Paths to Transitional Justice for Afghan Women

LAURA GRENFELL*

“When we speak of accountability, we refer to an Afghan led and owned process that has different elements. These are justice, truth telling, reconciliation and institutional reform. The process should be one that is focussed on victims and the promotion of security.”

“The recovery of Afghanistan must entail the restoration of the rights of Afghan women. Indeed, it will not be possible without them. The rights of the women of Afghanistan will not be negotiable.”

1. Introduction

These statements by the former UN High Commissioner for Human Rights, Mary Robinson, and the former US Secretary of State, Colin Powell, raise high hopes for transitional justice and Afghan women. They lead to the question of how can transitional justice in Afghanistan best address past abuses, in particular gender-based abuses? Is there a path?

The aim of transitional justice is to halt the culture of impunity by providing accountability for the past and preventing abuses in the future. The oblig-

* BA (Hons), LLB (Hons) (Adelaide); LLM (Toronto); Lecturer, Law School, The University of Adelaide, Australia. Thanks to Anthony Orford and Shelley Broadbent for their excellent research assistance. Thanks also to Barnett Rubin, Mariam Nawabi, researchers at Human Rights Watch, the International Centre for Transitional Justice, Women for Afghan Women, and the United Nations, for giving me their time. (Please note that any errors remain my own.)


3 Transitional justice means those measures by which a society accounts for past abuses as it moves on a path from conflict, apartheid or dictatorship, where the perpetrators of violence enjoy impunity, to civil peace, where the new regime seeks to provide justice and security to its citizens: B. Rubin, ‘Transitional justice and human rights in Afghanistan’, 79 International Affairs (2003) p. 567. These measures include constitution-making, amnesty agreements, truth
ation to address and investigate serious human rights abuses lies with the government of the State where crimes took place. But the international community has an obligation to assist in this process because crimes, such as crimes against humanity, are considered to be crimes against the international community itself. For this reason it is incumbent upon us to help transitional States such as Afghanistan in the process of identifying and crafting the best measures to halt the culture of impunity.

Manifold crimes were committed against the Afghan population in the period from 1978 to the Bonn conference in 2001. This 23 year conflict, which claimed an estimated one million lives, started with a coup by the Marxist-Leninist Party in 1978, followed a year later by the decade-long Soviet Invasion. After the Soviet withdrawal in 1989, came three years of unstable communist government, a further two years of instability dominated by the mujahidin and finally the Taliban regime from 1994 to 2001. The crimes perpetrated during this era include massacres, the shelling of towns and cities, mass rapes and the persecution of women and ethnic groups under the Taliban. An instance of these crimes is the killing, rape and disappearances of ethnic Hazaras in West Kabul in February and March 1993. Over the twenty-three years, almost every part of the civilian population suffered such crimes, regardless of geography, tribe, ethnicity, or religion.

Under international law, Afghanistan has the responsibility to investigate whether crimes against humanity, war crimes and other crimes against international law have occurred. Where there is sufficient admissible evidence, it has the obligation to prosecute them in some form. This is a logical extension of State responsibility. For example, in the *Janes Claim*, Mexico was held responsible not for the death of Janes at the hands of private individuals but because it had failed to apprehend and punish those individuals. “[I]n these types of case, the state is responsible because it has violated an additional primary obligation of its own, even though the trigger for that obligation lay in the non-attributable act of an individual. It must not be forgotten, therefore, that ‘state responsibility’ can arise even in cases where the initial act is not attributable to the state”: M. Dixon and R. McCorquodale, *Cases and Materials on International Law* (Blackstone Press, London 2000) p. 240. See also International Law Commission, *International Law Commission’s Articles on State Responsibility* (Cambridge University Press 2002). For an argument that States also have a duty to prosecute, see D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *Yale Law Journal* (1991) p. 2539.

5 See for example, Human Rights Watch, ‘Military Assistance to the Afghan Opposition: A Human Rights Watch Backgrounder’ (October 2001). Human Rights Watch reports that these crimes were committed by Jamiat-I Islami forces and those of another faction, Abdul Rasul Sayyaf’s Ittihad-I Islami.

6 Afghanistan has a mosaic of ethnicities:Pashtuns constitute 38 percent of the population, Tajiks constitute 25 percent, Uzbeks are six percent, and Hazaras make up 19 percent. See J. Lobe and A. Aslam, ‘Self-Determination Regional Conflict Profile: Afghanistan’, Foreign