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## To Forgive and Forget: How Reconciliation and Amnesty Legislation in Afghanistan Forgives War Criminals while Forgetting their Victims

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**TO FORGIVE AND FORGET:  
HOW RECONCILIATION AND AMNESTY  
LEGISLATION IN AFGHANISTAN  
FORGIVES WAR CRIMINALS WHILE  
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*Sara L. Carlson\**

INTRODUCTION

In 2009, after more than two generations of civil war and armed conflict, the controversial National Reconciliation, General Amnesty and National Stability Law (“Reconciliation and Amnesty Law”) became effective in the Islamic Republic of Afghanistan.<sup>1</sup> This law aims to aid in the reconciliation process of former and current

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\* J.D. candidate, 2012, Dickinson School of Law, Pennsylvania State University. Gratitude is owed and duly given to my husband for his patience, support, and love and to the two little boys who blessed me with the title of “Mommy,” for they also sacrificed so that I could chase a dream. Lastly, this comment is dedicated to my friends, comrades, and fellow veterans and their families whose undaunted courage and immeasurable sacrifices will forever hold a place in my heart and to whom “thank you” will never be enough.

<sup>1</sup> See National Reconciliation, General Amnesty, and National Stability Law, Official Gazette, 965 of 13 Qaus 1387, Dec. 2009 (Afg.), art. 3 [hereinafter Reconciliation and Amnesty Law], <http://dkiafghanistan.um.dk/da/~media/dkiafghanistan/Documents/Other/National%20Reconciliation%20and%20Amnesty%20Law.ashx>.

armed fighters, in turn bringing an end to decades of war.<sup>2</sup> Specifically, the Reconciliation and Amnesty Law authorizes amnesty from prosecution to perpetrators of hostile actions committed against the government of Afghanistan prior to the interim administration taking effect in late 2001. It also provides a path to amnesty for those committing subsequent and future hostile acts against the Afghan government.<sup>3</sup> In July of 2010, after nearly a decade of failed programs that sought to implement reintegration guidelines for reconciled fighters, the government of Afghanistan approved the Afghanistan Peace and Reintegration Program (“APRP”).<sup>4</sup> The APRP provides a functioning framework for reconciliation and reintegration of combatants. Its aim is to achieve a sustainable peace in Afghanistan.<sup>5</sup> This framework calls for the implementation of a broad spectrum of policies to reconcile former anti-government fighters, and attempts to succeed where previous reconciliation and reintegration programs fell short.<sup>6</sup> Despite the lofty aspirational goals of these legislative efforts, implementation has and will continue to fail a critical party: the victims.

This comment will analyze the reconciliation framework as delineated by the APRP and the implementation of the Reconciliation and Amnesty Law. Part I of this comment will provide a brief overview of transitional justice<sup>7</sup> as a solution to human rights

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<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See* DISARMAMENT AND REINTEGRATION COMMISSION, AFGHANISTAN PEACE AND REINTEGRATION PROGRAM 3, July 7, 2010 [hereinafter APRP].

<sup>5</sup> *See id.*

<sup>6</sup> *See* TAZREENA SAJJAD, AFG. RESEARCH & EVALUATION UNIT, PEACE AT ALL COSTS: REINTEGRATION AND RECONCILIATION IN AFGHANISTAN (2010) [hereinafter PEACE AT ALL COSTS], <http://www.areu.org.af/Uploads/EditionPdfs/1035E-Peace%20at%20all%20Costs%20IP%202010%20web.pdf> (providing a detailed discussion of the APRP in its entirety).

<sup>7</sup> Transitional justice “refers to the set of judicial and non-judicial measures that have been implemented by countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.” *What is Transitional Justice?*, INT’L CTR. FOR TRANSITIONAL JUST. [hereinafter *What is Transitional Justice?*], <http://ictj.org/about/transitional-justice> (last updated 2012).

abuses and the applicable law in Afghanistan.<sup>8</sup> While the best approach to transitional justice relies on a comprehensive process including individualized responses to the judicial and non-judicial factors that traditionally define transitional justice,<sup>9</sup> this comment focuses only on the APRP's approach to reconciliation and the existing legislation. Part II will provide the historical framework necessary to understand the current implications of the recently enacted Reconciliation and Amnesty Law.<sup>10</sup> Part III will describe briefly Afghanistan's previous efforts at reconciliation, and examine why those efforts failed.<sup>11</sup> Part IV will explore the APRP as it is currently being implemented,<sup>12</sup> and Part V will describe its interplay with the Reconciliation and Amnesty Law.<sup>13</sup> Part V also will examine how the current legislative framework falls short of its objectives.<sup>14</sup> This comment will expose several problems that may arise as a result of combining the APRP's plan for reintegration and reconciliation with the existing reconciliation legislation. It will also propose recommendations for modifying the existing legislation. Recognizing that the armed conflict in Afghanistan continues, this comment will conclude by asserting that the failure to recognize victims' rights, while awarding amnesty to past and present war criminals, will significantly harm the reconciliation process, and ultimately delay the country's ability to achieve sustainable peace.

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<sup>8</sup> See *infra* Part I.

<sup>9</sup> See Louis Bickford, *Transitional Justice*, in 3 THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045, 1045-47 (Dinah Shelton ed., 2004); see also *What is Transitional Justice?*, *supra* note 7 (providing a brief overview of transitional justice by defining the term and describing its historical roots and future relevance in international law).

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> See *infra* Part V.

## I. TRANSITIONAL JUSTICE AS A SOLUTION

## A. Innocent Victims

His name is Shafiq and he is purportedly eleven years old, though he appears no more than nine.<sup>15</sup> Most children his age spend their days attending school, playing soccer, or flying kites. Shafiq, however, spends his days preparing to enter the practice of *bacha bazi*, or “dancing boys.”<sup>16</sup> *Bacha bazi*, an ancient practice recently resurrected, involves pre-pubescent boys dressed in women’s clothing performing dances for the entertainment of wealthy and powerful men.<sup>17</sup> It is a symbol of power, prestige, and social status among warlords, drug lords, and past and present insurgent commanders in the war torn country of Afghanistan.<sup>18</sup> Unfortunately for the young boys forced into this criminal enterprise, the silence of the music and the end of the dance often leads to unspeakable crimes as the boys frequently transition to the role of sex slave.<sup>19</sup> Shafiq thought he would be learning a new trade as an apprentice under the watchful tutelage of his new master when his impoverished and destitute family sold him because they needed money.<sup>20</sup> Shafiq had no way of knowing that his world would change forever in the most cruel and horrendous ways imaginable.

Now consider the life of a young woman whose father promised her to a local Taliban fighter at the age of twelve.<sup>21</sup> Her

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<sup>15</sup> See *Frontline: The Dancing Boys of Afghanistan* (PBS television broadcast Apr. 20, 2010) [hereinafter *Dancing Boys*], <http://video.pbs.org/video/1474778660>.

<sup>16</sup> See Zadzi, *Boys in Afghanistan Sold Into Prostitution, Sexual Slavery*, DIGITAL J., Nov. 20, 2007, <http://www.digitaljournal.com/article/246409>.

<sup>17</sup> See *Dancing Boys*, *supra* note 15.

<sup>18</sup> See Zadzi, *supra* note 16.

<sup>19</sup> See *id.*; see also Youngbee Dale, *Bacha Bazi: Pedophilia and Child Trafficking Justified by the Tradition in Afghanistan*, EXAMINER, Feb. 23, 2010, <http://www.examiner.com/article/bacha-bazi-pedophilia-and-child-trafficking-justified-by-the-tradition-afghanistan>.

<sup>20</sup> See *Dancing Boys*, *supra* note 15.

<sup>21</sup> See Aryn Baker, *Afghan Women and the Return of the Taliban*, TIME, Aug. 9, 2010 [hereinafter Baker, *Afghan Women*], <http://www.time.com/time/magazine/article/0,9171,2007407,00.html>; see also Karen Grigsby Bates, *Bibi Aisha, Disfigured Afghan Woman Featured on ‘Time’ Cover, Visits U.S.*, NPR NEWS BLOG (Oct. 13, 2010, 12:57 AM) [hereinafter Bates, *Bibi Aisha*], <http://www.npr.org/blogs/thetwo->

personal courage and will to live now serve as inspiration to the world.<sup>22</sup> Aisha married the Talib fighter when she was only fourteen and she soon fell victim to unspeakable domestic abuse at the hands of her husband and her in-laws.<sup>23</sup> In 2009, at the age of eighteen, she found the courage to escape but was quickly caught and returned to her abusive husband.<sup>24</sup> The local Taliban commander, serving as the local unofficial judge, decided the reprisal she would face for her actions would serve to deter similar acts by other young wives in the future.<sup>25</sup> Taliban fighters, including her husband, delivered the punishment with reckless abandon as they pulled out a knife, held her down, and sliced off Aisha's ears and nose.<sup>26</sup> Passing out from the pain, Aisha awakened when she began to choke on the blood streaming down the back of her throat.<sup>27</sup> She had been left to die by the brutal executors of Taliban justice in the mountains of Afghanistan.<sup>28</sup>

In a world where innocence should be the tie that binds children across continents, these horrific accounts paint a very different picture of the harsh reality that many children in countries plagued by war and civil strife continue to face. The concept of transitional justice serves as a framework for addressing the past crimes and abuses of victims like Shafiq and the present crimes that

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[way/2010/10/13/130527903/bibi-aisha-disfigured-afghan-woman-featured-on-time-cover-visits-u-s](http://www.pennstatejournaloflawandinternationalaffairs.com/2010/10/13/130527903/bibi-aisha-disfigured-afghan-woman-featured-on-time-cover-visits-u-s).

<sup>22</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>23</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>24</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>25</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>26</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>27</sup> See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

<sup>28</sup> While Aisha's story has all of the hallmarks of a modern day nightmare, her future is looking brighter. Shortly after she awoke on the mountainside, she managed to crawl to her grandfather's home and she was covertly transported to a U.S. military medical facility. Aisha was stabilized and placed in a secret shelter in Kabul where she remained until October of 2010 when she was transported to a private medical facility in California. She has since begun the arduous reconstructive surgery process, at no cost to her, but the healing process is far from over. See Baker, *Afghan Women*, *supra* note 21; Bates, *Bibi Aisha*, *supra* note 21.

women like Aisha endure despite existing legislation designed to prevent such brutality.<sup>29</sup>

## B. Transitional Justice in Afghanistan

Transitional justice combines traditional judicial processes, such as prosecuting those accused of human rights violations, with non-judicial efforts.<sup>30</sup> These non-judicial efforts include: creating fora such as truth commissions to investigate past abuses,<sup>31</sup> establishing a system for reparations to victims of past abuse or violence, memorializing the victims of violence, transforming government security institutions such as police and military to ensure future violations do not occur and to restore trust in the government, and reconciling divided factions of society.<sup>32</sup>

In 2005, the Government of the Islamic Republic of Afghanistan (“GIROA”), in collaboration with the Afghanistan Independent Human Rights Commission and the United Nations Assistance Mission in Afghanistan, developed the Peace, Reconciliation and Justice in Afghanistan Action Plan (“Justice Action Plan”).<sup>33</sup> This comprehensive plan incorporated five actions to promote peace, reconciliation, and justice in Afghanistan while creating a culture of respect for human rights and accountability for

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<sup>29</sup> See Bickford, *Transitional Justice*, *supra* note 9, at 1045-47; see also *What is Transitional Justice?*, *supra* note 7.

<sup>30</sup> See Bickford, *Transitional Justice*, *supra* note 9, at 1045-47.

<sup>31</sup> A truth commission, though varied in its administration, is a “victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict and (2) making recommendations for their redress and future prevention.” ERIC WIEBELHAUS-BRAHM, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY 3-4 (2010).

<sup>32</sup> Bickford, *Transitional Justice*, *supra* note 9 at 1045-47; *What is Transitional Justice?*, *supra* note 7.

<sup>33</sup> See PEACE, RECONCILIATION AND JUSTICE IN AFGHANISTAN: ACTION PLAN OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN [hereinafter JUSTICE ACTION PLAN], [http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action\\_Pln\\_Gov\\_Af.pdf](http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf).

human rights violations.<sup>34</sup> Following the traditional model for transitional justice, these actions include: “(1) acknowledgement of the suffering of the Afghan People; (2) ensuring credible and accountable state institutions; (3) truth-seeking and documentation; (4) promotion of reconciliation and national unity; and (5) establishment of effective and reasonable accountability mechanisms.”<sup>35</sup>

Unfortunately, the government has failed to exercise the Justice Action Plan’s comprehensive approach to addressing both perpetrators of human rights violations and, more importantly, their victims.<sup>36</sup> Ironically, this is likely due to the passage of the Reconciliation and Amnesty Law, a law allegedly meant to supplement the Justice Action Plan’s reconciliation ‘key action,’ but which has instead stifled the reconciliation process.<sup>37</sup> The legislators’ need for self-preservation trumped justice. They likely passed the Reconciliation and Amnesty Law due to fears that some of them would face prosecution for previous human rights violations committed either by their own hands or by those under their control.<sup>38</sup> Their legislation left yet another reminder of corruption in government by providing for the broad amnesty of criminals, including some members of the government, while essentially closing the door to victims seeking justice.<sup>39</sup> Guidance from the Disarmament and Reintegration Commission addressing the implementation of the Reconciliation and Amnesty Law focuses on the recently approved Afghanistan Peace and Reintegration Program and abandons the Justice Action Plan and its comprehensive transitional justice model.<sup>40</sup>

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<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See* MICHAEL SEMPLE, RECONCILIATION IN AFGHANISTAN 59 (2009).

<sup>37</sup> *See Afghanistan: Justice Action Plan Heading for Oblivion*, IRIN, Apr. 14, 2010, <http://www.irinnews.org/Report/88807/AFGHANISTAN-Justice-action-plan-heading-for-oblivion>.

<sup>38</sup> *See* SEMPLE, *supra* note 36, at 59.

<sup>39</sup> *See* JUSTICE ACTION PLAN, *supra* note 33; *Afghanistan: Justice Action Plan Heading for Oblivion*, *supra* note 37.

<sup>40</sup> *See* SAJJAD, PEACE AT ALL COSTS, *supra* note 6.



### C. Abandoning Transitional Justice: What Now?

In March of 2007, the Afghan Parliament passed the Reconciliation and Amnesty Law.<sup>41</sup> Despite the fact that President Karzai never signed the bill,<sup>42</sup> in accordance with the Afghan Constitution, it became law after a fifteen day lapse.<sup>43</sup> The legislative process in Afghanistan provides that a bill will take effect only after it is published in the Official Gazette, even though it has passed and has effectively become law. In the case of the Reconciliation and Amnesty Law, publication in the Official Gazette did not occur until December of 2009, more than two years after its passage.<sup>44</sup> The furtive publication of the Reconciliation and Amnesty Law was met with controversy from human rights advocates because of the broad, sweeping nature of the law's amnesty provision for eligible perpetrators of past, present, and potential future crimes.<sup>45</sup> Specifically, Article 3 of the Reconciliation and Amnesty Law states that:

(1) All political factions and hostile parties who were involved in one way or another in hostilities before establishing of the Interim Administration shall be included in the reconciliation and general amnesty program for the purpose of reconciliation among different segments of society, strengthening of peace and stability and starting of new life in the contemporary political history of Afghanistan, and

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<sup>41</sup> See Sari Kouvo, *After Two Years in Legal Limbo: A First Glance at the Approved 'Amnesty Law'*, AFG. ANALYSTS NETWORK, Feb. 22, 2010, <http://aan-afghanistan.com/index.asp?id=665>.

<sup>42</sup> President Hamid Karzai is the president of the Islamic Republic of Afghanistan.

<sup>43</sup> THE CONSTITUTION OF AFGHANISTAN Jan. 3, 2004, art. 94, <http://www.unhcr.org/refworld/docid/404d8a594.html>; see also Jon Boone, *Afghanistan Quietly Brings Into Force Taliban Amnesty Law*, GUARDIAN, Feb. 11, 2010, <http://www.guardian.co.uk/world/2010/feb/11/taliban-amnesty-law-enacted>.

<sup>44</sup> See Jonathon Burch, *U.N. Calls for Repeal of Afghan Amnesty Law*, REUTERS, Mar. 25, 2010, <http://in.reuters.com/article/2010/03/25/idINIndia-47212320100325>.

<sup>45</sup> See Boone, *Afghanistan Quietly Brings Into Force Taliban Amnesty Law*, *supra* note 43; Burch, *U.N. Calls for Repeal of Afghan Amnesty Law*, *supra* note 44.

enjoy all their legal rights and shall not be legally and judicially prosecuted.

(2) Those individuals and groups who are still in opposition to the Islamic Republic of Afghanistan and cease enmity after the enforcement of this resolution and join the process of national reconciliation, and respect the Constitution and other laws and abide them shall enjoy the benefits of this resolution.

(3) The provisions set forth in clause (1) and (2) of this article shall not affect the claims of individuals against individuals based upon Haqullabd (rights of people) and criminal offences in respect of individual crimes.<sup>46</sup>

The practical effect of this article is that the government of Afghanistan has permitted members of insurgent groups presently opposing the government, such as the Taliban, the Haqqani Network, and the Hezb-e Islami Gulbuddin, to seek amnesty without question of past crimes, and perhaps even without concern for future acts.<sup>47</sup> However, the reach of the law also extends to those members of opposition groups that fought prior to the events of September 11, 2001.<sup>48</sup> These opposition forces include the anti-government *mujahbedeen* fighters who fought to expel the former Soviet Union during their invasion of Afghanistan beginning in December of 1979,<sup>49</sup> the opposing factions fighting for power in the civil war that followed,<sup>50</sup> and, more recently, the rise of the Taliban.<sup>51</sup>

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<sup>46</sup> Reconciliation and Amnesty Law, *supra* note 1, art. 3.

<sup>47</sup> See AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 240-47 (2009) [hereinafter RASHID, DESCENT].

<sup>48</sup> See Kouvo, *After Two Years in Legal Limbo: A First Glance at the Approved 'Amnesty Law'*, *supra* note 41.

<sup>49</sup> See STEPHEN TANNER, AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE WAR AGAINST THE TALIBAN 235-37 (rev. ed. 2009) (2002).

<sup>50</sup> See *id.* at 277-83.

Representatives from Afghanistan's government recently participated in a global conference to discuss what has become known as the Afghanistan Peace and Reintegration Plan (APRP).<sup>52</sup> The APRP sets forth the policy and framework, as proposed by the National Directorate of Security, that the Islamic Republic of Afghanistan shall take as it moves toward achieving a unified and peaceful nation.<sup>53</sup> The APRP sets out the peace and reintegration approach in two overarching categories: operational and strategic/political.<sup>54</sup> The operational category focuses on the low-level fighters, or foot soldiers, while the strategic/political category focuses on the senior level leadership of the insurgency.<sup>55</sup> The framework provided by the APRP for the reconciliation of anti-government fighters relies on existing legislation, specifically the highly debated Reconciliation and Amnesty Law passed in 2008, and the Afghan Constitution.<sup>56</sup> To fully understand how the APRP and existing laws will impact today's reconciliation efforts, it is important to understand the recent history of Afghanistan that the Reconciliation and Amnesty Law encompasses.

## II. HISTORICAL CONTEXT: THREE DECADES OF WAR AND BRUTALITY

### A. The End of the Monarchy, The Beginning of Communism

Modern Afghanistan arose from the ashes of considerable civil strife and political turmoil as well as foreign invasion and occupation. Reaching back to the era of King Zahir Shah, the country struggled to balance establishing a democratic, constitutional society with maintaining a monarch state, resulting in intense political instability.<sup>57</sup> In 1973, former Prime Minister Daoud initiated a

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<sup>51</sup> *See id.* at 283-87.

<sup>52</sup> APRP, *supra* note 4, at 3.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 6-7, 10.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 6.

<sup>57</sup> *See* CHARLES H. BRISCOE ET AL., WEAPON OF CHOICE: U.S. ARMY SPECIAL OPERATIONS FORCES IN AFGHANISTAN 8-9 (2003); TANNER, *supra* note 49, at 227-29.

successful coup and ended King Zahir's reign.<sup>58</sup> Five years in to Daoud's presidency, the instability had grown even more tenuous as his attempt institute a new constitution failed and his foreign policy deepened resentment from the Communist People's Democratic Party of Afghanistan<sup>59</sup> (PDPA).<sup>60</sup> In April 1978, following violent attacks on the capital city of Kabul that resulted in the murder of Daoud and nearly two thousand innocent civilians, Nur Mohammad Taraki, the leader of the PDPA, appointed himself to be the President of Afghanistan.<sup>61</sup>

Taraki wasted no time implementing new Marxist policies and received assistance from an influx of Soviet advisors.<sup>62</sup> Much to Taraki's dismay, the Afghan people, in particular the rural villagers, found his social reform policies to be an abomination of their traditional way of life, and they began to revolt.<sup>63</sup> During efforts to quell these uprisings, government troops under Taraki's orders killed thousands of innocent civilians.<sup>64</sup> In September of 1979, President Taraki was murdered and replaced by his deputy, Hafizullah Amin.<sup>65</sup> Amin found himself the leader of a country in a full-scale civil war.<sup>66</sup> Because of growing displeasure with Amin's performance and his

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<sup>58</sup> See BRISCOE ET AL., *supra* note 57, at 9; TANNER, *supra* note 49, at 229.

<sup>59</sup> Nur Mohammed Taraki founded the People's Democratic Party of Afghanistan (PDPA) in January of 1965. An ideologically Communist party, the PDPA received funding from the KGB and guidance from Moscow. After a short time, the PDPA divided into the predominantly Pashtun and significantly more radical Khalq faction, led by Taraki, and the intellectual Parcham group, led by Babrak Karmal. See TANNER, *supra* note 49, at 228.

<sup>60</sup> See BRISCOE ET AL., *supra* note 57, at 9; TANNER, *supra* note 49, at 229-31.

<sup>61</sup> See BRISCOE ET AL., *supra* note 57, at 9; TANNER, *supra* note 49, at 229-31.

<sup>62</sup> See BRISCOE ET AL., *supra* note 57, at 9-10; STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001, at 42-47 (2005); TANNER, *supra* note 49, at 230-32.

<sup>63</sup> See BRISCOE ET AL., *supra* note 57, at 9; TANNER, *supra* note 49, at 231-32.

<sup>64</sup> See TANNER, *supra* note 49, at 232-33.

<sup>65</sup> See BRISCOE ET AL., *supra* note 57, at 9; COLL, *supra* note 62, at 46-47; TANNER, *supra* note 49, at 233.

<sup>66</sup> See COLL, *supra* note 62, at 46-47; TANNER, *supra* note 49, at 233.

inability to implement the Soviet agenda, Moscow decided an intervention in Afghanistan was imperative.<sup>67</sup>

## B. The Soviet Occupation

On Christmas Eve in 1979, Soviet Army troops arrived and quickly took control of the Kabul International Airport.<sup>68</sup> Three days later, they stormed the Darulaman Palace in Kabul and killed President Amin allowing Moscow's replacement choice, Babrak Karmal, to assume the presidential role.<sup>69</sup> The brutality of the Soviet invasion would effectively end the civil uprisings, but not because it ended the fighting.<sup>70</sup> While the Soviets thought they were coming to Afghanistan to provide assistance to the Afghan Army, the invasion of the foreign troops invoked a sense of unity in the Afghan people that went beyond any tribal affiliation, political party, or ethnic group resulting in the *mujahedeen*.<sup>71</sup> While the *mujahedeen* found unity in the common enemy of the Soviet, they lacked structure beyond their common purpose.<sup>72</sup> By the summer of 1980, only one third of the Afghan Army the Soviets sought to reinforce were loyal to the Soviets.<sup>73</sup>

With Soviet-loyal President Karmal failing to unify a divided country brutalized by Soviet occupation, Iran and Pakistan took advantage of the *mujahedeen* and began to covertly introduce support to rid the region of Soviet influence.<sup>74</sup> In 1986, then Soviet President Mikhail Gorbachev expressed immense disapproval of Karmal's failure to heal the "bleeding wound"<sup>75</sup> that the military situation in

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<sup>67</sup> See COLL, *supra* note 62, at 46-50; TANNER, *supra* note 49, at 233.

<sup>68</sup> See BRISCOE ET AL., *supra* note 57, at 10; COLL, *supra* note 62, at 46-47; TANNER, *supra* note 49, at 233.

<sup>69</sup> See COLL, *supra* note 62, at 50-52; TANNER, *supra* note 49, at 235-58.

<sup>70</sup> See BRISCOE ET AL., *supra* note 57, at 11; TANNER, *supra* note 49, at 241.

<sup>71</sup> See BRISCOE ET AL., *supra* note 57, at 11; TANNER, *supra* note 49, at 238-44.

<sup>72</sup> See TANNER, *supra* note 49, at 248.

<sup>73</sup> See BRISCOE ET AL., *supra* note 57, at 12.

<sup>74</sup> See BRISCOE ET AL., *supra* note 57, at 13; TANNER, *supra* note 49, at 250-51.

<sup>75</sup> TANNER, *supra* note 49, at 265.

Afghanistan had become, and replaced him as president with Mohammed Najibullah in 1987.<sup>76</sup> The leadership change was to no avail, however, as the *mujabedeens*'s guerilla tactics and strategic external alliances forced the Soviet occupation to end.<sup>77</sup>

With the departure of the *mujabedeens*'s common enemy and the country under the control of Communist-backed President Najibullah, the struggle for power among tribal leaders and *mujabedeens* commanders soon grew into a full-scale civil war.<sup>78</sup> The Najibullah government collapsed in 1992 when President Najibullah abandoned the government and sought refuge in a U.N. Compound in Kabul.<sup>79</sup> Soon thereafter, the country that had been saved from the Soviets by the unified fighters of the *mujabedeens* was now caught in the crossfire of a fierce civil war that would last until 1996.<sup>80</sup>

### C. Civil War

The brutality of the civil war became ever more apparent with increased reports of the destruction of villages by indiscriminate mortar attacks, torturous acts of rape,<sup>81</sup> kidnappings, and executions.<sup>82</sup> Former Junbish commander Rashid Dostum, former

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<sup>76</sup> See BRISCOE ET AL., *supra* note 57, at 16; TANNER, *supra* note 49, at 265-66.

<sup>77</sup> See TANNER, *supra* note 49, at 266-70.

<sup>78</sup> See BRISCOE ET AL., *supra* note 57, at 16-17; TANNER, *supra* note 49, at 271.

<sup>79</sup> See BRISCOE ET AL., *supra* note 57, at 17; TANNER, *supra* note 49, at 276.

<sup>80</sup> See BRISCOE ET AL., *supra* note 57, at 17-21; TANNER, *supra* note 49, at 276-80.

<sup>81</sup> While there are reported acts of using rape as a weapon by both the Soviets and their affiliated Afghan Army counterparts during the Soviet occupation, the majority of the reported instances of using rape as a weapon to punish villages and communities for suspected alliances with rival political and mujahedeen groups was during the 1992-1996 Civil War. See AFG. JUST. PROJECT, CASTING SHADOWS: WAR CRIMES AND CRIMES AGAINST HUMANITY: 1978-2001, at 62 (2005) [hereinafter CASTING SHADOWS], <http://afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf>.

<sup>82</sup> See AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA 21 (2d. ed. 2010) [hereinafter RASHID, TALIBAN]; TANNER, *supra* note 49, at 276-80; CASTING SHADOWS, *supra* note 81, at 62.

interim President Burhanuddin Rabbani, and former *mujahedeen* commander Abdul Rasul Sayyaf each have been accused of leading forces alleged to have committed some of the harshest human rights violations on record during the Afghanistan Civil War era.<sup>83</sup> In 1993, the city of Kabul was pounded by indiscriminate rocket attacks and firefights that left 30,000 killed and nearly 100,000 innocent civilians wounded.<sup>84</sup> Rabbani aligned with Sayyaf and wreaked havoc on the Shiites, conducting ruthless beheadings of elderly men as well as women and children.<sup>85</sup> On the outskirts of the city, Dostum's fighters were using rape as a weapon in the communities and ruthlessly executing innocent villagers.<sup>86</sup> Shockingly, each of these three suspected war criminals would find prominent positions in the Karzai-led government following the ouster of the Taliban.

#### D. The Rise of the Taliban

In 1994, the legacy of the Taliban began when two young girls were kidnapped and raped by a *mujahedeen* commander in a village outside of Kandahar.<sup>87</sup> Mohammed Omar, a young mullah, or religious leader, gathered thirty of his religious students, armed them, conducted an operation to free the girls, and subsequently hanged the *mujahedeen* kidnapper.<sup>88</sup> Hailed a hero by a local populace desperate for order in a lawless land, Mullah Omar began to expand his religious teachings, and the number of his Taliban fighters and followers quickly grew.<sup>89</sup> Mullah Omar claimed that the Taliban

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<sup>83</sup> See COLL, *supra* note 62, at 263; see also Saeed Shah, *Karzai Backs Infamous Warlord to be Speaker*, THE SYDNEY MORNING HERALD, Jan. 29, 2011, <http://www.smh.com.au/world/karzai-backs-infamous-warlord-to-be-speaker-20110128-1a8et.html>.

<sup>84</sup> See BRISCOE ET AL., *supra* note 57, at 17-18; TANNER, *supra* note 49, at 277.

<sup>85</sup> See BRISCOE ET AL., *supra* note 57, at 17-18; TANNER, *supra* note 49, at 277.

<sup>86</sup> See BRISCOE ET AL., *supra* note 57, at 17-18; TANNER, *supra* note 49, at 277.

<sup>87</sup> See RASHID, TALIBAN, *supra* note 82, at 25.

<sup>88</sup> See CHARLES ALLEN, GOD'S TERRORISTS: THE WAHHABI CULT AND THE HIDDEN ROOTS OF MODERN JIHAD 291 (2006); RASHID, TALIBAN, *supra* note 82, at 41-42.

<sup>89</sup> See BRISCOE ET AL., *supra* note 57, at 18; TANNER, *supra* note 49, at 279.

movement was based on the premise that “[the Taliban] were fighting against Muslims who had gone wrong. How could [the Taliban] remain quiet when [they] could see crimes being committed against women and the poor?”<sup>90</sup>

After nearly a year of gaining control of provinces around the country, the Taliban had to decide whether to attempt to capture Kabul, or to retreat to Kandahar and regroup.<sup>91</sup> Deciding to regroup and reorganize in Kandahar, the Taliban held a *shura*, or meeting, where the local religious leaders named Mullah Omar the Amir ul Monimeen, or Commander of the Faithful.<sup>92</sup> The next day, Mullah Omar appeared wearing the cloak of the Prophet Mohammed, essentially granting him the power to lead not just the Taliban but all Muslims.<sup>93</sup>

In September of 1996, the Taliban captured Kabul<sup>94</sup> and instituted an intensely strict form of Sharia.<sup>95</sup> Under Taliban rule, all women were banned from working, all schools for girls were closed, and women were required to wear burqas in order to be covered completely from head to toe when outside of the home.<sup>96</sup> The wolf

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<sup>90</sup> BRISCOE ET AL., *supra* note 57, at 18; RASHID, TALIBAN, *supra* note 82, at 25.

<sup>91</sup> See ALLEN, *supra* note 88, at 291; RASHID, TALIBAN, *supra* note 82, at 41-42.

<sup>92</sup> See ALLEN, *supra* note 88, at 291; RASHID, TALIBAN, *supra* note 82, at 42.

<sup>93</sup> See RASHID, TALIBAN, *supra* note 82, at 42.

<sup>94</sup> See ALLEN, *supra* note 88, at 292; RASHID, TALIBAN, *supra* note 82, at 50-51.

<sup>95</sup> Sharia is the “divinely ordained form of Islamic law” but there are vast differences as to the implementation of such law. The Taliban followed and vigorously enforced the strictest interpretation of Sharia anywhere in the world. The strictest rules of Sharia imposed by the Taliban included a ban on all women’s schooling, and forbidding women from working or leaving the home unless in the presence of a male family member. Men were required to have a beard. Additionally, all television and music was banned as were games including chess, soccer, and the popular game of kite flying. Persons caught stealing would have feet and/or hands amputated as punishment. Persons who were caught committing adultery would face public stoning. See ALLEN, *supra* note 88, at 291; BRISCOE ET AL., *supra* note 57, at 21; RASHID, TALIBAN, *supra* note 82, at 50-51; TANNER, *supra* note 49, at 284.

<sup>96</sup> See RASHID, TALIBAN, *supra* note 82, at 50-51.



was out of the sheep's clothing as the Taliban were no longer the saviors of Afghanistan, and were instead quickly imposing a brutal reign of the harshest form of Sharia law the world had ever seen.<sup>97</sup>

After the successful capture of Kabul, the Taliban continued their quest for national dominance by capturing the major cities of Bagram and Jalalabad.<sup>98</sup> While attempting to take the city of Mazar-e-Sharif, Dostum's forces fought back and the Taliban not only suffered severe casualties, but were also the victims of brutal war crimes.<sup>99</sup> The Taliban fought back, captured Mazar-e-Sharif,<sup>100</sup> and moved on to the northern province of Bamyan, murdering innocent villagers as their ruthless fighters ravaged the country that lay in their path.<sup>101</sup> After two years of fighting, the Taliban captured Bamyan in 2001 and the world gasped as they callously destroyed two sacred and archaic Buddha statues.<sup>102</sup> The Taliban were now front and center on the world stage, but the response to their newfound infamy was a separate matter.<sup>103</sup>

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<sup>97</sup> See ALLEN, *supra* note 88, at 292; RASHID, TALIBAN, *supra* note 82, at 50-51.

<sup>98</sup> See BRISCOE ET AL., *supra* note 57, at 21.

<sup>99</sup> Post conflict investigations have unearthed reports of war crimes including mass executions of nearly 3,000 Taliban fighters by Malik and Dostum's men and reports of metal shipping containers full of Taliban prisoners of war under the care of Dostum's men that died of suffocation and/or starvation, depending on the circumstance. See BRISCOE ET AL., *supra* note 57, at 21; RASHID, TALIBAN, *supra* note 82, at 63; TANNER, *supra* note 49, at 285; CASTING SHADOWS, *supra* note 81, at 62.

<sup>100</sup> See RASHID, TALIBAN, *supra* note 82, at 68-75; TANNER, *supra* note 49, at 285.

<sup>101</sup> See RASHID, TALIBAN, *supra* note 82, at 68-75; TANNER, *supra* note 49, at 285.

<sup>102</sup> The two Buddha statues at Bamyan, carved into the cliffs, stood 165 and 114 feet high before the Taliban destroyed them. Built in the third and fifth centuries A.D., they were known around the world as a historic relic to the religious traditions of the past. The world community saw the intentional destruction of the priceless relics as a final straw, and the Taliban finally had their attention. See RASHID, DESCENT, *supra* note 47, at 18; RASHID, TALIBAN, *supra* note 82, at 68, 76; TANNER, *supra* note 49, at 285.

<sup>103</sup> See RASHID, TALIBAN, *supra* note 82, at 76; TANNER, *supra* note 49, at 285.

### E. Introducing Al Qaeda

While world leaders were assessing the rapidly dissolving situation in Afghanistan, the Saudi born leader of Al Qaeda, Osama bin Laden,<sup>104</sup> wasted no time in waging jihad against the West.<sup>105</sup> In August of 1998, Al Qaeda operatives bombed U.S. embassies in Kenya and Tanzania.<sup>106</sup> Two years later in October of 2000, Al Qaeda operatives bombed the U.S.S. *Cole* while at port off the coast of Yemen, killing seventeen U.S. Navy sailors.<sup>107</sup>

The failure of the world to recognize the Taliban as the legitimate government of Afghanistan, and further sanction the group for the human rights violations and atrocities being committed in Afghanistan, created an ideal situation for Al Qaeda and the Taliban.<sup>108</sup> The Taliban needed both financial and logistical support from outside of the country, likely from Arab backers; Al Qaeda could provide this support if the Taliban would provide them a safe harbor to train as the U.S. hunted them in response to the attacks on U.S. embassies and the U.S.S. *Cole*.<sup>109</sup> An accord was struck and a mutually beneficial relationship began that continues today.<sup>110</sup>

With only the powerful warlord Massoud still standing in the Taliban's way of near complete control of Afghanistan, Al Qaeda offered to assist the Taliban by sending two operatives posing as

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<sup>104</sup> Osama bin Laden was killed on Sunday, May 1, 2011, during a coordinated raid by U.S. Navy SEALs and CIA operatives in a compound in Pakistan. Peter Baker, *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all>.

<sup>105</sup> See RASHID, TALIBAN, *supra* note 82, at 76; TANNER, *supra* note 49, at 285.

<sup>106</sup> See RASHID, TALIBAN, *supra* note 82, at 134; TANNER, *supra* note 49, at 286.

<sup>107</sup> See TANNER, *supra* note 49, at 286-87.

<sup>108</sup> See RASHID, TALIBAN, *supra* note 82, at 132-40; TANNER, *supra* note 49, at 286-87.

<sup>109</sup> See RASHID, DESCENT, *supra* note 47, at 18; RASHID, TALIBAN, *supra* note 82, at 132-40; TANNER, *supra* note 49, at 286-87.

<sup>110</sup> See RASHID, DESCENT, *supra* note 47, at 19; RASHID, TALIBAN, *supra* note 82, at 132-40; TANNER, *supra* note 49, at 286-87.

journalists to kill him.<sup>111</sup> The mission succeeded, and Massoud died on September 9, 2001.<sup>112</sup> Massoud's death allowed the Taliban to further their dominance in the region, but it also increased their reliance on Al Qaeda.<sup>113</sup> Just two days later on September 11, 2001, Al Qaeda operatives would crash four planes into targets in the United States, resulting in the loss of nearly 3,000 innocent lives, and marking the beginning of what would become known as the Global War on Terror.<sup>114</sup>

#### F. Post 9/11 Afghanistan

The attacks on America on September 11, 2001 ushered in yet another era of fighting for the war torn people of Afghanistan as the United States-led Coalition Forces retaliated against Al Qaeda and their Taliban hosts.<sup>115</sup> In early October of 2001, U.S. Army Special Operations Forces conducted various missions to secure airfields and compounds, and directed air strikes in Afghanistan.<sup>116</sup> After months of intense fighting, bombing campaigns, and the arrival of conventional forces, the Taliban and Al Qaeda fighters were forced to retreat, and the momentum belonged to the Coalition Forces.<sup>117</sup>

During this operational pause, the people of Afghanistan took the opportunity to adopt an interim government, appointing Hamid Karzai<sup>118</sup> to serve as the interim President.<sup>119</sup> This also marked

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<sup>111</sup> See BRISCOE ET AL., *supra* note 57, at 19; RASHID, DESCENT, *supra* note 47, at 19; TANNER, *supra* note 49, at 287.

<sup>112</sup> See BRISCOE ET AL., *supra* note 57, at 19; RASHID, DESCENT, *supra* note 47, at 19; TANNER, *supra* note 49, at 287.

<sup>113</sup> See RASHID, DESCENT, *supra* note 47, at 19.

<sup>114</sup> See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 311-13 (2004) [hereinafter 9/11 COMMISSION REPORT], <http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/pdf/GPO-911REPORT.pdf>; TANNER, *supra* note 49, at 289-91.

<sup>115</sup> See TANNER, *supra* note 49, at 295-97.

<sup>116</sup> See BRISCOE ET AL., *supra* note 57, at 96-113; TANNER, *supra* note 49 at 295-300.

<sup>117</sup> See TANNER, *supra* note 49, at 304.

<sup>118</sup> Hamid Karzai was appointed the interim President of Afghanistan at the International Conference on Afghanistan held in Bonn, Germany, in December 2001, where Afghan and international leaders decided on the temporary govern-

the first time in nearly six years that the Afghan people could begin rebuilding their country free from Taliban oppression.<sup>120</sup> However, some expressed concern that merely pushing the Taliban back without defeating them left the door open for a resurgence of violence.<sup>121</sup> This premonition would prove true as Taliban and Coalition Forces continue their back and forth struggle for control even today.

### III. PRELUDE TO MODERN RECONCILIATION

Throughout the course of the current war in Afghanistan, several programs have been enacted to afford insurgent fighters the opportunity to reconcile with the government.<sup>122</sup> These programs have met with mixed results, but a common theme is that none has resulted in long-term implementation or sustained success.<sup>123</sup>

One of the first examples of a failed reconciliation program in the post-9/11 conflict was the Afghanistan New Beginnings Program (“ANBP”).<sup>124</sup> The ANBP provided the Afghan government assistance in implementing a Disarmament, Demobilization, and Reintegration (“DDR”) program for militant forces that wished to turn in their weapons and join the new Afghan National Army or

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ment and leadership. See RASHID, DESCENT, *supra* note 47, at 95-96. In October of 2004, Karzai was elected President of Afghanistan in the country’s first democratic election since the ousting of the Taliban in 2001. *Karzai Declared Afghan President*, BBC NEWS, <http://news.bbc.co.uk/2/hi/3977677.stm> (last updated Nov. 3, 2004, 12:45 GMT). In 2009, he was elected to his second term as President of Afghanistan in a second democratic election. Abdullah Abdullah, *Karzai Declared Elected President of Afghanistan*, CNN.COM, Nov. 2, 2009, [http://articles.cnn.com/2009-11-02/world/afghanistan.election.runoff\\_1\\_azizullah-lodin-abdullah-abdullah-president-hamid-karzai?\\_s=PM:WORLD](http://articles.cnn.com/2009-11-02/world/afghanistan.election.runoff_1_azizullah-lodin-abdullah-abdullah-president-hamid-karzai?_s=PM:WORLD).

<sup>119</sup> See RASHID, DESCENT, *supra* note 47, at 96-97; TANNER, *supra* note 49, at 307-08.

<sup>120</sup> See RASHID, DESCENT, *supra* note 47, at 96-97; TANNER, *supra* note 49, at 307-08.

<sup>121</sup> See TANNER, *supra* note 49, at 304.

<sup>122</sup> See SEMPLE, *supra* note 36, at 51-66.

<sup>123</sup> See *id.*

<sup>124</sup> See *Afghanistan’s New Beginnings Programme*, UNDP, <http://www.anbp.af.undp.org/homepage/> (last visited Feb. 2, 2011).

Afghan National Police.<sup>125</sup> Applying the policies set forth in the Disbandment of Illegal Armed Groups (“DIAG”), the ANBP mandated that members of illegal armed factions turn in their weapons and provide the government of Afghanistan with lists of individuals serving in these anti-military forces.<sup>126</sup> While the DDR appears to have had success in the collection of weapons, the ANBP as a whole did not have a structure in place to provide sustained socio-economic support to those individuals renouncing their previous affiliation with illegal armed factions.<sup>127</sup> As result, the ANBP’s success was minimal.<sup>128</sup>

Another reconciliation program that has met with limited success is the Program Takhim-e-Sohl (“PTS”), or Strengthening Through Peace Program.<sup>129</sup> Introduced in 2005, the goal of PTS was to provide a means for former combatants to reconcile with the government in return for their safety from future military action by Afghan and Coalition Forces.<sup>130</sup> By 2007, reports claimed that more than 4,000 former combatants had participated in PTS, but inconsistencies and questionable reporting mar the integrity of these reports.<sup>131</sup> The PTS program failed to sustain long-term success in part because of the lack of clear guidance for, and efficient management by, the local offices responsible for the program’s

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<sup>125</sup> See Ali Ahmed, *Afghanistan’s New Beginnings Programme Client Satisfaction Survey: Comparative Analysis*, UNDP, July 31, 2005, <http://erc.undp.org/evaluationadmin/downloaddocument.html?docid=1064>; *Afghanistan’s New Beginnings Programme*, *supra* note 124.

<sup>126</sup> See *Afghanistan’s New Beginnings Programme*, *supra* note 124.

<sup>127</sup> See ROBIN-EDWARD POULTON, *DIAG EVALUATION: DISBANDMENT OF ILLEGAL ARMED GROUPS IN AFGHANISTAN, A PROJECT OF THE UNITED NATIONS DEVELOPMENT PROGRAMME AND AFGHANISTAN’S NEW BEGINNINGS PROGRAMME (ANBP)* 14-15 (Apr. 22, 2009), <http://erc.undp.org/evaluationadmin/downloaddocument.html?docid=3451>.

<sup>128</sup> See *id.*

<sup>129</sup> See *Former Taliban Commander Joins Forces With Afghan Government*, AM. FORCES PRESS SERV., Aug. 8, 2005, <http://www.defense.gov/news/newsarticle.aspx?id=16943>.

<sup>130</sup> See SEMPLE, *supra* note 36, at 39.

<sup>131</sup> See SEMPLE, *supra* note 36, at 39; MARISSA QUIE, *PEACE-BUILDING AND DEMOCRACY PROMOTION IN AFGHANISTAN: THE APRP AND RECONCILIATION WITH THE TALIBAN* 14 (Sept. 11, 2010), <http://stockholm.sgir.eu/uploads/sigir%206.pdf>.

execution.<sup>132</sup> Additionally, a lack of senior level insurgent commander participation in the program, a failure to combine the program with a demobilization process, and a lack of international support also contributed to the program's failure.<sup>133</sup> Further, combatants had little trust that the program would fulfill the promises it made due to allegations of corruption. In particular, the safety of the reconciled fighters could not be guaranteed.<sup>134</sup>

#### IV. THE AFGHANISTAN PEACE AND REINTEGRATION PROGRAM

Faced with a deteriorating security situation, the decreasing political will on the part of the Coalition forces to wage long-term war, and a populace yearning for a stable and peaceful country, the Afghan government's most recent attempt at reconciliation includes a revision of previous strategies.<sup>135</sup> The APRP is based on the recommendations of Afghan delegates of the Consultative Peace Jirga, presented at the London Conference in June of 2010, and formalized in July of the same year.<sup>136</sup> The APRP is based on three pillars: (1) strengthening security and promoting peace and reintegration through civilian governance; (2) improving the political process to provide a longstanding peace for the populace; and (3) providing local, regional, and international support in establishing peace and stability.<sup>137</sup> The peace and reintegration process of the first pillar is divided into two categories: operational and strategic/political levels.<sup>138</sup> The operational level addresses how to engage low-level fighters locally in their villages and districts.<sup>139</sup> More sensitive issues arise with respect to the reintegration of senior-level insurgent commanders, the strategic/political level of the operation.<sup>140</sup>

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<sup>132</sup> See SEMPLE, *supra* note 36, at 41; QUIE, *supra* note 131, at 14.

<sup>133</sup> See SEMPLE, *supra* note 36, at 41; QUIE, *supra* note 131, at 14.

<sup>134</sup> See SEMPLE, *supra* note 36, at 39-40; QUIE, *supra* note 131, at 14.

<sup>135</sup> See APRP, *supra* note 4, at 3.

<sup>136</sup> See *id.*

<sup>137</sup> *Id.* at 4.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

### A. Phase One: Social Outreach and Grievance Resolution

Regardless of the category the individual falls in, the three-phase peace and reintegration process remains the same.<sup>141</sup> The first phase includes social outreach programs, negotiations, and grievance resolution.<sup>142</sup> This step is vital because the community plays an integral role in accepting and reintegrating the reconciled combatant into the community.<sup>143</sup> Perhaps one of the most important aspects of this stage is the grievance resolution process available to combatants and their victims.<sup>144</sup>

The APRP, however, only allows for resolution of those grievances that are “creating armed resistance and violence and those linked to dissatisfaction with governance.”<sup>145</sup> This language of the APRP creates concern for human rights groups because, while current grievances are addressed, the program fails to offer a means for victims of prior crimes to seek redress.<sup>146</sup> During the negotiation and grievance resolution process, if an irreconcilable conflict arises and neither the local leaders, third party mediators, nor the government can help resolve the grievance, relocation of the reconciled former fighter may be available within or outside of Afghanistan.<sup>147</sup> It is also recognized that this crucial first step may take a substantial amount of time and, as such, may be completed simultaneous to phase two of the peace and reintegration process.<sup>148</sup>

### B. Phase Two: Demobilization

The second phase occurs when a fighter renounces violence, accepts the laws and the Constitution of Afghanistan, agrees to live by those laws, and demobilizes.<sup>149</sup> Once this occurs, the individual becomes eligible for amnesty as described in the existing

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<sup>141</sup> *See id.* at 5-6.

<sup>142</sup> *See id.* at 5-10.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.* at 6-7, 10.

<sup>146</sup> *See id.* at 6-7.

<sup>147</sup> *See id.* at 5-10.

<sup>148</sup> *See id.* at 10.

<sup>149</sup> *See id.* at 6-7, 10.

Reconciliation and Amnesty Law.<sup>150</sup> This law allows for political amnesty for anti-government fighters dating back as far as the beginning of the Soviet invasion in 1979.<sup>151</sup> Once deemed eligible for amnesty under the APRP, ex-combatants register their weapons and their biometric data is collected.<sup>152</sup> If the individual is a detainee, he is released to a community that agrees to support his social reintegration process.<sup>153</sup>

### C. Phase Three: Consolidation of Peace and Community Recovery

The final phase of the APRP is the consolidation of peace and community recovery.<sup>154</sup> This phase provides a menu of options that, while not available in its entirety to all communities due to diverse socio-economic needs and varying security requirements, have one goal: to provide a basic structure to get the fighter and the community started on a path to successful reintegration and sustained peace.<sup>155</sup> Consolidation of peace and community recovery is achieved through educational and occupational opportunities that benefit not only the newly reconciled former fighter, but also the community that chooses to embrace him.<sup>156</sup>

### D. APRP: Noble Aspirations, Poor Execution

In theory, the APRP seeks to achieve a sustainable peace for Afghanistan by utilizing community and international support to entice fighters to leave their anti-government networks and align themselves with the legitimate government of Afghanistan.<sup>157</sup> In reality, there are aspects of the APRP that provide hurdles to achieve this noble and very necessary goal. Born from corruption, the legislature created the Reconciliation and Amnesty Law not to support the Justice Action Plan, but instead to protect its own members, as many of them feared prosecution for their past

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<sup>150</sup> See *id.* at 6-7; Reconciliation and Amnesty Law, *supra* note 1, art. 3.

<sup>151</sup> See Reconciliation and Amnesty Law, *supra* note 1, art. 3.

<sup>152</sup> See APRP, *supra* note 4, at 13.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 10, 14-17.

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.* at 3-4.



crimes.<sup>158</sup> As a result, the Reconciliation and Amnesty Law failed to provide an end date for granting amnesty to fighters actively engaged in conflict against the government of Afghanistan. Once combined with the implementing guidance of APRP, the Reconciliation and Amnesty Law continues to grant amnesty to broad classes of anti-government fighters but fails to provide a means for victims of crimes committed during the last three decades of armed conflict to seek justice.

## V. THE APRP AND THE RECONCILIATION AND AMNESTY LAW: FORGOTTEN VICTIMS

### A. Legislation Born From Corruption

As discussed above, the Justice Action Plan provided a comprehensive approach to transitional justice in Afghanistan.<sup>159</sup> One of the plan's key provisions created a truth commission that would investigate past abuses and injustices and advise the legislature on how to address such abuses in the future.<sup>160</sup> Unfortunately, the legislature's members, including people like notorious war criminal Abdul Rasul Sayyaf,<sup>161</sup> thereafter drafted the Reconciliation and Amnesty Law, which protects criminals and does next to nothing to assist victims seeking truth or justice.

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<sup>158</sup> See SEMPLE, *supra* note 36, at 59-60.

<sup>159</sup> See JUSTICE ACTION PLAN, *supra* note 33.

<sup>160</sup> See *id.*

<sup>161</sup> Abdul Rasul Sayyaf is notorious for his ruthless crimes against the Hazaras during the civil war. Sayyaf, leader of the Wahhabi Ittihad-i-Islami group, fled Afghanistan in the late 1980's to the Philippines where he began the Abu Sayyaf Group, a known terrorist group with radical Wahhabist views. See ALLEN, *supra* note 88, at 287. He is also reported to have trained Khalid Sheikh Mohammed, the "mastermind of 9/11." 9/11 COMMISSION REPORT, *supra* note 114, at 149. Most recently, however, President Karzai is reported to have been supporting the election of Sayyaf to the position of Speaker of the House in the legislature in Afghanistan's government, another indication of problems within Karzai's government and his failure to identify with the people of Afghanistan. See Shah, *Karzai Backs Infamous Warlord to be Speaker*, *supra* note 83.

## B. Reconciliation and Amnesty Law, Standing Alone

The Reconciliation and Amnesty Law places a heavy burden on the victims of war crimes and human rights abuses. The law's first section allows for the reconciliation of any anti-government faction, political party, or hostile party who fought against the government prior to the establishment of the Interim Administration.<sup>162</sup> Section one also affords these individuals general amnesty so that they "shall not be legally or judicially prosecuted."<sup>163</sup> The law's second section goes on to state that those who are currently engaged in armed conflict with the Islamic Republic of Afghanistan, but choose to cease and reconcile, shall enjoy the benefits of amnesty and reconciliation should they accept the constitution and choose to abide by the laws.<sup>164</sup> The first section permits amnesty for anyone who committed a crime against the Afghan government from as early as the Soviet invasion of 1979. Because of the open date in the law's second section, those who continue to commit hostile acts might be granted amnesty in the future as well.<sup>165</sup>

This open-ended construction arguably allows more combatants to reconcile with the government because the country remains actively engaged in armed conflict. The purpose of the law is, after all, to encourage fighters to cease fighting in opposition to the government and become part of a unified and peaceful Afghanistan.<sup>166</sup> However, the law also provides a convenient escape when these fighters are known targets of Afghan and Coalition Forces. One of the benefits of reconciling with the government is not only amnesty from prosecution of previous hostile acts against the government, but also removal from targeting lists or "black-lists."<sup>167</sup> The removal of reconciled fighters from these lists is an important step in gaining the trust of the ex-combatants as they reintegrate into the community. However, when abused, this step provides a convenient operational pause for fighters who seek refuge under the

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<sup>162</sup> See Reconciliation and Amnesty Law, *supra* note 1, art.3, § 1.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*, art.3, § 2.

<sup>165</sup> See *id.*, art.3, §§ 1,2.

<sup>166</sup> *Id.*, art.3.

<sup>167</sup> See APRP, *supra* note 4, at 23.

guise that they are participating in a legitimate program when they have no intent to fully reconcile. Revision of the Reconciliation and Amnesty Law by adding an end date for available reconciled fighters to participate in the program could alleviate that problem.

### C. Implementing the Reconciliation and Amnesty Law with the APRP: Forgetting Twenty Years of Victims

As mentioned above in the discussion of the historical underpinnings leading to the current political situation in Afghanistan, many human rights violations from the previous three decades remain unanswered. Some of the alleged human rights violations most relevant to this discussion include the alleged beheadings and rapes committed by Barhnuddin Rabbani's men during the Afghan Civil War in 1993.<sup>168</sup> Rabbani then served as the interim President of Afghanistan.<sup>169</sup> Rabbani, who was never charged or convicted of his alleged war crimes, recently served as the chair of the High Peace Council, the organization responsible for overseeing the implementation of the APRP.<sup>170</sup> In September 2011, a suicide bomber gained access to Rabbani's compound, killing Rabbani and four other members of the High Peace Council.<sup>171</sup> The immediate question that arises from Rabbani's recent position and very critical responsibilities stems directly from the scars of the civil war that have not been overshadowed by modern conflict. Was it possible for Rabbani, an alleged perpetrator of war crimes, to effectively implement and oversee a reconciliation and reintegration program that includes not only amnesty for war criminals, but also a grievance resolution process for victims of such atrocities? With his death, perhaps there is no answer to that question. However, the process that put an alleged violator of human rights in charge of overseeing the peace process in a war-ravaged country should be carefully scrutinized.

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<sup>168</sup> See COLL, *supra* note 62, at 263.

<sup>169</sup> See TANNER, *supra* note 49, at 277.

<sup>170</sup> See APRP, *supra* note 4, at 3.

<sup>171</sup> See *Former Afghanistan President Burhnuddin Rabbani Killed in Kabul Blast*, TELEGRAPH (U.K.), Sept. 20, 2011, <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8776911/Former-Afghanistan-president-Burhanuddin-Rabbani-killed-in-Kabul-blast.html>.

Perhaps the intent of the APRP is simply to forgive all alleged war criminals and forget their crimes so that the Islamic Republic of Afghanistan can move forward and free itself from the previous three decades of brutality. Can this amnesty approach work in a country that has been ravaged by war for thirty years and has so many war crimes yet to be addressed?

The reality of the APRP might be very clearly reflected in the text of the plan itself. The program focuses on “those grievances that are creating armed resistance and violence and those linked to dissatisfaction with governance. It cannot tackle all long-term grievances in Afghanistan.”<sup>172</sup> The plain language of the document, which became effective in July of 2010, indicates that the grievance resolution process is available to those seeking redress for current grievances, and specifically declares that those victims of the past will not be considered because the government simply “cannot tackle” their concerns. Moreover, the APRP fails to utilize the resources available to resolve grievances from previous conflicts.<sup>173</sup> While perhaps understandable given the fact that the country is currently engaged in armed conflict and peace is the immediate goal, the explicit exclusion of previous perpetrators and victims of war crimes raises several concerns. How will victims of war crimes that occurred prior to the modern Global War on Terror era seek justice? Who is eligible to seek justice for those victims who are gone but whose perpetrators remain and whose crimes remain unaccounted for? There is no avenue for survivors of slain victims to heal the wounds of war and the unnecessary loss of those that they love.

Another concern of the Reconciliation and Amnesty Law stems from its over-inclusiveness, as it permits amnesty for the perpetrators of crimes dating back more than thirty years.<sup>174</sup> The APRP implements the Reconciliation and Amnesty Law by providing for the reintegration of current fighters who wish to reconcile with the Afghan government according to the terms of the APRP, and authorizes amnesty from prosecution for those deemed eligible.

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<sup>172</sup> APRP, *supra* note 4, at 12.

<sup>173</sup> *See id.* at 12-13.

<sup>174</sup> *See* Reconciliation and Amnesty Law, *supra* note 1, art.3, § 2; APRP, *supra* note 4, at 10, 14-17.

Because the APRP only addresses current and recent fighters, but existing legislation permits reconciliation and amnesty for a broader population of perpetrators, the question remains as to how to respond to those from previous conflicts who wish to avail themselves of the reconciliation process. There is no incentive for ex-fighters to maintain a life of peace when they are excluded from the support the APRP can provide. If anything, the APRP may entice them to take up arms again so that they may become eligible for the programs offered by the APRP. Further, what framework is in place to ensure that the reconciled combatants from previous conflicts maintain their commitment to the government of Afghanistan, and what support is available to assist them in this endeavor?

Perhaps the more significant failure of the Reconciliation and Amnesty Law relates to the victims of the crimes. One example of this failure is Rashid Dostum, whose victims included not only innocent villagers but also members of the Taliban. Dostum is alleged to have taken hundreds of Taliban prisoners captive and transported them in large metal shipping containers over many miles.<sup>175</sup> Few of those prisoners survived, and Dostum has never been prosecuted for these alleged crimes.<sup>176</sup> In fact, Dostum recently served in the Karzai administration as both the Afghan Army Chief of Staff and Deputy Defense Minister.<sup>177</sup> While victims are traditionally thought to be people like Aisha and young Shafiq, history reveals that there are Taliban victims as well.

It defies logic that the Afghan government would ask members of the Taliban to reconcile when they hypocritically employ one of the most notorious offenders of human rights. Further, the government not only allows such perpetrators to be safe from prosecution for their crimes, but also fails to provide a grievance resolution process for the victims or their families.

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<sup>175</sup> See RASHID, DESCENT, *supra* note 47, at 74.

<sup>176</sup> See *id.*

<sup>177</sup> See Jeremy R. Hammond, *Karzai Reappoints Dostum as Chief of Army Staff*, FOREIGN POL'Y J., Jan. 26, 2010, <http://www.foreignpolicyjournal.com/2010/01/26/afghanistan-karzai-reappoints-dostum-as-chief-of-army-staff/>.

## CONCLUSION

There is no doubt that the challenges facing the Islamic Republic of Afghanistan are daunting. The last thirty years have taken an immense toll on the Afghan people, creating generations who know only war and have yet to experience peace. Government efforts to move the country forward have focused only on reconciling with former combatants, while leaving thousands of victims of violence and their families without the opportunity to seek justice.<sup>178</sup>

The APRP has done a fair job assessing the needs of combatants using a multi-phased, community based approach to provide a sustainable reintegration program.<sup>179</sup> It is, of course, not without faults: the victims of the modern conflict have an opportunity to be heard while many of the victims from earlier decades are left seeking justice. Rather than ignoring these victims, the government needs to provide a mechanism to resolve their grievances. During a time when building trust is crucial to the success of the nation's future, a critical step in the healing process is implementing a program that achieves a sense of justice for all victims before eliminating the threat of prosecution for their perpetrators.

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<sup>178</sup> See Reconciliation and Amnesty Law, *supra* note 1, art.3.

<sup>179</sup> See APRP, *supra* note 4.