 2008, the UN Special Rapporteur on Extrajudicial Killings, Philip Alston, criticized international forces for their reluctance to identify which military units were involved in particular engagements, observing that getting 'clarification from the international forces is like entering a maze' that rarely led to a satisfactory outcome.⁷⁵

Some measures have been taken in recent months to mitigate a number of detention-related issues. However, the larger issue of accountability for actions undertaken by international forces has mostly remained unchanged, notwithstanding some incident-specific special investigations.

Over time Afghans have grown more, rather than less, concerned about the way in which the war is being waged and its ramifications for Afghans at the individual as well as the societal level. Central to this concern is a growing perception that rules are applied differently and without due regard for the rights of Afghans. In routine conversations that I have had with Afghan colleagues, community elders, and civil society activists, interlocutors stress that members of the international community are expected to be law-abiding and should not be contrasted with insurgents who have been openly contemptuous of international humanitarian and human rights norms. It is invariably pointed out on such occasions that the international community has been strong in advocating the rule of law while simultaneously flouting the very standards it propagates. The fact that the international community has embraced those who are the chief proponents and beneficiaries of the pervasive and much resented culture of impunity has led many in Afghanistan to conclude that, unless the war is brought to an end, the country has little chance of emerging from the debilitating and self-perpetuating cycle of 'warlordism', lawlessness, death, and destitution.

Conclusions

Afghanistan's contemporary history is that of a weak and contested state that has enjoyed neither nationwide jurisdiction nor a high level of legitimacy. The ability of the central administration to deliver on such fundamentals as a modicum of human security – freedom from fear and freedom from deprivation – has been extremely limited. The failure of the Bonn process to acknowledge, or attempt to address, the structural fault lines that had given rise to decades of political turmoil and armed conflict and had torn apart Afghan society effectively condemned Afghans to a repetition of their grim contemporary history.

The experience of other war-torn countries struggling to emerge from armed violence points to the importance of moving rapidly to build on the popular desire for an end to the arbitrary exercise of power and lawlessness. In Afghanistan,

75 Professor Philip Alston, Special Rapporteur of the UN Human Rights Council on extrajudicial, summary, or arbitrary executions, Press Statement, Kabul, 15 May 2008.

the opposite occurred. Most Afghans were weary of war and welcomed the prospect of becoming citizens of a nation where they and their families could live in peace. The vast majority of the population have long aspired to live in a just and fair society where accountability is the norm rather than the exception. Their expectations of the Bonn process were cruelly frustrated when the international community linked arms with warlords and turned a blind eye to the strategic, and peace-defying, ramifications of the 'legitimization' of ruthless and brutal abuse of power. The Emergency Loya Jirga effectively set in motion the reinstitutionalization of abusive power structures. It also signalled that efforts to challenge impunity and change the prevailing political culture would not enjoy the support of those in charge of state-building.

As 2010 draws to a close, it should now be apparent that an Afghanistan at peace with itself and the wider world will only become a viable reality when Afghans and their external partners commit to making a break with the politics and practices of the past. Policies that favoured impunity and instability have proved deadly for Afghans and the development of a functioning state system. The experience of the past nine years shows that impunity is a recipe for the replication of the past. A 'Bonn II', designed to produce a new, inclusive political framework is urgently needed so that all Afghans can aspire, with confidence, to a peaceful future.