Afghanistan
Re-establishing the rule of law

1. Introduction

Re-establishing the rule of law, including ending impunity, is an essential pre-requisite for peace and stability in Afghanistan. Recognising this, the international community has pledged to assist Afghanistan in rebuilding and reforming its shattered justice system. The challenge of reconstructing a judicial system in the wake of 23 years of armed conflict is a formidable one. The lack of effective governmental control outside of Kabul, the existence of ongoing conflict and a *de facto* rule by commanders and armed groups in certain areas of Afghanistan are factors that are undermining the rule of law. Currently, the Afghan courts lack legitimacy and there is a perception among the people that the judicial system is unable to properly serve the interests of justice. The lack of public confidence in the court system is compounded by a history of reliance on informal judicial mechanisms in Afghanistan.

Despite the political and security problems undermining the rule of law, courts are operating in some urban centres in Afghanistan, albeit with limited capacity. However, in rural areas the judicial system is barely functioning. Where courts have been established, they are fragile and they lack the basic facilities necessary to ensure the administration of justice. The international community's promised program of judicial assistance lacks strategic direction and it has been delayed in its commencement. As a result, the Afghan courts still lack basic facilities such as premises, furniture and copies of legal texts.

The judiciary has not received the support necessary to ensure that it is able to resist the pressures upon it. The failure of the international community to provide effective security and bring an end to the influence of armed groups has left the judiciary extremely vulnerable. Furthermore, the current lack of arrangements for the protection of courts, judicial officers, witnesses and victims undermines the capacity of the judiciary to assert its independence. As a result, certain individuals remain above the law because of their place in the community or because they are able to use threats, intimidation and other forms of pressure to influence judicial proceedings. In addition, economic influences have led to a widespread problem of corruption.

The rights of defendants are currently not being protected by the criminal justice system. Defendants, including children, are being denied the right to a fair trial. There is also a widespread problem of arbitrary detention. Many judges and prosecutors lack the qualifications and training necessary to properly apply domestic laws let alone relevant international law. Furthermore, legal reform is required to ensure that all domestic laws fully comply with international law, including the International Covenant on Civil and Political Rights (ICCPR) and the Rome Statute of the International Criminal Court (Rome Statute).

The high level of discrimination against women in Afghanistan is reflected in the criminal justice system. Women victims and defendants are being denied access to justice and are discriminated against by both the formal and informal justice systems.

The international military intervention in Afghanistan led by the United States of America (US) resulted in the fall of the Taleban government, which had been responsible for grave violations of human rights. The military intervention was accompanied by a political and financial commitment to reconstruction, legal reform and human rights. In a speech in October 2001, British Foreign Secretary Jack Straw stated that, "Afghanistan's development needs will be huge. The cost of rebuilding Bosnia was $5 billion. Afghanistan has four times Bosnia's population.…But we have to be ready to bear the cost, because if we do not, the price we pay will be far greater." Leaders of other governments made similar promises. However, at the Tokyo International Conference on Reconstruction Assistance of Afghanistan, half a billion dollars less was pledged by the international community for Afghanistan than it was for Bosnia. Furthermore, in the current financial year there is a $15 million shortfall for rule of law related projects in Afghanistan.

As the international community focuses its attention on post-conflict reconstruction in Iraq, it is crucial that it does not rescind promises made to the Afghan people. Afghanistan requires comprehensive, long-term support and assistance to ensure that it develops a criminal justice system that is based upon respect for the rule of law and which operates in a manner that is consistent with universally accepted human rights standards.

2. Background

In November 2001, US-led military intervention in Afghanistan led to the fall of the Taleban government. On the 5 December 2001, talks brokered by the United Nations (UN) resulted in the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement). The Bonn Agreement provided for a six-month Interim Administration. The Interim Administration was "intended as a first step toward the establishment of a broad-based, gender sensitive, multi-ethnic and fully representative government" and was required to respect international human rights law. The Interim Administration was entrusted with the task of preparing an Emergency *Loya Jirga* followed by a Constitutional *Loya Jirga* within 18 months.[1]

Under the terms of the Bonn Agreement, the Emergency *Loya Jirga* was to be convened to "elect a Head of the State for the Transitional Administration" and to "approve proposals for the structure and key personnel of the Transitional Administration". The Emergency *Loya Jirga* met in June 2002 and established the Afghan Transitional Administration (ATA), headed by President Karzai.

In December 2001 the UN Security Council authorised the deployment of an International Security Assistance Force (ISAF) in Kabul and its surrounding areas.[2] ISAF, currently led by NATO, is credited with increasing security in Kabul. However, in the rest of Afghanistan, factional fighting continues between rival armed groups. The ATA has been unable to

[1] A *Loya Jirga* (General Assembly) is a traditional Afghan body dating from the eighteenth century. The assembly, which generally meets to appoint new leadership, determine national policy, or draft a constitution, last met in 1977.
[2] United Nations Security Council Resolution 1386, 20 December 2001.

establish control outside of Kabul, where powerful regional commanders wield power through the control of private armies. Some of these commanders have been incorporated into the ATA and they have placed their supporters in key positions within the police and local government. Commanders act with a high degree of autonomy and display little loyalty to President Karzai's government. The lack of security and control by the ATA outside of Kabul is widely seen as a major factor hindering Afghanistan's transitional process to a system that is based upon the rule of law. The ATA, the UN Secretary-General and international and national non-governmental organisations have repeatedly called for an expansion of ISAF's mandate. However thus far the Security Council and ISAF contributing countries remain unwilling to deploy troops outside of Kabul.[3]

In March 2002 the Security Council established the United Nations Assistance Mission in Afghanistan (UNAMA).[4] UNAMA was mandated to assist the ATA with the implementation of the Bonn Agreement. UNAMA is headed by the Secretary-General's Special Representative (SRSG), Lakhdar Brahimi, who oversees the work of two "pillars"; pillar one is responsible for political affairs, and pillar two is tasked with the co-ordination of humanitarian relief, recovery and reconstruction.

In his report to the Security Council setting out the mandate and structure of the mission, the Secretary-General stated that "a rights based and gender-sensitive approach would be integrated fully into the United Nation's activities in Afghanistan".[5] A number of political affairs officers were placed in the pillar one structure with terms of reference that included the promotion of human rights. In addition, the posts of a senior advisor on human rights and a senior advisor on the rule of law were included in the office of the SRSG. However, due to staffing problems both positions are currently vacant.

UNAMA has been criticised for its failure to fully integrate human rights into its activities.[6] In particular, the mission has been unsupportive of Afghan calls to end impunity for past human rights violations. In addition, the human rights' components of UNAMA, which are fragmented and lack strategic direction, have not ensured that human rights are integrated into UNAMA's activities. Moreover, rule of law activities have been perceived to be the sole responsibility of the senior advisor on the rule of law and there has been no input into rule of law issues from the human rights' components of UNAMA. As a result of this artificial fragmentation of human rights and rule of law, UNAMA has failed to engage in activities that

[3] Provincial Reconstruction Teams (PRTs), consisting of 50-100 civilian and military officials have recently been deployed to some provinces to engage in civil-military and humanitarian activities. However, PRTs do not have orders to intervene in conflicts between factions or to protect civilians. PRTs are engaged in activities that include construction of schools, clinics and bridges, and training of police. There are ongoing discussions as to whether PRTs are a real option for security across the country.

[4] United Nations Security Council Resolution 1401, 28 March 2002.

[5] Report of the Secretary-General on "The Situation in Afghanistan and its Implications for International Peace and Security", 18 March 2002.

[6] See, for example, Conflict, Security and Development Group, "A Review of Peace Operations – A Case for Change, Afghanistan", March 2003.

support the protection of human rights within the criminal justice system. Furthermore, UNAMA has had mixed success in its efforts to support the implementation of the Bonn Agreement, in particular support to the judicial reform process.

The Bonn Agreement provided for the establishment of three Commissions. The Judicial Reform Commission, the Constitutional Commission, and the Human Rights Commission were each mandated to oversee the implementation of different parts of the Bonn Agreement. The Constitutional Commission was established in April 2003 with a mandate to draft a new Afghan Constitution in preparation for the Constitutional *Loya Jirga*. The Commission is believed to have completed a preliminary draft of the constitution. It has commenced a public consultation with the stated aim of gathering views from a broad section of the Afghan people but without sharing the draft text. The final draft of the Constitution is expected to be completed for presentation to the Constitutional *Loya Jirga* in October 2003.

The Constitutional Commission has been widely criticised for failing to carry out its mandate in a transparent and inclusive manner and for accommodating hard-line factional leaders.[7] The Commission has thus far not disseminated the preliminary draft of the Constitution and it has failed to conduct a meaningful public consultation with a broad cross-section of the population, including members of civil society and human rights advocates.

The Afghan Independent Human Rights Commission (AIHRC) was set up in June 2002. The AIHRC has a mandate to investigate and monitor human rights violations and to establish a programme of human rights education. The AIHRC has established regional offices and is receiving, and actively investigating, allegations of human rights abuses. The AIHRC has departments that are concerned with women's rights, the rights of the child and transitional justice. The AIHRC investigation unit has started to monitor the prison system from an international human rights law perspective. However, the AIHRC currently lacks the capacity to engage in an all encompassing judicial monitoring program, including court observation. The AIHRC has competent staff who have already carried out a significant amount of work. Progress has been made despite long delays on the part of the Office of the High Commissioner for Human Rights (OHCHR) in delivering a promised program of technical assistance to the AIHRC.

The Judicial Reform Commission (JRC) was established in November 2002 and is composed of 12 prominent Afghan legal experts. The JRC is mandated to "rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." However, as a creation of the Bonn Agreement, the JRC has no formal role in the administration of justice. The JRC's role is limited to proposing reform strategies and seeking international donor assistance. Thus, the success of the JRC depends on the willingness of the formal judicial institutions – the Supreme Court, the Ministry of Justice and the Attorney General's Office - to implement its suggested reforms. Thus far the JRC has struggled to devise and facilitate the implementation of a coherent judicial reform strategy. However, the JRC has facilitated the compilation of applicable laws and it has convened working groups that are currently redrafting legislation, including the criminal law, for

[7] See: International Crisis Group "Afghanistan's Flawed Constitutional Process", June 2003.

presentation to the ATA. The JRC has also successfully initiated the establishment of the Legal Education Centre and members of the JRC have recently carried out a survey of the judicial system.

The applicable law was set out in the Bonn Agreement as "the Constitution of 1964…the existing laws and regulations, to the extent that they are not inconsistent with the agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions of the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those regulations". Currently, however, there is confusion regarding the applicable law among legal professionals. This results, in part, from a recent history of non-reliance on written law and delays in the compilation and dissemination of applicable statutory law. Moreover, there is currently a lack of clarity among many legal professionals regarding the nature of, interpretation and interplay between, various sources of applicable Afghan law.[8]

3. Amnesty International in Afghanistan

This report is the third in a series of four reports on the criminal justice system in Afghanistan.[9] Amnesty International established a field presence in Afghanistan in June 2002 in order to facilitate reporting and campaigning on human rights. Preparatory research for this report was undertaken in March 2003 by a Legal Adviser from the International Secretariat. An expert on the administration of justice then visited Afghanistan from 15 April to 30 May 2003 and collected the information that forms the basis of this report.

Amnesty International delegates met with a wide range of Afghan legal professionals, including judges, prosecutors, independent lawyers and members of the JRC. Amnesty International also met with officials from the ATA, AIHRC, UNAMA, UNICEF, UNDP, UNHCR, donor governments and international and national non-governmental organisations (NGO).

Amnesty International is particularly grateful to the Supreme Court, Ministry of Interior and the Ministry of Justice and for facilitating access to courts and places of detention. Amnesty International is also grateful to the detainees and prisoners who shared their stories.

Amnesty International hopes that the analysis, observations and recommendations contained in this report will provide a constructive contribution to the protection of human rights in Afghanistan and ending impunity.

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[8] See: International Commission of Jurists "Afghanistan's Legal System and its Compatibility with International Human Rights Standards", February 2003.

[9] The first report was Amnesty International *Afghanistan: police reconstruction essential for the protection of human rights* (AI Index: ASA 11/003/2003). The second was Amnesty International *Afghanistan: crumbling prison system desperately in need of repair* (AI Index: ASA 11/017/2003). The fourth report on women's access to and treatment in the criminal justice system will be published shortly.

4. Judicial reform and reconstruction

Kabul Welayat - one of the two main courts in Kabul. It houses some of the primary city courts, family court and public security court. ©AI

4.1. The Afghan courts

The Afghan courts have been established within the framework of the structure envisaged by the 1964 Constitution and other applicable laws.[10] The highest court in Afghanistan, the Supreme Court, sits in Kabul and is headed by the Chief Justice. The Supreme Court is constitutionally charged with the organisation and administration of the lower courts, including oversight of the judiciary. The Supreme Court is also responsible for nominating candidates for judicial appointment to the President. Within the Supreme Court, a Court of Cassation functions as an administrative Court of Appeal.

The High Court of Appeal is at the next level of the hierarchy underneath the Supreme Court. The High Court of Appeal, based in Kabul, has jurisdiction to hear appeals against decisions

[10] The 1964 Constitution, the 1968 (1346) Law on the Jurisdiction and Organization of the Courts and the 1956 (1335) Law on the Administration of the Courts of Justice set out the structure of the Afghan courts. For a detailed analysis see: The International Commission of Jurists "Afghanistan's Legal System and its Compatibility with International Human Rights Standards", February 2003.

made by the Provincial courts. Each administrative province in Afghanistan has one Provincial Court which has appellant jurisdiction over decisions made by the lower Primary Courts.[11] Afghan law sets out that the Chief Justice is responsible for determining the number of Primary Courts in each province. There are currently 2,006 judges and approximately 3,000 prosecutors attached to the Afghan courts. It is reported that the courts have dealt with 5,310 criminal cases in the period April 2002-April 2003.[12]

Outside of Kabul, the Provincial Courts are in operation in some provincial capitals. For example, Provincial Courts have commenced work in the capitals of Kandahar, Kunduz, Herat, Nangarhar, Kabul, Balkh, Parwan, Badakhsan, Paktia, Farah, Logar, Badghis, Parwan, Logar and Wardak provinces. However, in many of these provinces, the Primary Courts have yet to be established. For example, in Mazar-e Sharif, Jalalabad and Herat only a very small number of Primary Courts are working. As a consequence, these Primary Courts and the Provincial Court are attempting to deal with the caseload of up to ten Primary Courts.

In some districts, such as Bamiyan and Khost, neither the Provincial nor the Primary Courts have been established. In addition, outside of the urban provincial capitals, courts have not been set up. Furthermore, logistical and resource constraints have hampered efforts to extend the activities of the urban based Provincial and Primary Courts to rural areas. As a result, the police and courts lack legitimacy and the ability to exercise their jurisdiction in rural areas. In these rural areas there is a heavy reliance on informal justice mechanisms.

In addition to the general courts, Afghan law also provides for the establishment of specialized courts. However, some of the envisaged specialized courts, most notably, the Juvenile and Family Courts, have not been established outside of Kabul. In the absence of the Juvenile Courts, cases involving minors are being adjudicated under adult procedures. While the Provincial and Primary Courts are currently attempting to deal with a small number of family cases, judges currently lack the legal expertise necessary to ensure that these cases are dealt with in a fair and effective manner.

Amnesty International recognises that logistical and financial constraints may have hindered the establishment of some specialized courts. However, in the areas visited by the organisation, it was evident that apart from the Family and Juvenile Courts, all other specialized courts, including Public Security and Commercial Courts, had been established. Amnesty International is concerned that the failure to establish the Juvenile and Family Courts stems from the reluctance, on the part of the Supreme Court, senior Afghan judges and the international community, to recognise and prioritise the work of these courts. The failure to establish the family and juvenile courts appears to reflect a wider lack of concern for the protection of vulnerable groups in Afghan society and, in particular, women.

There is an evident lack of proper premises and facilities for the courts that are in operation. Judicial personnel in many areas are working in buildings that lack electricity, water and heating. Furthermore, many courts visited by Amnesty International did not have proper flooring, windows, appropriate furniture, including desks and filing cabinets in which to store

[11] Afghanistan is divided into 32 provinces. Each province is sub-divided into a number of districts.
[12] Figures provided by the Supreme Court and the Attorney General's Office, May 2003.

case files and other court documents. All the courts visited by Amnesty International lacked basic stationery supplies such as files, pens, paper and record books which are essential for ensuring the proper administration of the courts.

In addition, the courts are currently operating in extremely overcrowded conditions. In many areas, up to four courts share a room and administrative staff are cramped into offices. For example, in Kabul, up to three Primary Courts share one badly equipped room and in Mazar-e Sharif, up to 40 staff in the Attorney General's office share a single office.

The physical conditions of the courts visited by Amnesty International were extremely poor and tended to hinder the administration of justice. Amnesty International recognises that security and logistical constrains complicate the provision of assistance to the Afghan courts. However, the organization has observed that the international community has been slow in commencing its promised judicial assistance program. This means that the courts are currently operating without the basic minimum physical requirements. At the time of writing no emergency assistance to courts outside of Kabul had been provided.

4.2. Delays in formulating a judicial assistance strategy

"The development of a fair and effective justice system in Afghanistan is a vital requirement to meet the needs of the Afghan people and to protect their human rights, with special consideration for the most vulnerable sections of society, to ensure peaceful dispute resolution, to promote good governance …... an effective justice system is essential not only for the successful development of Afghan society as a whole, but also to achieve lasting peace and security in Afghanistan." Final statement of the Rome Conference on Justice in Afghanistan, December 2002.

At the Rome Conference on Justice in Afghanistan attended by government and UN officials, the international community pledged its support for the reconstruction and reform of the Afghan judicial system. The Italian government has assumed the responsibility for coordinating international donor assistance in the justice sphere. In its role as "lead donor", the Italian government has chaired donor co-ordination meetings in Kabul, brought a number of legal experts to Afghanistan to assist the JRC and provided a considerable amount of financial assistance for judicial reform projects. The governments of Austria, Canada, India, Turkey, United Kingdom and US have also already provided, or pledged, funds for judicial reconstruction and reform in Afghanistan.

The Afghan cabinet approved $27 million for the justice sector in the development budget for the financial year ending March 2004. This $27 million represents the total amount of funds that the Afghan judicial institutions are authorised to seek from the donor community. However, at the time of writing, pledges had been secured for only $12 million. Thus, in the current financial year there is a $15 million shortfall for rule of law related projects in Afghanistan.

Delays in securing and distributing international assistance stems, in part, from a failure on the part of the international community to commit to providing the funds necessary to ensure

that the Afghans can embark upon a comprehensive judicial reform programme. This, coupled with the delays on the part of some donor governments in fulfilling financial pledges they have already made has stalled the implementation of urgently needed assistance projects. Furthermore, a lack of co-ordination by the international donor community and delays on the part of the lead donor, the Italian government, in initiating regular donor co-ordination meetings in the period January-August 2003, has further delayed assistance.

There have also been delays in the distribution of some of the funds that have already been donated. At present international financial assistance to the justice sector is channelled through the JRC, rather than directly to Afghan judicial institutions. Development funds for judicial assistance projects are placed in the "justice fund", administered by UNDP. The "justice fund" provides a pool of money that is available for the implementation of projects identified by the JRC. At the time of writing, an estimated $7 million, which had been donated by the international community, remained unspent in the "justice fund". UNAMA officials and representatives of donor governments indicated that the delays had been caused by UNDP which has failed to ensure prompt implementation of projects identified by the JRC. However, UNDP blamed the JRC stating that it had failed to provide UNDP with clearly articulated projects for funding.

Since its establishment, the JRC, the body created by the Bonn Agreement to "rebuild the domestic justice system", has proposed and initiated a number of projects. For example, the JRC has facilitated the compilation of applicable laws and convened working groups that are currently redrafting legislation, for presentation to the ATA. The JRC has also played an important role in the establishment of the Legal Education Centre. However, the JRC has struggled to formulate other quick impact and long-term judicial reform projects for presentation to the international donor community and to devise an overall strategy for justice.

The failure of the JRC to formulate a coherent strategy for justice stems, in part, from initial delays in undertaking a comprehensive needs assessment of the justice sector. In the absence of a proper needs assessment, the JRC has not been able to prioritise needs. For example, a list of proposed projects recently circulated by the JRC includes 29 projects that are not explained in detail or prioritised in order of importance or given an expected date of implementation. As one senior ATA official explained, "the priorities of the JRC are wrong. Instead of formulating concrete plans for things that they can do they have come up with a list of everything that is needed to totally rebuild the justice system". In discussions with Amnesty International the JRC refused to acknowledge that it lacked strategic direction.

UNAMA, which was mandated under the Bonn Agreement to assist the JRC in carrying out its mandate, has failed to fully support the JRC and provide the technical assistance necessary to ensure that it has the capacity to devise a clear strategy for justice. The UNAMA rule of law component, currently staffed with one junior UN official, lacks the resources and capacity to provide appropriate technical assistance to the JRC. Although the government of Italy has brought a number of legal experts to Afghanistan, it has failed to ensure that technical experts are available to assist the JRC in formulating clear and precise proposals for projects for presentation to the donor community.

Strategic planning in the justice sector is also being hindered by a lack of co-ordination between the key Afghan institutions – the Ministry of Justice, the Supreme Court and the Attorney General's Office. One ATA official described relations between the three judicial institutions as "fraught with competition and friction". The Supreme Court's relationships with both the Ministry of Justice and the Attorney General's Office are extremely poor. In addition, communications between the Ministry of Justice and the Attorney General's Office have broken down as a result of a dispute regarding whether the Attorney General's Office should fall under the competence of the Ministry of Justice or whether, as the Attorney General wishes, it should be independent.

Rivalry and a lack of communication between the three judicial institutions has greatly complicated the work of the JRC which, as a creation of the Bonn Agreement, has no power to actually implement any of the reforms that it proposes. In the absence of proper communication between the main judicial institutions, the JRC is in fact powerless to facilitate the implementation of any holistic judicial reform strategy that it proposes.

Noting the problems stemming from the lack of communication within the justice sector, one representative of the Ministry of Finance stated that "there can be no rule of law in Afghanistan until such time as the Afghan judicial institutions and the donor community work together to devise concrete projects which can be presented to the international community for funding".

The JRC has recently sought to rectify the initial failure to complete a needs assessment of the Afghan courts. In the period between March and May 2003, the JRC with the support of UNDP, UNAMA, the Italian and US governments undertook a survey in 11 urban centres of judicial institutions, including detention facilities, in terms of their physical infrastructure, staff, and operations. The survey focused on the physical needs of the courts and did not attempt to assess the caseload of the courts or identify systemic problems in the judicial system. The implementation of judicial assistance projects has been put on hold pending the completion of the survey.

Amnesty International welcomes the completion of the survey. However, the organisation has observed that the presentation of the findings to the international community planned for June 2003 has been delayed. In order for the survey to be an effective tool, the JRC, with the assistance of the Italian government, must immediately use the information collected in the survey to produce a clear strategy for justice, which includes precisely defined and prioritised quick impact and long-term projects for the Afghan courts, including those outside of Kabul. Once the JRC has a clearly prioritised list of quick impact and long-term projects, they must be immediately presented to the international donor.

4.3. Recommendations:

- **Strategy for justice:** Afghanistan's judicial institutions and the JRC, with the assistance of the international community, must immediately utilise the results of the judicial survey to formulate clear and precisely defined proposals for both short and long-term judicial assistance projects. These projects must be clearly set out and form part of an overall strategy for justice, which includes clear priorities for the short and long-term. A strategy for justice must be immediately presented to the donor community for funding.
- **Prioritise the establishment of Juvenile and Family Courts**: The establishment of properly functioning Family and Juvenile courts is essential for ensuring that the rights of vulnerable groups are protected. The Supreme Court and the JRC, with the assistance of the international community must immediately establish the Family and Juvenile courts outside of Kabul.
- **Donor co-ordination**: Under the strategic leadership of the government of Italy, the donor community must increase its efforts to co-ordinate judicial assistance. The Italian government must ensure that regular information on the judicial reform process is disseminated to the donor community and that regular co-ordination meetings are held in Kabul.
- **Long-term financial assistance for judicial reform and reconstruction**: The international community pledged to support judicial reconstruction as a means of facilitating peace and security in Afghanistan. The international community must ensure that it provides long-term financial assistance to ensure the re-establishment of the rule of law in Afghanistan. Donor governments who have pledged to provide financial assistance must deliver these funds as a matter of urgency.
- **Relations between Afghan judicial institutions**: The breakdown in relationships between the Afghan judicial institutions is an extremely serious problem. Effective co-operation between the Supreme Court, Ministry of Justice and the Attorney General's office is a pre-requisite for judicial reform. The ATA must immediately take steps to facilitate better working relationships between these three key judicial institutions.
- **Strengthen UNAMA's role**: UNAMA is mandated under the Bonn Agreement to provide assistance and support to the judicial reform process. The rule of law component of UNAMA must be strengthened and staffing levels increased in order to ensure that it is able to effectively carry out its mandate. In addition, there must be no further delays in recruiting a senior advisor on the rule of law. UNAMA should also consider placing an expert in international human rights law under the senior advisor on the rule of law to ensure that human rights are fully integrated into rule of law activities. All UNAMA rule of law activities must be properly co-ordinated with the human rights components of the mission.

5. The Afghan judiciary

5.1. Judicial appointments

Afghan judges are appointed by the President based upon the recommendation of the Chief Justice. The 1964 Constitution and the 1967 Law on the Jurisdiction and Organisation of the Courts set out the qualifications required for judicial appointment. According to the law, to be appointed as a judge, an individual must hold a degree from either the Faculty of Law or the Faculty of Sharia. In addition, she or he is required to have completed the one-year legal professional training and should be aged between 28 and 60.[13] Despite the fact that the law clearly sets out the requirements for judicial appointment, there is evidence that many sitting judges do not hold the necessary qualifications and have exceeded the specified age limit.[14]

There are strong indications that the judicial appointment process has been marred with political manipulation and bias, including pressure from armed groups. In interviews with Amnesty International, a number of senior judges expressed concern over the lack of properly qualified judges working in their courts and stated that this is a key problem currently undermining the effective administration of justice. While the full extent of the problem is unknown, in one provincial region a source in the judiciary claimed to Amnesty International that only around 20% of judges are properly qualified. Many judges interviewed by Amnesty International attributed the appointment of unqualified judges to political manipulation within the Supreme Court. Commenting on this problem, one senior judge asserted to Amnesty International that "the recruitment of judges by the Supreme Court is linked to political considerations and as a result many judges do not have a legal education". Moreover, the Supreme Court informed Amnesty International that it has appointed 137 judges to the Supreme Court. This represents 128 more judges than the Supreme Court is competent to appoint under the applicable law.[15]

Amnesty International believes that the President also bears responsibility for this problem, as he is vested with the ultimate power to appoint judges. While the President's office is aware of the problem, it has proved unwilling to trigger proceedings for the removal of unqualified personnel, instead preferring to apportion blame upon the Supreme Court. One senior source in the President's office informed Amnesty International that; "we know that the judiciary is politicised and that the Chief Justice has appointed many judges who are not qualified". However, he did not indicate that the President's office would be taking steps to remedy this

[13] See: Article 105, 1964 Constitution and Articles 74-79, 1967 (1346) Law on the Jurisdiction and Organisation of the Judiciary.
[14] There has been much controversy regarding the Chief Justice, Fazil Hadi Shinwari. It is alleged that he does not hold the necessary qualifications set out in Article 105 of the Constitution for his post and that he has exceeded the age limit of 60. See: "Chief Justice Under Scrutiny", Institute of War and Peace Reporting, 02/04/2003.
[15] Article 105, 1964 Constitution.

situation. The JRC is also aware of the problems regarding the appointment of unqualified judges and has stated that the problem can be tackled by providing training to sitting judges.

Unsurprisingly, the Supreme Court is also unwilling to initiate the removal of unqualified judges. In an interview with Amnesty International, the Chief Justice acknowledged that there had been "some problems with unqualified judges". However, he stated that he had managed to resolve these problems by "talking to the unqualified judges".

One of the essential foundations of a fair and effective judicial system is a properly qualified professional judiciary. Amnesty International is concerned by the failure of the Supreme Court and the Afghan President to ensure that only properly qualified persons are selected for judicial appointment. Furthermore, the organisation believes that the plan to provide short-term training to unqualified sitting judges is a poor substitute for ensuring that the judiciary is comprised of properly qualified professional personnel.

5.2. Training the judiciary

The JRC and the international community have recognised that judicial training is a key component of judicial reform. Two training programmes have been initiated. The first, which commenced in May 2003, is a one-year course for young legal professionals. This course is being organised by the newly established Legal Education Centre (LEC) in Kabul and it aims to provide a backstop for the legal professional training which is currently unavailable, but which is a legal pre-requisite for judicial appointment. There are currently 150 young lawyers, all employees of either the Ministry of Justice, Supreme Court or Attorney General's Office, engaged in the program. Only 20 of the participants are women.

Amnesty International welcomes the LEC program for young lawyers and commends the JRC for securing an agreement from the Supreme Court and the Ministry of Justice that all young lawyers who wish to be considered for judicial appointment must have successfully completed the LEC training. However, the organisation believes that this arrangement should be institutionalised and formalised in law in order to ensure that there is no ambiguity regarding the recognised qualifications for judicial appointment in Afghanistan.

The second training program is intended for sitting judges and prosecutors. The International Development Law Organisation (IDLO) has assumed responsibility for this training, which involves three-month, part-time training courses for serving judicial personnel. The IDLO had intended to start the first training cycle of 250 judges and prosecutors on 1 June 2003. However, a number of problems, including the absence of a properly planned and appropriate curriculum, stalled the initial commencement of this program, which started in August 2003. The IDLO programme provides training to judges and prosecutors together. Given the short duration of these part-time courses, this raises questions as to whether it will be possible to equip both professional groups with the very different legal skills that they require to carry out their duties.

There is an evident lack of communication between the IDLO and the LEC. The lack of co-ordination was obvious in meetings with IDLO and the JRC. For example, IDLO

representatives stated that they would eventually assume responsibility for the young legal professional training, taking it away from the LEC. However, the JRC informed Amnesty International delegates that they had no knowledge of this plan and that they would not support such a move. The failure of IDLO to properly co-ordinated its work with the LEC also raises concerns over the consistency of the two curricula. In addition, the failure of both the LEC and IDLO to devise a programme of training for independent lawyers is of considerable concern.

Amnesty International is also extremely concerned that IDLO has decided not to include training on the human rights of women and gender sensitivity in the curriculum. IDLO informed Amnesty International delegates that training on women's human rights will not be included as it is "too sensitive for Afghans". However, this view conflicts with those expressed by many senior Afghan judges and law professors who informed Amnesty International delegates that they would welcome training on human rights, including the rights of women.

It is regrettable that neither IDLO nor LEC plan to conduct any training programs outside of Kabul. Participants from outside of Kabul who are currently attending the LEC training have experienced financial and other problems with relocation to Kabul. In addition, interviews by Amnesty International delegates outside of Kabul indicate that family, financial and security considerations will prevent a large number of sitting judges and prosecutors from attending any planned training in the capital. Frustrated with the lack of training outside of Kabul, UNHCR organised a four-day training for judges in Nangarhar. Amnesty International believes that there is an urgent need to plan training programs outside of Kabul.

5.3 Under-representation of women in the judiciary

Gender inequality in Afghanistan permeates into the judiciary where women are greatly under-represented. While, at the time of writing, no exact statistical data pertaining to the number of women judges was available, a Supreme Court representative informed Amnesty International delegates that out of a total of 2,006 sitting judges, only approximately 27 are female.[16]

With the exception of the heads of the juvenile and family courts in Kabul, women are excluded from key positions within the judiciary. In addition, where women do serve as judges they do not perform the same functions as their male counterparts. Female judges tend to act in the capacity of judicial clerks and are rarely involved in the adjudication of cases. There were no women judges present at any of the 17 proceedings observed by Amnesty International.

In interviews with Amnesty International, a number of senior judges expressed a lack of concern for, and even resistance to, the greater inclusion of women in the judiciary. The lack

[16] The organisation was unable to ascertain the number of women prosecutors.

of concern with the under-representation of women is evident in the fact that neither the Supreme Court, Ministry of Justice nor the Attorney General's Office hold any statistical data on the number of women judges and prosecutors. Furthermore, in interviews with Amnesty International delegates, many senior judges expressed outright opposition to increasing the number of women judges. Other judges informed the organisation that if there were to be more women in the judiciary then it would only be appropriate for them to serve in the family and juvenile courts. When Amnesty International delegates asked the Chief Justice whether he had a strategy for increasing the number of women judges, he informed the organisation that "there are many unemployed men and our priority is to provide jobs for them. Once the problem of male unemployment has been resolved then we will turn our attention to women".

In March 2003, Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW places an obligation on the government of Afghanistan to ensure the right of women to hold public office and perform all public functions at all levels of government.[17] In addition, both CEDAW and the ICCPR ratified by Afghanistan in 1983 set out that, where necessary, governments should undertake affirmative action to ensure that men and women enjoy equal rights.[18] Amnesty International's research demonstrated that while approximately 25 percent of law students at the University of Balkh and Kabul are women, only approximately 1.3 % of judges are women. Amnesty International believes that affirmative action must be taken to ensure greater participation of women in the Afghan judiciary.

Amnesty International recommends that a fast-track program for training women judges be initiated without delay. The organisation believes that women law graduates should be targeted for recruitment into the LEC training program and that the requirement that participants be employees of the Supreme Court, Ministry of Justice or the Attorney General's Office be waived. The LEC should aim to admit more women to the training each year and take positive steps to ensure that women are recruited. The international community must provide financial support to the LEC and women lawyers to ensure that they are able to engage in the training program. After successful completion of the LEC training, the Supreme Court should actively ensure that properly qualified women are nominated for judicial appointment.

5.4. Recommendations:

- **Cease appointments of unqualified judges:** The Supreme Court and the President must ensure that all persons appointed as judges possess the qualifications required by law. The President's office must compile a public register of judicial qualifications. In addition, the qualifications of each candidate must be viewed by the President's office prior to judicial appointment.

[17] Article 7, CEDAW.
[18] Article 4, 3, 2 and 5 CEDAW; Article 3, ICCPR and Human Rights Committee General Comment 28.

- **Fast track program for women judges:** In order to remedy gender imbalance within the judiciary a fast track program for women lawyers must be initiated. Female graduates from the law school and qualified female lawyers should be identified for recruitment to the LEC. There should be no requirement that these women lawyers are employees of the Ministry of Justice, Supreme Court or Attorney General's office. The international community must assist in the establishment of this program, by providing financial assistance to both the LEC and women lawyers targeted by the program. Those candidates who successfully complete the LEC program should be targeted for recruitment into the judiciary.
- **Institutionalise and support the development of the Legal Education Centre (LEC):** The international community must fully support the development of the LEC. The LEC young lawyers program must be institutionalised and provided with a legal basis. The international community must ensure that the LEC is able to properly able to oversee and co-ordinate all legal training programs, including the IDLO legal training centre, in association with Afghanistan's Universities. In addition, the LEC must develop a training program for independent lawyers as a matter of urgency.
- **Training:** The JRC, IDLO and donor governments must co-ordinate judicial training projects. In addition, judicial training projects outside of Kabul must be implemented as a matter of urgency. Judges and prosecutors should be provided with separate training courses that reflect their different professional needs. All judicial trainings must include practical legal skills. Furthermore, all training programs must include human rights, including the rights of women. Amnesty International offers this report, specifically Chapter 7 on violations of the right to a fair trial as a diagnostic tool highlighting relevant areas of international and domestic law that should be incorporated into human rights training.[19]

6. The independence of the judiciary

There is currently a lack of confidence in the courts and judicial personnel. Altering such perceptions will depend, in part, on demonstrating that the Afghan judiciary is free from political and economic influences and that it is not compromised. Article 97 of the 1964 Constitution and the Bonn Agreement guarantee the independence of the judiciary.[20] However, at present, the judiciary does not receive the support necessary to ensure that it is free from outside influences. As a consequence, the independence of the judiciary is being undermined by political interference from certain armed groups, persons holding public office

[19] See also: '*Amnesty International's 12-point guide for good practice in the training and education of human rights for government officials*' AI Index: ACT 30/1/98.
[20] Part 11(2) of the Bonn Agreement states that "the judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan and other such courts as may be established by the Interim Administration".

and private individuals. In addition, economic influences have led to a widespread problem of corruption.

6.1. Threats to the independence of the judiciary

Amnesty International is concerned that the judiciary does not currently receive the required support to resist the pressures upon it. The failure of the international community to terminate the influence of armed groups and to improve security has left the judiciary extremely vulnerable. In addition, the failure to ensure proper security for the courts, judicial personnel, victims and witnesses has undermined further the capacity of the judicial system to act independently. As a consequence, certain individuals remain above the law because of their place in the community or because they are able to use threats, intimidation and other forms of pressure to influence judicial proceedings.

Pressure, including threats and intimidation, by armed groups

Amnesty International has documented a number of cases where there is evidence of interference in the work of the judiciary by armed groups. In all of the main prisons visited by Amnesty International delegates, the organisation met so-called "political prisoners".[21] That is, persons held extrajudicially upon the order of a member of an armed group or on suspicion of being associated with the former Taleban regime. In one prison, Amnesty International met with three "political prisoners" who had been detained for over a year and who had never been charged or gone before a court. When Amnesty International sought clarification of the status of these prisoners from prison authorities, the organisation was informed that the commanders were responsible for their detention and that they had prevented the court from dealing with their cases. When the Amnesty International delegates asked the competent court about these detainees, judges explained that it was "too dangerous" for them to deal with their cases due to "political influences".

Furthermore, there is also evidence of threats being exerted upon members of the judiciary with the aim of ensuring that certain persons remain above the law. A number of judges, prosecutors and Ministry of Justice officials interviewed by Amnesty International in Herat, Jalalabad and Mazar-e Sharif stated that they had received threats from armed groups. In one case documented by Amnesty International, prosecutors were forced to drop an investigation into a double murder after being threatened by armed men. Prosecutors working on this case informed Amnesty International delegates that there would be no prosecution "because the murder suspect belongs to a commander's family". In another region, public security court judges stated that they had been prevented from dealing with cases involving serious crime, including drug related offences, after being threatened by armed men. In another region,

[21] The Afghan authorities use the term "political prisoner" to denote a person who is held extrajudicially. Persons referred to as "political prisoners" by the Afghan authorities were found in all central detention facilities visited by Amnesty International. For example, in Herat central prison, the organisation learned that there were 25 "political prisoners".

judicial officials reported that armed gunmen had come to their offices on two occasions to ensure termination of judicial involvement in a number of property cases.[22]

Interference in the judicial process by persons holding public office

Amnesty International has also documented cases where there is evidence of interference in the work of the courts by persons holding public office in Afghanistan. One case involved a young woman who was initially held as a material witness in a murder case in January 2003. She was subsequently charged with unlawful sex before marriage before being released one month ago.[23] The victim in the murder case was the son of a local governmental official. After spending four months in detention, the young woman was released by an order of the Primary Court. However, political interference in the case prevented the young woman's release. After the court ordered her release, it is reported that she was summoned to the head of the Provincial Court who informed the young woman that the head of the local government official was a friend of his and that he would not allow her release.

In the same region, it was reported that the District Governor frequently interferes in the work of the judiciary and that he takes the final decision in all cases involving "political prisoners", girls and women defendants.[24] In this region, it is reported that the prison authorities do not release prisoners until they have received the decision of the District Governor regardless of whether there is an order from the competent court ordering release.

Pressure on the judiciary from family members

There is a widespread pattern of family members putting pressure upon the courts in order to ensure that a relative, who has not acted in accordance with their wishes, is detained. The problem is particularly acute in cases involving girls and young women who resist forced marriages or who wish to marry men against the wishes of their family. Amnesty International interviewed a number of girls and young women in prison whose families had put pressure on the police and courts to ensure their arrest and continued detention after they had refused to marry in defiance of their families. The legal basis for these detentions was, in most cases, unclear.[25]

In one case, the father of an 18 year old woman initiated the arrest and prosecution of his daughter after she refused to marry a cousin. The young woman had informed her family that she wished to marry a different man. However, her parents insisted that she marry her cousin and when she refused her father put pressure on the police to facilitate her arrest. At her first court appearance, the judge informed the young woman that she was being detained for "wishing to marry without her parents' consent". However, the young woman was

[22] In that region, armed groups are reported to have forcibly seized a number of properties.
[23] The practice of holding material witnesses, though in violation of applicable law, was also noted in other cases. Amnesty International delegates met three other persons being detained where it appeared that the only reason for the detention was due to their status as a material witnesses in a criminal case.
[24] It was also reported that the governor has intervened in a number of minor criminal cases.
[25] Forcible marriage is prohibited under Article 23(3) of the ICCPR; See also: Article 8, ICCPR, Article 16(2) of the UDHR, Article 1, 1971 (1350) Afghan Law on Marriage and Chapter VII, 1967 (1355) Afghan Criminal Code.

subsequently subjected to two forcible virginity tests and informed that she was being charged with illegal sex before marriage.[26] Both the police and the court informed the woman that she would not be released from prison until such time as her family changed their minds and agreed to the marriage that she wanted.

While there is no evidence of corruption in this case, in other similar cases there are indications that family members provided financial incentives to judges in order to ensure that female relatives remain in prison. One case documented by Amnesty International involves a 14 year old girl who was sentenced to three years for leaving her husband.[27] The girl had been forcibly married by her family at the age of 13 and was reportedly subjected to physical and sexual abuse by her husband. A year after being married, the girl left her husband with the assistance of another man. It was reported that the family paid the judges to ensure her conviction.

6.2. Judicial corruption

There is a widespread problem of corruption amongst judges and prosecutors. Detainees in a number of regions of Afghanistan informed Amnesty International that judges and prosecutors had asked them, or their families, for money in return for their release. Prison staff also stated that judges and prosecutors routinely asked defendants for money and that prisoners who were able to pay were released from prison. The problem of corruption appears to affect every region of Afghanistan. However, it appeared to be particularly bad in Kabul. One detainee described the Kabul Welayat detention centre as "a business enterprise for the judges and prosecutors".[28]

Amnesty International has also documented cases where judges and prosecutors appear to have accepted bribes in return for not proceeding with certain cases. One case involved a 15-year-old girl who wanted to divorce her 60-year-old husband. The girl sought a divorce after being so badly abused by her husband that she required hospital treatment. After being discharged from hospital, the girl refused to return to her husband and went to live with her family who assisted her in approaching the court for a divorce. However, the girl's husband refused to grant a divorce and it is reported that he paid the judges in order to ensure that they did not proceed with the case. The girl's father, who took the case up on her behalf, stated that when he went to the court to follow up on the case he found that all the court documents, including statements from witnesses and medical professionals were missing. The following day armed men are reported to have visited the girl and informed her that she must return home. The girl then committed suicide by hanging herself.

[26] One of the virginity tests was performed by a male doctor.
[27] "Running away from home" is a crime in Afghanistan. See: Section 8.2.
[28] In Kabul, there are allegations that the judges in one of the city courts request detainees to send a "visitor" to the court. When the "visitor" arrives at the court a certain judge asks them for money in return for the release of the prisoner.

In another case, there is evidence that a prosecutor took money from a wealthy businessman to secure the arrest of two brothers who were believed to be his business rivals. At the time of Amnesty International's mission to Afghanistan, the two brothers had been held in a public security prison for over a year without being charged with a criminal offence. Commenting on this case, the Supreme Court informed Amnesty International that it had informed the public security court on a number of occasions that there was no basis for the brothers' detention. However, the Supreme Court stated that they had failed to secure the release of the men in this "political case" because heavy bribes had been paid to a prosecutor and judge.

6.3. Resources for the judiciary

The problem of judicial corruption is well recognised and was discussed by senior judges, Supreme Court representatives, ATA officials and members of the JRC. Many attributed the problem to economic hardship and, in particular, the low level and irregular payment of salaries. Judges in Afghanistan currently receive approximately $50 a month. In the provincial regions visited by Amnesty International between April and May 2003, judges and prosecutors had not received their salaries for three months.

It has been argued by some member of the Afghan judiciary that the problem of corruption could be tackled by immediately increasing the salaries of all judges. Amnesty International recognises that providing sufficient financial resources to the judiciary is an important safeguard against judicial corruption.[29] However, the organisation does not believe that current problems facing the judiciary can be automatically eradicated by merely increasing the funds available for judicial salaries.

The problems related to irregular and low-level salaries in the judicial sector do not appear to stem from a lack of financial resources. The Ministry of Justice stated to Amnesty International that in the current financial year there are sufficient funds within the "regular budget" to ensure the level salaries paid to judges and judicial personnel were sufficient for them and their families to survive. However, the Ministry of Finance stated that the irregular payment of salaries outside of Kabul was due to the absence of a safe method of salary distribution to the provincial regions.

Furthermore, the Ministry of Finance and individuals involved in civil service reform attributed the financial problems within the judicial sector to a problem of over-employment within Afghanistan's judicial institutions. Amnesty International notes that thus far there has been no independent assessment of the staffing levels required to service Afghanistan's judicial institutions as a part of the judicial reform process. Moreover, the unregulated appointment procedures have resulted in a problem of employment of a number of unqualified personnel.

[29] Principle 7, Basic Principles on the Independence of the Judiciary recognizes that "it is the duty of Member States to provide adequate resources to enable the judiciary to properly perform its functions".

6.4. Insufficient judicial oversight

According to the applicable law, the Supreme Court is responsible for oversight of the judiciary, including the investigation of judicial misconduct.[30] Within the Supreme Court, the Judicial Department and the Monitoring Unit have assumed dual responsibility for the investigation of judicial misconduct. However, despite the existence of these departments, there are indications that the judicial oversight mechanism is currently failing to effectively detect, investigate and act upon allegations of judicial misconduct, including corruption.[31]

There is an evident lack of transparency within the Supreme Court regarding its procedure for the investigation of judicial misconduct. Different departments of the Supreme Court provided Amnesty International with conflicting information about the manner in which cases are detected and investigated and the procedure for the impeachment of a judge. However, what was clear from discussions with the Monitoring Unit is that the court has no effective capacity to detect and investigate cases of misconduct outside of Kabul due to logistical and financial constraints. It was also apparent that the Supreme Court is only overseeing the lower judiciary and that there is currently no effective judicial oversight of the Supreme Court itself.

In addition, the Supreme Court has no functioning public complaints mechanism. The court informed Amnesty International that members of the public who wished to make a complaint against a judicial officer could "bring a letter to the Supreme Court". Thus, the procedure for lodging a complaint against a judicial officer is wholly inaccessible to persons held in detention and any person living outside of Kabul city. Given the current lack of an effective and accessible judicial oversight mechanism, it is not surprising that despite the large number of allegations of judicial misconduct, there have been very few proven cases over the past year.[32]

The Supreme Court is currently responsible for both recommending candidates for judicial appointment and for investigating judicial misconduct. The current lack of effective oversight of judicial misconduct suggests that the independence and impartiality of the Supreme Court's judicial oversight function is being compromised by its role in the judicial appointments process and that the dual functions assumed by the court may represent a conflict of interests. A similar conflict of interests appears to exist within the Attorney General's Office, which is responsible for both the appointment and oversight of public prosecutors. Amnesty International recommends that the dual roles of appointment and oversight of personnel

[30] Articles 99 and 106, 1964 Constitution and Chapter 4, 1967 (1346) Law on the Jurisdiction and Organisation of the Courts.

[31] One senior member of the JRC informed Amnesty International that; "the judicial oversight department of the Supreme Court is not efficient and is not dealing with the problem of corruption".

[32] Conflicting information regarding the number of cases of judicial misconduct was given to Amnesty International by different departments within the Supreme Court. The Chief Justice stated that there had been 10-12 such cases in the past year. However, the Judicial Department stated that there had been 150 cases of judicial misconduct, but that all of them were "unfounded". The Monitoring Unit stated that there had been three proven cases of judicial misconduct in the last year.

assigned to the Supreme Court and the Attorney General's Office be assigned to independent bodies.

6.5. Recommendations:

- **Increase security throughout Afghanistan:** Security is a pre-condition for the rule of law and it is essential for creating an environment in which the judiciary can operate independently. The international community must take immediate steps to institute measures to ensure an effective level of security and human protection throughout Afghanistan, including by giving active consideration to the extension of ISAF's mandate. In addition, the demobilisation, disarmament and reintegration process must be strengthened and expanded.
- **Security for Afghan courts:** The ATA and the international community must devise effective measures to ensure the security of the courts and judicial personnel in consultation with international courts and with states that have effective court security programs, particularly witness protection programs. Effective measures to protect judicial personnel, witnesses and victims must be developed as a part of the judicial reform strategy. In addition, trained and accountable police must be attached to the Afghan courts in order to ensure basic security.
- **Review staffing requirements within Afghanistan's judicial institutions with a view to streamlining:** A comprehensive review of staffing levels within the Supreme Court, Ministry of Justice and Attorney General's office must be initiated. This review must seek to identify the number of judges, prosecutors and judicial personnel required to staff Afghan courts with a view to streamlining. Within the context of the review, those persons found not to possess the required qualifications must be removed from office in procedures that guarantee the process and preserve the independence of the judiciary. Amnesty International recommends that this review be overseen by the Civil Service Commission within the context of the planned reform of the civil service. After reviewing and streamlining staffing within judicial institutions the ATA should raise judicial salaries.
- **Establish a judicial services commission:** In order to ensure effective oversight of judges and prosecutors, a judicial services commission should be established. The judicial services commission should be given a mandate to investigate misconduct, hold a central record of judicial qualifications and be responsible for the establishment of a public complaints' mechanism. The judicial services commission should have the power to trigger a criminal investigation into any cases of alleged criminal activity by judges and prosecutors.

7. Violations of the right to a fair trial

One of the cornerstones of the rule of law is the notion of the right to a fair trial. The right to a fair trial is designed to ensure that all individuals are protected by law throughout the criminal process, from the moment of detention right up until the final disposition of their case. Afghanistan's international legal obligations under articles 9, 10 and 14 of the ICCPR entail a right of all persons to a fair trial. The right to a fair trial is also set out in other international instruments, including the Rome Statute.[33]

The right to a fair trial is also guaranteed in Afghan law. Most notably, articles 25 and 26 of the Afghan Constitution, which set out the "basic rights and duties of the people", include a number of important provisions related to the right to a fair trial.[34]

However case monitoring and trial observation by Amnesty International indicate that the Afghan criminal justice system currently lacks the ability to ensure that persons accused of criminal offences are afforded their right to a fair trial.[35] The extremely serious and widespread violations of the right to a fair trial highlight the complex range of issues that must be tackled in developing a criminal justice system that fully protects the rights of both suspects and victims.

7.1. Violations of the right to a fair trial in the pre-trial stage

The right to be brought promptly before a judge

All persons deprived of their liberty have the right to be brought promptly before a judge or judicial officer.[36] While international human rights law does not prescribe an exact time-limit within which a detainee should be bought before a judge, jurisprudence suggests that "delays should not exceed a few days".[37] The right to be bought promptly before a judge is an essential safeguard that protects against arbitrary detention and torture and ill-treatment.

However Amnesty International has observed that this fundamental right is being systematically denied to persons deprived of their liberty in Afghanistan. In the course of

[33] See Article 55, Rome Statute, 1955 Standard Minimum Rules for the Treatment of Prisoners, 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. For a commentary and analysis see: Amnesty International "*Fair Trials Manual*", AI Index POL 30/02/98.

[34] Article 25 of the 1964 Constitution guarantees equality before the law. Article 26 provides the right of all persons to liberty and dignity, the presumption of innocence, an open trial, defence counsel and it protects against retroactive application of law, torture, cruel, inhuman and degrading treatment and arbitrary arrest and detention. Furthermore, Article 100 guarantees the right to a public trial.

[35] Amnesty International delegates observed 10 trials and seven pre-trial proceedings and conducted case monitoring in Bamiyan, Jalalabad, Kabul, Herat and Mazar-e Sharif between March and May 2003. Amnesty International also carried out extensive interviews with detainees and prisoners in these areas and in Kandahar and Kunduz in the period September 2002-March 2003.

[36] Article 9(3), ICCPR.

[37] Human Rights Committee General Comment 8, para. 2.

substantial case monitoring and interviews with hundreds of detainees, the organisation did not identify a single detainee who had been brought before a judge or judicial officer within one month of the date of their initial detention. The organisation found that it was in fact normal for detainees to be held for up to three months before being bought before a judge. Moreover, the organisation documented over 20 cases where detainees, including children, were held for up to eight months before being brought before a judge.

The right to challenge the lawfulness of detention

The right to challenge the legality and obtain release if detention is unlawful is a fundamental safeguard. However, Amnesty International notes with concern that there is currently no mechanism in place in Afghanistan to ensure that detainees are able to challenge the legality of their detention. The lack of an effective mechanism by which to challenge the legality of detention represents a basic but critical omission to the applicable law.[38]

Domestic law does, however, set out procedures for ensuring regular judicial reviews of detention.[39] However, Amnesty International found that these procedures were disregarded and that detention reviews that were conducted were done in closed hearings, conducted in the absence of the detainee. Moreover, case monitoring demonstrated that the outcome of detention reviews was often not recorded in the court file and that there was a failure on the part of the court to inform the prison authorities or the detainee of the outcome.

Violations of the right to defence and notification of rights

Afghanistan's international and domestic legal obligations include a right of all persons suspected of criminal offences to defend themselves in person, or with the assistance of legal counsel and the right to be notified of this right.[40] However, the international and domestic guarantees related to the right to defence are not implemented. Currently detainees have no access to legal counsel or the facilities necessary to prepare their defence during pre-trial proceedings (including during interrogations in police custody, interviews with the prosecutor and during pre-trial hearings).

It is highly exceptional for a detainee to be notified of their right to defence counsel by the police or the public prosecutor. In extensive interviews with individuals deprived of their liberty, Amnesty International was not able to identify a single detainee who had been offered the assistance of legal counsel during the pre-trial stage.

Without the essential safeguard of defence at this crucial stage of the investigation, Amnesty International found that confessions were routinely elicited by the police by the use of torture. The organisation documented numerous cases where detainees held in police custody were forced to sign confessions after being beaten with electric cables or metal bars or being given

[38] Article 9(4) of the ICCPR recognizes this right.
[39] Chapter VII, 1976 (1355) Afghan Criminal Procedure Code.
[40] For example, Article 14(3) ICCPR; Article 26(l) 1964 Constitution; Articles 1, 2 and 9, 1972 (1351) Law on the Organisation of the Defence Attorneys (Defence Law).

electric shock treatment. Some detainees also described being hung by their arms, sometimes for several days while in police custody.[41]

Amnesty International also noted a number of other practices employed by the police and prosecutors that tend to undermine detainees' right to defence. For example, the organisation noted the widespread failure on the part of prosecutors and the police to read back statements taken in custody to detainees before they are signed. Some detainees also reported being told to sign other documents by the police and prosecutors without being given an opportunity to read them before providing a signature.

Arbitrary arrest and detention

International human rights law and applicable Afghan law require states to take a series of protective measures to ensure that individuals are not deprived of their liberty unlawfully or arbitrarily.[42] The practice observed by Amnesty International of holding "political prisoners" extrajudicially, violates this provision.[43]

International law and standards not only require that an arrest or detention must not be arbitrary, but they must also be on grounds, and according to procedures, established by law. Thus, a detention can become arbitrary where there are elements of injustice, lack of supervision by judicial or other bodies and where they violate the procedures set out by domestic and international law.[44]

Amnesty International observed a widespread failure on the part of the police, prosecutors and judges to follow the Afghan Criminal Procedure Code when dealing with persons deprived of their liberty on suspicion of committing criminal offences. In particular, the organisation observed that the provisions relating to supervision of detainees in the initial stages of detention were largely ignored. Under the applicable law, the police are authorised to hold a detainee for up to a maximum of 72 hours, after which time the case must be referred to the public prosecutor who can authorize the detention for a further seven days. After seven days the person must be charged by a judge or released.[45]

However, Amnesty International found that the majority of detainees are kept for over a week by the police and that in some cases, the police held suspects for weeks and sometimes even months.[46] The organisation also found that prosecutors were failing to adhere to domestic detention procedures by not charging detainees and by failing to refer their cases to the courts within the one-week limit. For example, Amnesty International delegates interviewed a British man who had been held for five weeks by the police and a further seven weeks on the order of the public prosecutor. Whilst being detained in police custody, this man was held for

[41] See for example: Amnesty International "*Afghanistan: police reconstruction essential for the protection of human rights*", AI Index: ASA 11/003/2003.
[42] Article 9(1), ICCPR, Article 26(a) and (b), 1964 Constitution.
[43] See: Section 6.1.
[44] See: *Mukong v Cameroon*, (458/1991), 21 July 1994, UN. Doc. CCPR/C/51/458/1991, p.12.
[45] See: Chapter 3, 1976 (1355) Afghan Criminal Procedure Code.
[46] See for example: Amnesty International "*Afghanistan: police reconstruction essential for the protection of human rights*", AI Index: ASA 11/003/2003.

approximately two weeks in an unofficial detention facility located in the basement of the Ministry of Interior in Kabul.

The organisation is concerned that prolonged periods of pre-trial detention, in the absence of safeguards such as judicial supervision and access to defence counsel, leave adult and child detainees susceptible to other human rights violations such as torture, or cruel and inhuman treatment. In addition, the current absence of safeguards for detainees held for extended periods in pre-trial detention raises serious questions regarding the legality of their detention.

The right to trial within a reasonable time

Detainees also have the right to trial within a reasonable time.[47] This right has been interpreted to mean that the authorities must act with particular expedience and urgency when an accused is subject to a deprivation of liberty before he has been proven guilty of a criminal offence.[48]

With regard to juvenile suspects, international human rights law sets out that "arrest, detention or imprisonment of a child should be used as a measure of last resort and for the shortest possible time".[49] However, despite these guarantees, Amnesty International observed that prolonged pre-trial detention was the norm.

In all of the major prisons visited by Amnesty International, the organisation met detainees who had been subjected to extended periods of pre-trial detention, above and beyond the nine-month maximum time limit prescribed by Afghan law.[50] For example, in Kabul Welayat detention centre, Amnesty International delegates interviewed one detainee who had been held on suspicion of theft and assault for 11 months pending trail. Furthermore, in Jalalabad the organisation interviewed two detainees who had both been held for over a year awaiting trial. Similar cases were recorded in all detention centres visited by Amnesty International.

Amnesty International also interviewed children who had been held for extended periods in pre-trial detention.[51] In Mazar-e Sharif, out of a total of 13 boys who spoke to Amnesty International, four had been awaiting trial for over seven months. Moreover, none of the children interviewed had received detention orders or had any information regarding the status of their case, including the scheduled date of their trial.[52]

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[47] Article 9(3), ICCPR.
[48] Article 88, 1976 (1355) Afghan Criminal Procedure Code.
[49] Article 37 and 40 CRC. Currently under Afghan law a juvenile is defined as a person under the age of 15. It is recommended that the law be amended to ensure that all persons of 18 years or under are recognised as children.
[50] Article 87, 1976 (1355) Afghan Criminal Procedure Code.
[51] Article 40 of the CRC sets out provisions for the treatment of children accused of criminal offences.
[52] The cases of these children are a matter of concern due to the fact that they are being detained with adult detainees and convicted prisoners. Prisons outside of Kabul do not have the facilities to separate adults and children. See Amnesty International *"Afghanistan: Crumbling prison system desperately in need of repair"* AI Index: ASA 11/017/2003.

The right to the presumption of release pending trial

In accordance with the right to liberty and the presumption of innocence, people awaiting trial on criminal charges should not, as a general rule, be held in custody.

However, there are certain circumstances in which the authorities may impose conditions on a person's liberty or detain an individual pending trial – including when it is deemed necessary to prevent the suspect from fleeing, interfering with witnesses or when the suspect poses a clear and serious risk to others.[53] However, in Afghanistan, determinations regarding detention of a suspect pending trial rarely appeared to involve an examination of these circumstances. Rather, interviews with judicial personnel and detainees indicated that determinations regarding detention, when they did occur, revolved around the question of whether the prosecutor had collected any evidence. Where the prosecutor had failed to collected any evidence, detainees were kept in detention pending the discovery of such evidence.

7.2. Violations of the right to a fair trial during the trial and appeal stages

The right to call and examine witnesses

A fundamental element of a fair trial is the right of the accused to call and examine witnesses at trial. This right, which is guaranteed under applicable international and national law, ensures that there is an opportunity for the accused to examine and challenge the evidence against him or her.[54] However, during the course of trial observation Amnesty International discovered that it was exceptional for witnesses to be presented in criminal trials. No witnesses were present, or called to court, in any of the 10 trials observed by Amnesty International delegates. In three of these trials, defendants asked for witnesses to be called. However, in all three cases, all the defendants' requests were either ignored or denied by the judge. While it is not known whether these witnesses could have provided exculpatory evidence, the courts refusal to call or examine any defence witnesses represents a serious violation of the right to a fair trial.

For example, after one trial in which the accused was found guilty of theft, Amnesty International delegates asked the judge why he had denied the suspect the right to call witnesses. The judge replied by stating that the proceedings would take "too much time if witnesses were called", and that, in any case, if the court did summon witnesses, the police were "not professional" and would fail to assist the court in summoning witnesses.

In five of the trials observed by Amnesty International, the judges or the prosecutor indicated that witnesses' testimony, including statements from the victim, were included in the criminal investigation file. However, in none of the other trials observed were witness statements, referred to during trial, read out in court nor was their any indication that the witnesses had been properly examined during the investigation stage. Amnesty International is seriously

[53] Article 9(3) of the ICCPR.

[54] Article 14(3), ICCPR, Articles 221 and 222, 1976 (1355) Afghan Criminal Procedure Code and Article 55, Rome Statute.

concerned that failure to read out the full statements in court denied the defendants the opportunity to hear and examine the evidence against them. In a number of other trials, the total absence of any references to witness statements indicated a failure, on the part of the prosecution, to identify and collect relevant evidence and statements pertaining to the alleged crime.

The presumption of innocence

A fundamental principle of the right to a fair trial is the right of every person to be presumed innocent until proven guilty beyond reasonable doubt and according to law after a fair and public trial.[55] This right requires judges and prosecutors to refrain from pre-judging any case. The requirement of the presumption of innocence means that at trial the burden of proof is on the prosecution to demonstrate that the accused is guilty. If there is a reasonable doubt then the accused must not be found guilty.[56]

However, in the trials observed by Amnesty International in Herat, Mazar-e Sharif and Kabul the presumption of innocence tended to be undermined by attributes of guilt being borne by the accused. For example, in a number of courts, defendants remained shackled during trial. In addition, the language and actions of some judges and prosecutors indicated a presumption of guilt. For example, in three trials observed, the presiding judge turned to defendants who had pleaded not guilty and asked them why they had committed the crime.

Moreover, in the majority of trials, the court found the accused to be guilty despite the fact that there appeared to be a reasonable doubt that the accused had committed the alleged offence. Amnesty International believed that reasonable doubt existed due to the fact that in these cases the prosecution failed to present witnesses or other evidence against the accused during both the investigation and trial stages.

For example, one trial involved a juvenile defendant who was sentenced to one year of imprisonment for attempted murder by the primary court. The boy had been accused of going to the home of the alleged victim with a group of 12 men, including a "commander" and demanding money. It was alleged that when the victim refused to give the group of men money, the boy shot the victim in the leg with an AK47. The juvenile defendant denied the charges and told the judges that he had initially confessed to being at the scene of the crime after being beaten by the police. After the defendant pleaded not guilty, the judge accused the defendant of lying. Moreover, during the trial, the prosecutor presented no physical evidence or witnesses, such as a statement from the alleged victim of the crime. In court the boy asked for the alleged victim to be called, however, judges refused this request. The judges eventually found the defendant guilty on the basis that he had a criminal record and that he had confessed to the crime. However, at no stage during the proceedings was a confession read out in the court.[57]

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[55] Article 14(2), ICCPR.

[56] See: Human Rights Committee General Comment 13, para.7.

[57] Moreover, the judges' discussion on sentencing revolved around the question of whether the victim had sustained heavy or light injuries as a result of the shooting. The judges proceeded with this discussion, despite the fact that no medical examination of the victim was included in the court file.

In another case, at a pre-trial hearing involving a British man accused of murder, the prosecutor stated in open court that he would not disclose any evidence to the accused as it was "up to the defendant to prove his innocence to the court". Amnesty International delegates also observed a court pronouncing a man guilty of theft that had been allegedly committed by the defendant's son. The judges stated that in the absence of the defendant's son, they were trying his father for the alleged crime. During the trial, the prosecutor did not produce any evidence or witnesses. The accused, who had been in detention pending trial for seven months, was sentenced to five years' imprisonment.

Exclusion of evidence elicited as a result of torture or other compulsion

Afghanistan's national and international legal obligations set out that evidence, including confessions, elicited as a result of torture or other compulsion must be excluded by the court.[58] However, Amnesty International delegates were present at three trials during which the defendant claimed that their initial confession had been given after being tortured by the police. In all three trials, the courts failed to stop the trial proceedings and examine the defendants' torture allegations in any other way. For example, in one trial in Kabul, a defendant charged with theft stated that he had confessed to the crime after being beaten by the police. However, the court ignored the allegation and proceeded to find the defendant guilty and sentenced him to seven months imprisonment. During the trial no witnesses or physical evidence were presented in court.

Amnesty International believes that wherever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held before such evidence is admitted in the trial. At such a hearing, evidence should be taken on whether the statement in question was made voluntarily, then it must be excluded from evidence in all proceedings except those brought against those accused of coercing the statement. Furthermore, whenever there are reasonable grounds to believe that an act of torture has been committed a prompt and impartial investigation must be initiated, including a medical examination of the alleged victim.[59]

Violations of the right to defence and access to information

It is extremely rare for a defendant to be represented by a defence counsel at trial. Defence counsel was not present at any of the pre-trial and trial proceedings against Afghan detainees observed by Amnesty International.[60] Furthermore, the organisation was not able to identify a single Afghan detainee who had engaged, or received any form of advice, from a legal representative during any stage of the criminal proceedings.

Amnesty International observed this trial with a representative from the AIHRC who stated that due to the presence of "foreigners" in court the boy received a very light sentence.

[58] Article 15, CAT, Article 26(k), 1964 Constitution.

[59] Articles 12 and 16, CAT.

[60] During only two trials observed by Amnesty International were defendants notified of their rights and asked whether they wished to engage a lawyer. However, in neither case was the defendant prepared to stop proceedings to engage a lawyer whose services they were unable to pay for.

As a result of the complete absence of access to defence counsel, the only manner in which a defendant can present a defence is if they are able to do it themselves. Under the circumstances, it is extremely important that the defendant have the access to information and documents pertaining to their case, including the evidence against them, in order for them to be able to prepare a defence.[61] Amnesty International delegates noted, however, that it is highly exceptional for defendants to be provided with any information, documents or other resources required for preparing a defence.[62]

In fact, none of the detainees interviewed by Amnesty International had been given access to any documents relating to their case prior to trial. Furthermore, the organisation discovered that the majority of accused persons are not provided with basic information relating to the criminal proceedings, including written notification of the charges, detention decisions, judgements and sentencing orders. Moreover, the majority of detainees interviewed stated that they had not been given advance information regarding scheduled pre-trial and trial proceedings and that they only discovered that they were to appear in court a few minutes before the proceedings commenced. Where detainees had managed to gain information about their case, it had been provided to them by family members who had visited the court on their behalf.

In the trials observed, defendants were able to respond to the allegations against them in court. However, many convicted prisoners interviewed by Amnesty International delegates stated that they had not been allowed to speak during the trial proceedings. One convicted prisoner stated that he was told to "shut up" by the judge when he attempted to defend himself in court. In another case, a number of persons present at the trial of a young couple accused of adultery independently reported that the presiding judge refused to read a written defence which had been prepared by the male co-defendant on behalf of both defendants. The basis of the allegation was that the female co-defendant was already married when she married the male co-defendant. In the defendant's written defence they had claimed that there was exculpatory evidence in the form of a letter from the female co-defendant's first husband, which stated that they were divorced. However, due to the judges' refusal to read, or consider in any way, the defence presented by the defendants, the male co-defendant was sentenced to 10 years' and the female co-defendant to six years' imprisonment.

The right to a public hearing

The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process and it is a means of protecting public confidence in the justice system.[63] The right to a public hearing means that not only parties in the case, but also the press and general

[61] Articles 14(3)(d) and 14(3)(b), ICCPR .

[62] A large number of defendants interviewed were illiterate and would, in any case, require the assistance of counsel.

[63] Article 14(1) of the ICCPR sets out that the press and public may be excluded from a trial for reasons of "morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires or…where publicity would prejudice the interests of justice". See also: Article 100, Afghan Constitution.

public has a right to observe how justice is being administered and what decisions are reached by the judicial system and to comment on the proceedings.

On three occasions, Amnesty International was denied access to closed trials. On one occasion, when Amnesty International delegates requested information as to why these trials were closed, the judge responded by asking delegates to inform him of the type of trial they wanted to observe so that such a trial could be "organised".[64] Moreover, judges in Herat, Jalalabad, Mazar-e Sharif and Kabul made no attempt to conceal the fact that the primary, provincial and public security courts regularly held closed or "secret" trials.[65] Furthermore, Supreme Court judges informed Amnesty International delegates that all criminal appeal proceedings within the court were closed not only to the public and that they were in fact conducted without the accused being present.

Amnesty International is extremely concerned that the practice of holding closed hearings may undermine public confidence in the judicial system and lead to violations of the right to a public hearing.

7.3. Urgent need to build the capacity of independent lawyers

The current absence of the right to defence is a serious problem that must be remedied in order to ensure that Afghanistan develops a criminal justice system that respects both the rights of victims and the accused.

The Afghan Defence Law recognises a right of all persons to defence counsel and establishes a system of state funded legal aid.[66] The Defence Law also envisages the establishment of a "Defence Attorney Administration", located within the Ministry of Justice, which is responsible for the registration, organisation and regulation of defence attorneys.[67] However, this system envisaged under the applicable law is currently not functioning.

The collapse of the system for the organisation of independent defence lawyers and for the provision of legal aid can be attributed, in part, to historical factors. Independent lawyers have never featured prominently in the Afghan legal system. This factor, coupled with the political turbulence of the past 23 years and the absence of effective legal training means that there are very few qualified defence lawyers working in Afghanistan today. However, Amnesty International found that claims by the JRC, UNAMA and a number of international legal

[64] During a visit to one court, Amnesty International delegates were not able to gain access to proceedings due to the fact that there was "no evidence or any prosecutors present at today's trials".
[65] In Kabul and Mazar-e Sharif, Amnesty International delegates were prevented from observing certain proceedings in the city courts on the basis that they were not public trials.
[66] Article 10 of the 1972 (1351) Defence Law envisages free legal assistance by the state for persons who are financially unable to engage legal assistance.
[67] Article 3, 1972 (1351) Defence Law.

experts that there are no independent lawyers to be inaccurate.[68] Amnesty International delegates discovered that the Ministry of Justice holds lists of registered independent lawyers in all the provincial regions in which it operates. Amnesty International delegates located and interviewed 15 independent lawyers and 6 lawyers' associations in Herat, Jalalabad, Kabul and Mazar-e Sharif.

Discussions with lawyers demonstrated that it was rare for them to engage in criminal defence work, due to economic difficulties experienced by detainees and by the lawyers themselves. Amnesty International delegates noted that the majority of detainees do not have the resources to pay for legal assistance.[69] In addition, the current absence of a legal assistance program rules out *pro bono* legal aid to detainees and, in turn, payment to lawyers engaging in criminal defence work for impoverished clients by the state.

The JRC has recognised that the absence of defence lawyers represents a serious gap in the Afghan criminal justice system. Thus far the JRC has attempted to address this issue by redrafting the Defence Law. The JRC has also stated that it plans to facilitate the creation of an independent bar association.[70] However, no donors have been identified to support this project. Amnesty International welcomes these initiatives by the JRC and notes that the creation of an independent bar association, capable of overseeing and organising the work of defence lawyers, is an essential component of the judicial reform program.

However, Amnesty International believes that this ambitious plan – which currently lacks donor support – should not detract from the identification and implementation of immediate measures to build the capacity of independent lawyers. Amnesty International believes that there are practical measures that should be taken immediately with the aim of assessing and building the capacity of existing, and potential, independent lawyers.

The failure of the JRC and the Italian government to include an assessment of the existing capacity of independent lawyers as a part of the recently completed judicial survey should be remedied forthwith. Amnesty International believes that the starting point for supporting the development of independent lawyers should be a capacity assessment. The organisation recommends that an immediate survey of independent lawyers be carried out in order to review current capacity, including numbers and regional location of independent lawyers. This assessment should also include a survey of recent graduates of law faculties in order to identify persons who may be qualified to train as independent lawyers.

Amnesty International also recommends that the JRC and the LEC, with the assistance of the international community, immediately devise a training program for independent lawyers in close consultation with civil society and independent lawyers' associations. Amnesty International is concerned that the current JRC plan to train only lawyers and judicial

[68] The JRC informed Amnesty International that there are "only four or five independent lawyers in Kabul". However, the organisation found there were in fact well over 30 independent lawyers in Kabul.
[69] Amnesty International delegates were informed by a number of detainees that if they had the money to pay for legal assistance they would prefer to use the money to "pay their way out of prison".
[70] In a list of priorities recently distributed by the JRC, the creation of a bar association ranked as priority number 17. Priority number one was listed as resettlement of the JRC to a new location.

personnel who work for the state, will serve only to perpetuate, rather than reform, a legal system which is already heavily weighted in favour of the prosecution. In the absence of any training for newly qualified graduates who are not employed by judicial institutions there is currently no incentive or encouragement for young lawyers to consider an independent career. This absence represents a serious gap in the judicial reform strategy.

Amnesty International also recommends the creation of a legal assistance program for persons accused of criminal offences, but who do not have the economic resources to engage legal assistance. The organisation believes that in the interim period, until such time as an independent bar association can be created, the international community must provide the Ministry of Justice with the financial resources to ensure that registered lawyers are able to provide legal assistance to detainees.[71] Amnesty International recommends that this initiative be supported by the creation of legal aid clinics within Afghanistan's universities. Such a program, if supported by the Ministry of Justice and the international community, could hold the potential to further encourage the development of independent lawyers.

7.4. Urgent need for legal reform to protect the human rights of detainees

The Bonn Agreement states that the existing law is only applicable in so far as it is consistent with Afghanistan's international legal obligations.[72] However, case monitoring and trial observation by Amnesty International revealed that provisions of the criminal law and criminal procedure code that are incompatible with international human rights law continue to be applied. Given that a number of these provisions result in serious violations of human rights, there is an urgent need to reform the law in order to ensure that it is conformity with Afghanistan's international legal obligations.[73]

The new Constitution

Drafting the new Constitution presents the people of Afghanistan with a unique opportunity to establish a judicial system that is firmly based upon the rule of law, including universally accepted standards of human rights. Afghanistan is party to a number of important human rights treaties, including the ICCPR, ICESCR, CAT, CRC, CEDAW and the Rome Statute. These instruments recognise a comprehensive set of rights, which are universal and indivisible.

[71] The Supreme Court has established a Legal Assistance Department (LAD) with the stated aim of providing free legal assistance to detained persons. The LAD has no basis in law and has no capacity to provide free legal assistance. The establishment of the LAD appears to a part of the Supreme Court's turf war with the Ministry of Justice.

[72] See: Section II (ii), Bonn Agreement.

[73] While the Bonn Agreement leaves room for judges to disregard provisions of domestic law that are not in conformity with international law, legal professionals currently lack the knowledge to ensure that incompatible provisions are not applied.

By ratifying these international human rights law treaties, Afghanistan has undertaken to guarantee that the rights contained therein are afforded to all Afghans without discrimination. Thus, Afghanistan has an obligation under international law to ensure that the provisions of these treaties are implemented at the national level. Moreover, Afghanistan is obliged to adopt legislative measures to give effect to these rights.[74] Recognising this, the UN Human Rights Commission recently stressed the importance of "incorporating Afghanistan's international human rights obligations in the new Constitution".[75]

Amnesty International underlines the fact that the ATA has a responsibility to ensure that human rights are fully incorporated into the new Constitution. The new Constitution must contain an express provision which sets out that international human rights law treaties, to which Afghanistan is, or becomes, a party should be fully incorporated into national law or that the provisions of these treaties are directly applicable and enforceable in a court of law.

The ATA must also ensure that human rights standards relevant to the administration of justice are fully articulated and guaranteed. In particular, the new Constitution must provide for the abolition of the death penalty and the system of *Hadd* punishments which are contrary to international human rights law. In addition, the provisions of the 1964 Constitution related to the right to a fair trial must be expanded and strengthened as they currently fall short of international human rights law and fail to fully incorporate the right to a fair trial as set out in international law. In particular, the new constitution must guarantee the rights to liberty and security of person, the right to a fair trial, the right to be brought promptly before a judge, the right to compensation for unlawful detention and the right to defence. The constitution must guarantee that all persons are able to challenge the legality of their detention before a court during public proceedings.

In order to ensure that these rights are fully available to all people living in Afghanistan, the new Constitution should provide an unambiguous non-discrimination provision, which guarantees equal rights for all regardless of gender, religion, and ethnicity. The Constitution must also contain a provision that guarantees the right to an effective remedy, including judicial review, for all rights guaranteed in the Constitution. By providing a mechanism for the enforcement of rights, the new Constitution would go a long way to ensure that people are able to effectively access their rights.

Review of the criminal law

In adjudicating criminal cases, judges are currently applying a mixture of Sharia law, Afghan customary law and statutory law. However, there is an evident lack of clarity regarding the

[74] Article 2(2) of the ICCPR states that "where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". Similar provisions are found in Article 2(a) and (b) CEDAW; Article 4, CRC. In addition, as a party to the Rome Statute, Afghanistan has an obligation to exact legislation implementing complementarity and co-operation obligations.

[75] Commission on Human Rights, Resolution 2003/77, on the "situation of human rights in Afghanistan", 25 April 2003, para. 5.

relationship between the different sources of law and how to resolve conflicts, if any, between the different sources.

Lack of understanding and clarity surrounding the applicable law is further compounded by weak knowledge amongst some members of the judiciary of both statutory and Sharia law. Noting the problem, one legal expert stated that "many judges do not have a basic knowledge of the criminal code and the criminal procedure code that are in force". In addition, one judge informed Amnesty International delegates that "judges state that they are applying Sharia, however, the majority of my colleagues have little knowledge of Sharia and invoke Sharia law in order to justify an illegal act". Afghan law currently also contains a number of human rights protections. However, Amnesty International noted that there was also poor understanding and awareness of these provisions.

Confusion regarding the applicable law is intensified by a noticeable lack of statutory compilations and other legal materials in the courts. None of the courts visited by Amnesty International held a full collection of the law and most primary instance courts had copies of only the criminal code and the traffic law. The IDLO has compiled copies of the applicable laws but does not have the resources to distribute these compilations of legal texts to the courts. The failure to implement comprehensive legal training has exacerbated the problems.

The JRC has recognised the need for legal reform and it has convened working groups, which have started to review existing laws, including the criminal code and the criminal procedure code. Once drafting is completed, the JRC will submit these draft codes to the Ministry of Justice, which has the ultimate authority to amend and promulgate new or existing law. However, neither the JRC nor the Ministry of Justice currently have experts in international human rights law who are in a position to review the laws from an international human rights law perspective. When Amnesty International asked the JRC what capacity existed to ensure that the laws were reviewed and amended in line with international human rights law, the organisation was informed that the JRC had "given the panel responsible for drafting the laws a copy of the Amnesty International Fair Trials Manual".[76]

The Canadian government has recently pledged to place a team of legal drafting experts within the Ministry of Justice. This pledge, if implemented, represents a positive step forward. In particular, the organisation welcomes the commitment to identifying experts who are able to assist and amend law from an international human rights law perspective.

Sharia Hadd punishments

The Criminal Code prescribes the system of *Hadd* punishments for crimes such as theft, adultery and sex before marriage. These punishments include the payment of fines and retaliation on the part of the victim for crimes that are against Sharia law. For example, the *Hadd* punishment for adultery requires the stoning to death of convicted persons. The imposition of *Hadd* punishments was understood by many judges to be applicable where a certain standard of evidence was reached. Therefore, judges who spoke to Amnesty

[76] Amnesty International *"Fair Trials Manual"* AI Index: POL 30/02/98.

International did not rule out the application of *Hadd* in cases where the evidentiary requirements were met.

Death penalty

The Criminal Code and the Criminal Procedure Code currently provide for the imposition of the death penalty in certain circumstances. Amnesty International believes that the death penalty violates the right to life and is the ultimate form of ill-treatment. Although President Karzai has currently imposed a moratorium on the death penalty this provision must also be removed from the Criminal Code.

Fair trial guarantees

Universally recognised international human rights standards relating to the right to a fair trial must be clearly reflected and protected within the Criminal Code and Criminal Procedure Code. These include the rights to liberty and security of person, the right to a fair trial, the right to be brought promptly before a judge, the right to compensation for unlawful detention and the right to defence. The Criminal Procedure Code must also contain procedural guarantees for detainees, especially a right to challenge the legality of detention and for the provision of public and transparent detention reviews. The current lack of an effective procedure by which to challenge the legality of detention before a judge who is able to order release if the detention is unlawful represents a basic but critical omission to the law.

7.5. Recommendations:

Building the capacity for defence:

- **Capacity assessment of defence:** The JRC, with the support of the international community, should undertake an assessment of defence lawyers throughout Afghanistan in order to identify existing and potential independent lawyers, including those able to engage in criminal defence work. This review should also identify the geographical location of lawyers and determine the measures that are necessary to increase their availability throughout Afghanistan.
- **Legal assistance program:** The international community should support efforts to ensure that detainees who do not have financial means are able to engage the assistance of legal counsel. Amnesty International recommends that until the creation of an Afghan bar association, assistance should be channelled to the Ministry of Justice in order to immediately build capacity to provide detainees with their right to defence.
- **Independent bar association:** The international community should support the JRC and independent lawyers in creating an independent bar association that is able to oversee the registration and organisation of independent lawyers.
- **Training for defence lawyers:** The LEC and IDLO with the support of the international community, must immediately devise and implement a training program for independent lawyers. Training should focus on criminal defence work and include

practical skills such as case management, legal reasoning and defending. The international community must ensure that financial resources are provided to initiate such training as a matter of urgency.

- **Legal aid clinic:** The international community should fund the establishment of legal aid clinics at Afghan universities in order to build capacity and knowledge of criminal defence work amongst upcoming lawyers.
- **Public education:** The JRC, with the support of Afghan judicial institutions and the international community must initiate a program of public education on the criminal justice system, paying particular attention to the rights of detainees and the rights of women.

Legal reform:

- **Codification of law:** In order to ensure that there is no further ambiguity regarding the law, the Ministry of Justice with the assistance of the JRC and the international community should facilitate a process of codification of the law.
- **Dissemination of law:** The international community should provide the financial resources to ensure that the compilations of laws are disseminated without further delay to the courts and lawyers.
- **Review of Criminal Code and Criminal Procedure Code to ensure that the rights of the accused are fully protected**: The criminal laws should be amended as a matter of urgency to ensure that they fully comply with Afghanistan's international legal obligations relating to the right to a fair trial. In particular, the rights to liberty and security of person, the right to be brought promptly before a judge and the right to defence must be fully incorporated. The criminal procedure code must also include procedural guarantees for detainees, especially a procedure to challenge the legality of detention before a judge who is able to order release if detention is unlawful and for public and transparent detention reviews.
- **Expeditious placement of legal experts in the Ministry of Justice and the JRC**. Amnesty International welcomes the government of Canada's commitment to place legal experts in the Ministry of Justice. Amnesty International believes that other donor governments, particularly Islamic states, should consider providing legal experts to assist the Ministry of Justice in amending applicable law.

The Constitution:

- **Place human rights at the centre of the new Afghan Constitution:** Afghanistan's obligations under international law must be incorporated into the new Constitution. In particular, the Constitution must contain an unambiguous non-discrimination clause which guarantees equality of al people regardless of their sex, religion or ethnicity. The constitution must also incorporate Afghanistan's international legal obligations related to the right to a fair trial. In order to ensure that all Afghans are able to access their rights, the constitution must guarantee the right to an effective remedy, including judicial review, for all rights set out in the Constitution.

- **Full consultation with the AIHRC on the Constitution:** In order to facilitate the incorporation of Afghanistan's international legal obligations into the new Constitution, the Constitutional Commission must fully consult with international and national human rights experts, including the AIHRC.

8. The failure to protect the human rights of women

A woman outside the entrance to the women's section of a prison in Kabul. ©AI

The high level of discrimination against women in Afghanistan is reflected in the criminal justice system. Amnesty International welcomes Afghanistan's recent ratification of the CEDAW and hopes that this will provide an impetus to take steps to eliminate discrimination against women.

8.1. Denial of access to justice for women

Women victims of crime are currently denied access to justice in Afghanistan. Amnesty International observed that there are very few prosecutions for crimes against women, including rape, violence against women in the family and forced and underage marriage of women and girls. The cases which do reach the criminal justice system, almost always do so where a woman or girl has the assistance of a male relative or supporter who is in a position of authority or is otherwise able to approach the police, prosecutor or courts on their behalf.

Violence against women in the family

There is a failure to address and adequately tackle violence against women in the family. The Afghan Criminal Code contains no provision that clearly criminalizes violence in the private sphere.[77] In addition, even in serious cases, the police and courts do not treat violence against women as a criminal offence. As a result of these factors the only reported cases where the courts consider violence against women in the family is during divorce proceedings before a civil court.

In two divorce proceedings observed by Amnesty International delegates, women claimed that they had been physically abused by their husbands. However, in both of the cases, the judges failed to view the physical abuse allegations as giving rise to any form of criminal liability on the part of the husband. In one of the cases, the judge ordered the wife to return home to her husband and "come to an agreement with him". The judge stated that if they had not come to an agreement within three days that they should return to the court to decide whether a divorce should be granted. Amnesty International observed that reconciliation of partners is the preferred method used by the court in cases of violence against women in the family and that women are routinely sent back to an abusive spouse.[78]

Moreover, it appears that even in divorce proceedings, violence against women in the family is not always seen as appropriate grounds for granting a divorce. Amnesty International delegates were informed that injuries sustained must be perceived to be serious by the judges in order for them to consider granting a divorce. In one divorce case, it was reported that a woman was beaten in the street by her husband, and that witnesses supporting her claim appeared in court. However, the judges reportedly stated that as her arm was only lightly injured, and not broken, there were no proper grounds for a divorce.

Some judges interviewed by Amnesty International delegates stated that the practice of using any form of physical violence against a woman, violated the Sharia. However, the failure to criminalize the practice or offer any form of support to women victims of violence makes it almost impossible for women to bring cases before the courts. Medical professionals interviewed by Amnesty International stated that the inability of women to secure divorces

[77] The 1974 (1355) Afghan Criminal Procedure Code criminalizes assault and murder. However, there is a need to incorporate an express provision in the law setting out that these crimes, when committed in the family, carry criminal liability for the perpetrator.

[78] It is also reported that this is the preferred method of dispute by informal justice mechanisms.

from abusive husbands has led to a high suicide rate among women subjected to violence in the family.

Rape

Prosecutions for cases of alleged rape are extremely rare within the criminal justice system. This is due, in part, to a lack of capacity within the criminal investigation department to investigate rape cases properly. Currently, there are no facilities for forensic investigations that are essential for the collection of evidence in rape cases. Instead virginity testing is carried out on rape victims. The police and prosecutors stated that the results of virginity tests, and witness statements, if they exist, are currently the only supporting evidence that can be produced before the court in rape cases. However, the major factor preventing victims of rape complaining to the authorities is the fear that instead of being treated as a victim, they themselves will be prosecuted for unlawful sexual activity. Amnesty International's interviews with women in detention highlight that there is a widespread practice of treating women victims as defendants.

Forcible marriage of girls and women and the failure to prosecute

Forcible and underage marriage is a crime under Afghan national law.[79] However, the practice of forcing girls and young women to marry is widespread in Afghanistan. There is currently a failure to treat forcible marriage as a criminal offence due to attitudes of judicial personnel and wider society. One woman interviewed in Jalalabad told Amnesty International delegates that "it is impossible for a woman to complain about forced marriage….If she complains the family will kill her".

In other areas of Afghanistan, where Amnesty International did find that cases of forcible marriage had come to the attention of the courts, there was an evident failure to initiate any criminal proceedings against the accused. For example, in one particularly serious case, the grandmother of an eight year old girl approached the court to facilitate proceedings against a 48 year old man to whom her granddaughter had been forcibly married. Under Afghan law, the legal age for marriage is 16. However, the court refused to initiate any proceedings for forcible marriage of a juvenile and stated that the only manner in which the case could be dealt with is through proceedings for divorce.

8.2. Prosecutions of girls and women for *Zina* crimes

In many parts of Afghanistan, there is a strong emphasis on prosecuting girls and women for adultery, "running away from home" and for engaging in consensual sex before marriage.

Under Afghan law, adultery is a criminal offence carrying a maximum prison sentence of up to ten years or, where certain evidentiary requirements are met, the imposition of the *Hadd*

[79] See: Chapters 7 and 8, 1976 (1355) Afghan Criminal Code.

punishment of stoning.[80] There is no basis for the crime of "running away from home" in the statutory law. Judges informed Amnesty International that the offence is based in Islamic law. Judges stated that for a girl to be found guilty of "running away from home", she does not necessarily have to be found to have engaged in sexual activity. A girl or woman may be found guilty of "running away from home" where it is demonstrated that she has absconded from either her family or spouse. In the absence of a statutory law basis for "running away from home", there is no prescribed minimum or maximum sentence. Adultery, "running away from home" and unlawful sexual activity are referred to as "*Zina*" crimes in Afghanistan. Although Amnesty International did find a small number of cases of men accused or convicted of *Zina* crimes, the organisation noted that the criminal justice system places disproportionate emphasis on the prosecution of women for *Zina* crimes.

Amnesty International delegates interviewed over 40 women in prisons in Kabul, Herat and Mazar-e Sharif detained in relation to *Zina* crimes. In Herat central prison, Amnesty International found that there were 61 girls and young women detained or convicted for *Zina* crimes. The majority of these girls and women were accused or convicted of "running away from home" or engaging in consensual sex before marriage. In this region, investigations against girls and women are initiated by the police who, it is reported, "act like spies", following women and, in some cases, randomly carrying out forcible virginity tests. However, in other regions, Amnesty International found no girls or women detained for *Zina* crimes. For example, in Jalalabad, the organisation was repeatedly informed by legal and medical professionals that if there was a case involving *Zina* crimes it would not be reported to the police. Instead, the family would deal with the case by killing the girl or woman involved.

In other regions there is evidence of families initiating the prosecution of relatives for *Zina* crimes. For example, Amnesty International documented one case involving an 18 year old woman who had refused to marry her cousin in defiance of her family's wishes. The girl had informed her family that she was in love with another man. However, in response to her resistance to marry her cousin, her father approached the police and facilitated her arrest. The woman was subsequently forced to undergo two separate virginity tests and a pregnancy test and was detained accused of *Zina*. Commenting on the case, a representative of the AIHRC expressed serious concern over the charges and the validity of the results of the virginity tests. It is reported that at the first court appearance, one month after her initial detention, the judge stated that the woman "should be stoned".

Although Amnesty International documented cases where unmarried women were accused of *Zina* crimes, a large number of girls and women detainees were married. The majority of married girls and young women interviewed by Amnesty International stated that they had either been forced into marriage or sold by their families at an early age. Many girl detainees stated that they had subsequently become victims of sexual and/or physical abuse by their

[80] Articles 426-429, 1976 (1355) Afghan Criminal Code.

husband and had escaped the situation by leaving their home with the assistance of another man.[81]

For example, one case documented by Amnesty International involved a 14 year old girl who was convicted for "running away from home" and sentenced to three years' imprisonment. This girl informed Amnesty International that her family had forced her to marry a cousin at the age of 13, and that she was subsequently subjected to physical abuse. In order to escape her situation, she left her husband after almost a year of marriage with the assistance of another man. The girl had not been provided with any defence or the assistance of an adult during trial and the heavy sentence imposed demonstrates a failure on the part of the court to take the girl's age and family background, including the fact that she was forcibly married well below the legal marriage age, into account.

In another case, Amnesty International delegates interviewed a 16 year old girl who had "run away" from her 85 year old husband whom she was forced to marry at the age of nine. The girl stated that after five years of marriage she could no longer tolerate her situation and left her home with the assistance of a man. The girl, who was sentenced to two and a half years' imprisonment for *Zina*, stated that at her trial the judges repeatedly asked whether, if released, she would return home to her husband. In this case, it is reported that the man she "ran away" with was released from detention after five months.

Although there was evidence in more than 20 of the cases documented by Amnesty International that the girls and women accused of *Zina* crimes had been forcibly married, in none of these cases was there any attempt made by the authorities to impose any form of criminal sanction on those persons responsible of coercing girls into marriage. In addition, there was an evident failure on the part of the judges adjudicating cases to properly consider the family background of the accused, including the nature and extent of any physical or sexual violence suffered in their families.

Moreover, Amnesty International found that instead of initiating prosecutions for forcible or underage marriage, in some cases judges actually ordered girls to be married. The Head of the Juvenile Court in Kabul explained to Amnesty International that where an unmarried girl was accused of "running away from home", the court would reduce the sentence imposed if the girl agreed to marry the man. When Amnesty International delegates pointed out that the legal age of marriage is 16, the Head of the Juvenile court stated that "we know that it is illegal, however, our solution is to marry them". This judge then informed Amnesty International that it was simply not appropriate to release girls accused of *Zina* crimes as their families would kill them.

In all the cases involving girls and women accused of *Zina,* Amnesty International observed widespread violations of the right to a fair trial. In particular, girls and women were subjected to extended periods of pre-trial detention and not given any opportunity to prepare or present a defence. Of particular concern was the lack of concern for the age of, and support for, child

[81] It should be noted that due to social and economic constraints women are rarely able to leave an abusive home without the assistance of a man. See: Medica Mondiale, "Trapped by Tradition: Women and Girls in Detention in Kabul Welayat", March 2003, p.23.

defendants. In addition, in cases documented that had resulted in convictions, Amnesty International noted a failure on the part of the police and prosecutors to effectively investigate the allegations and to present evidence and witnesses in court. The only evidence that existed in the majority of cases was the results of virginity tests.

Criminalisation of girl and women victims of crime

An examination of the circumstances surrounding the cases of girls and women accused of *Zina* crimes, in particular their family background, highlights the tendency within the Afghan criminal justice system to criminalize female victims of crime.

For example, Amnesty International delegates interviewed a 14 year old girl who had been convicted and sentenced to two years' imprisonment for *Zina* crimes. The girl, who had been forcibly married at the age of 12, "ran away" from her abusive husband and was then forced into prostitution. The girl was being detained in the same cell as the women who had been convicted of pimping her. When Amnesty International delegates asked the judicial and prison officials about the case, they stated that the girl had not willingly engaged in prostitution. However, despite the authorities' recognition that the girl was in fact a victim, judicial officials gave no indication that they had any plans to review her case.

Another case involved a 13 year old girl who was detained pending trial for *Zina*. The girl stated to Amnesty International that she had been given to drug dealers by her fiancé who was indebted to them. She explained that she had subsequently been arrested with the drug dealers and accused of having unlawful sex with them. The prison authorities indicated that they were aware of this situation. Amnesty International was unable to find any evidence that her fiancé who had sold her, or the drug dealers, were in detention.

The criminalization of women victims of crime stems to a great extent from the manner in which *Zina* crimes are enforced. A lack of gender sensitivity on the part of the police and judicial officials further compounds the injustice being done to women and girls. Male judges and prosecutors who spoke to Amnesty International delegates displayed a lack of sensitivity and understanding for issues that affect the lives of women, including sexual and physical abuse. Moreover, in court proceedings and conversations related to cases involving women in Afghanistan, a number of judges made discriminatory remarks and sometimes even humiliated women. For example, during a divorce proceeding observed by Amnesty International delegates, a judge mocked a woman who claimed that she had been physically abused by her husband. After the woman was given the opportunity to speak in court, the judge laughed at the woman and ordered her to remove her veil. When she would not, the judge attempted to forcibly remove the woman's veil, clearly causing her public humiliation and distress.

8.3. Recommendations:

- **Legal reform to protect women's human rights:** The ATA and the international community must act immediately to ensure that the new Constitution and existing

legislation are in full conformity with CEDAW and provisions of the ICCPR that guarantee equality and non-discrimination. In particular, steps should be taken to ensure that violence against women, including rape, the sale or handing over of women and girls to settle disputes or as compensation, and forced marriage, are criminalized. The ATA should abolish laws, including those which proscribe *Zina* crimes that discriminate against women and girls, lead to imprisonment on the grounds of gender, the prosecution of rape victims, and which proscribe cruel, inhuman and degrading punishments.

- **Build capacity within the criminal justice system to protect the human rights of women victims and accused:** Capacity must be developed within law enforcement and judicial agencies to ensure that the criminal justice system is able to effectively bring the perpetrators of violence against women, including forcible marriage, to justice. Amnesty International urges the ATA with the assistance of the international community to incorporate the investigation and prosecution of crimes against women into all training programs for the police, prosecutors and judges. Furthermore, all programs must also include training on appropriate methods of dealing with women victims and accused. In addition, the ATA must develop codes of conduct for the judiciary and law enforcement officials that fully incorporate procedures that aim to ensure respect and protection of women victims and accused. Effective oversight mechanisms must be put in place to ensure that codes of conduct are respected. Women and girls facing violence in the family for perceived social transgressions must receive protection. Shelters should be established for women and children and their purpose should be only protective; they should be available all over the country, adequately resourced, and linked to legal aid and vocational training.
- **Affirmative measures to increase the number of female police officers, prosecutors and judges:** The lack of access to justice for women and the discrimination against women in the criminal justice system is compounded by the lack of female professionals working in the Afghan criminal justice system. CEDAW and the ICCPR place an obligation on the ATA to ensure that women hold public positions. Amnesty International urges the ATA, with the assistance of the international community to ensure that women have equal access to employment in the police and judiciary. The ATA must ensure that affirmative action is taken to increase women's participation in the police and judiciary.
- **Ensure that the international community places a focus on women's rights:** International efforts to assist reconstruction and reform of the criminal justice system in Afghanistan have placed little emphasis on the protection of women's rights. The international community must ensure that measures to prevent serious violations of human rights against girls and women are fully incorporated into the judicial reform strategy, including all proposed activities of the JRC and all Afghan judicial institutions. In particular, steps must be taken to end impunity for violence against women. Furthermore, the international community must not condone or assist in the

perpetuation of practices within the criminal justice system that discriminate against women.

9. Informal justice systems

There is a heavy reliance on informal justice mechanisms in Afghanistan. The informal justice mechanisms are known as the *jirga* and the *shura* and they are extremely heterogeneous.[82] There is also great regional variation in the emphasis placed upon informal justice systems by local populations living in different regions of Afghanistan.[83] The *jirga* and the *shura* can be broadly described as non-judicial alternative dispute resolution mechanisms. The *jirga* and the *shura* are comprised of prominent male members of the community and they convene to resolve community problems, including those related to land, property, the family and crime. In the process of decision making the *jirga* and *shura* apply different sources of law, including Sharia law and Afghan custom.

The emphasis on informal, non-judicial dispute resolution mechanisms is partly a reaction to the imposition of foreign models of justice that were perceived by Afghans as being unable to properly serve the interests of justice. The pre-existing lack of confidence in formal justice mechanisms, compounded with recent delays in rebuilding the formal judicial system, means that there is currently a strong reliance on informal justice systems in many areas. The geographical isolation of many Afghan communities and the absence of courts means that, at present, the *jirga* and the *shura* are the only accessible justice mechanisms available to certain communities.

The relationship between informal and formal justice systems is also regionally diverse. In some areas, there is a strong relationship between the formal and informal justice systems. For example, in Nangarhar province, eastern Afghanistan, Amnesty International found that primary courts would refuse to deal with some criminal and civil cases that had not been initially referred to the local *jirga* and that they would send such cases to the *jirga* for resolution. However, in other areas, the organisation found that no relationship existed between the courts and the *jirga* or the *shura*. For example, in Herat, judges stated that they would never refer cases to the *jirga* or the *shura* and that there was no interaction between the two systems. At the present time, the relationship between the formal and informal justice systems and the competence of the informal system is largely unregulated. However, the law does set out that Afghan courts have exclusive jurisdiction.[84]

There is a noticeable lack of consensus among the JRC, Afghan judicial institutions and the international community over the envisaged future role of informal, non-judicial mechanisms. The JRC has stated that it believes that once the formal judicial system is established, there

[82] *Jirga* is a Pashto word meaning the gathering of people for consultation. S*hura* is the equivalent in Dari. Both words are commonly used to refer to councils of tribal elders.
[83] The emphasis placed upon the *jirga* in Pashtun communities was found to be much greater.
[84] See: Article 98, 1964 Constitution and Article 4, 1956 (1335) Law on the Jurisdiction and Organisation of the Courts.

will be no need for the *jirga* and *shura.* However, many senior judges indicated that the *jirga* and *shura* must continue to play a key role in administering justice in Afghanistan. UNAMA's position on informal justice systems was far from clear.

9.1. Human rights abuses resulting from informal justice mechanisms

The involvement of informal justice mechanisms in criminal matters can lead to serious human rights abuses, including violations of the right to a fair trial. Furthermore, there is a risk that the adjudication of criminal cases by non-judicial mechanisms can lead to violations of the prohibitions against torture and cruel, inhuman or degrading treatment or punishment, slavery and discrimination.

Amnesty International is concerned that the involvement of non-judicial mechanisms in criminal cases in the absence of regulated procedures and safeguards, can lead to violations of the rights of the accused. At present without any form of systematic monitoring or regulation, it is not known whether all the practices applied by the *jirga* and *shura* conform to international standards related to fair trial. However, it is reported that in some regions, such as Badakhshan, north eastern Afghanistan, local informal justice mechanisms have been co-opted by members of armed groups who utilise them to ensure that their authority is not undermined. Under such circumstances, there is a serious risk that the rights of persons accused of criminal offences in informal mechanisms are not protected.

Abuses of women's and girl's rights

Amnesty International is concerned that those who are most in need of protection of the formal court system, especially women and children, are being subjected to human rights abuses as a result of decisions made by non-judicial mechanisms in the absence of clearly recognised procedures which conform with international human rights law. Amnesty International has documented a number of cases that demonstrate that women and girls are being subjected to serious human rights abuses as a result of informal justice mechanisms.

In particular, the organisation is concerned about reported human rights abuses that have occurred as a result of the involvement of informal justice mechanisms in the adjudication of murder cases.

In Mazar-e Sharif, Jalalabad and Herat, judicial officials, detainees and some members of local *jirgas* reported that when murder cases were resolved by the *jirga* they did so by ordering that the alleged perpetrator provide the family of the alleged victim with a young girl or girls, usually below the legal marriage age, in order to compensate for the alleged crime. It was reported that the girl, who is 'exchanged', is then forcibly married to a male member of the victim's family. In one case documented by Amnesty International, a family member of a murder suspect stated that she had been coerced into providing the family of the alleged victim with two young girls as a means of providing redress for the alleged offence.[85]

[85] The family stated that the girls were aged eight and 15.

Amnesty International is extremely concerned that this Afghan customary practice, known as *"Bad"*', violates the prohibitions against slavery and discrimination and also constitutes torture or cruel, inhuman or degrading treatment.

Amnesty International is also concerned that some members of the international community are actively legitimising the work of *jirgas* who are reported to have utilised the practice of *Bad*. For example, Amnesty International spoke to a UNAMA political affairs officer in Mazar-e Sharif who had been working closely with members of a local *jirga* which had ordered the exchange of women in a number of cases. When Amnesty International asked the UNAMA political affairs officer whether he was concerned about this practice and asked whether UNAMA was taking any steps to oppose it, he responded by stating, "I don't deal with women".

This highlights not only the lack of gender sensitivity displayed by some UNAMA officials, but also demonstrates the lack of concern on the part of UNAMA with human rights abuses resulting from non-judicial mechanisms.

Amnesty International is also concerned that Afghanistan's informal justice mechanisms are not representative of society and that as a result certain groups are not able to bring their community problems to them. The *jirga* and the *shura* throughout Afghanistan are exclusively comprised of men. As a consequence, women are unable to approach these informal mechanisms without the support and assistance of a male family member. There are also indications that women suffer discrimination when they do take cases relating to inheritance, property and marriage to them. The inaccessibility of the *jirga* and *shura* to women also indicates a problem of impunity in relation to crimes against women.

9.2. Recommendations

- **Undertake a comprehensive review of the informal justice systems**: Any efforts to review the justice system in Afghanistan must include an analysis of existing informal justice mechanisms. Reviewing the informal systems, including the diversity of such mechanisms, the frequency of use and determining the practices that they carry out is an essential component of the criminal justice strategy. This review must assess whether these systems apply procedures and laws that are in conformity with human rights protections, including the right to a fair trial, the prohibitions against torture, and ill-treatment and non-discrimination. Particular attention must be paid to the rights of women and girls under international and national law.
- **Regulate the informal justice system:** The competence of informal justice systems must be clearly set out in the law in order to remove any ambiguity regarding the role of Afghan informal justice mechanisms. The relationship between informal systems and the formal judicial system must be set out by law. In order to fulfil its obligation to exercise due diligence in protecting human rights, the ATA must ensure that *jirgas* and *shuras,* if they are allowed to continue to function, fully conform to international

human rights law. If this cannot be ensured then these informal justice mechanisms must be abolished. All case in which there are indications that a *jirga* or *shura* has perpetrated human rights abuses must be thoroughly investigated and all those participating in them must be brought to justice.

- **Criminalisation of the exchange of girls**: The exchange of girls as a means of resolving disputes in the community and dealing with criminal offences is a clear violation of international human rights law. The practice must be stopped immediately and the exchange of girls criminalized under Afghan law.
- **Disseminate information on the formal justice system**: In order to strengthen the formal justice system and to ensure that people are aware of how they can access justice, a comprehensive awareness raising campaign on the formal legal system must be commenced. It must also include an emphasis on international human rights law.
- **Outreach to rural communities**: The formal justice system must be extended to rural communities. All members of the formal criminal justice system, including the police and the judiciary, must be provided with the resources to enable them to establish a presence in rural areas. Members of rural communities must be provided information on how to access the formal system. Moreover, male and female members of rural communities must be consulted on judicial reforms.

10. Delays in ending impunity

During nearly a quarter century of almost continuous armed conflict, both international and non-international, Afghans have been the victims of human rights violations and abuses on a huge scale. Indeed, few families have not suffered in some way from such violations and abuses. Information gathered since the Soviet Union invaded Afghanistan in 1980, suggest that international war crimes and crimes against humanity have been committed by members of the Soviet backed government, the Taleban, the Mujahadin and other individuals acting as members of armed groups. The crimes committed include murder, "disappearances", imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other crimes of sexual violence and persecution on political, gender and other grounds.

Over the past 23 years, international and non-governmental organisations have documented serious human rights violations and abuses, including war crimes and crimes against humanity, perpetrated in Afghanistan.[86] In the first three months of operation, the AIHCR had

[86] See: Amnesty International "*Afghanistan: making human rights the agenda*" AI Index: ASA 11/023/2001, "*Afghanistan: massacres in Yakaolang"* ASA 11/008/2001, "*Afghanistan: executions in Panjshir*" ASA 11/004/2001, "*Afghanistan: children devastated by war, Afghanistan's lost generation*" ASA 11/013/1999, "*Afghanistan: women in Afghanistan: pawns in men's power struggles*" ASA 11/011/1999, "*Afghanistan: detention and killing of political personalities*" ASA 11/005/1999, "*Afghanistan: flagrant abuse of the right to life and dignity*" ASA 11/003/1998, "*Afghanistan: reports*

received 800 complaints from individuals alleging that they, or a member of their family, had been the victims of human rights violations, including crimes under international law, such as torture and extrajudicial executions.

Commenting on the scale of the human rights violations and international crimes committed over the past 23 years, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions noted that there has been "a pattern of arbitrary detentions, summary executions, massacres of civilians, the use of unjustified, excessive force during counter insurgency operations and armed resistance" and that "according to the overwhelming information of killings committed in the past the Special Rapporteur is inclined to believe that some human rights abuses would constitute crimes against humanity".[87]

Despite the enormous scale of the war crimes, crimes against humanity and other serious human rights violations and abuses committed in Afghanistan, a climate of impunity prevails and justice for the victims continues to be denied. Ensuring justice and full reparations are fundamental for the countless victims of human rights violations and abuses committed in Afghanistan. Furthermore, ending impunity is crucial for ensuring that Afghanistan builds a future that is based upon respect for the rule of law and to prevent repetition of crimes under international law. As the UN Secretary-General, Kofi Annan, recently stated:

"There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace."[88]

In the initial stages of the international military intervention, the UN recognised that ending impunity was a necessary key step in the restoration of peace and security in Afghanistan. In a report of 20 December 2001, the Secretary-General underlined the fact that "a sustainable peace cannot be built on a foundation of impunity". The Secretary-General urged the international community and the Afghan people to "commit themselves to addressing the problems of the past by ending impunity and ensuring accountability for past abuses, including gross and systematic violations of human rights".[89]

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of mass graves of Taleban militia" ASA 11/011/1997, "*Afghanistan: continuing atrocities against civilians"* ASA 11/009/1997, *"Afghanistan: grave abuses in the name of religion*" ASA 11/012/1996, "*Afghanistan: caught in the cross fire*" ASA 11/10/96, " *Afghanistan: executions, amputations and possible deliberate and arbitrary killings*" ASA 11/005/1995, "*Afghanistan: incommunicado detention and "disappearances"* ASA 11/001/1994, "*Afghanistan: reports of torture, ill-treatment and extrajudicial executions*" ASA 11/001/1992. See also: Physicians for Human Rights, "Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-e Sharif, Afghanistan", 2 May 2002.

[87] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Commission on Human Rights, 3 February 2003.

[88] UN Secretary-General Kofi Annan, Address at the inauguration of the judges of the International Criminal Court, 11 March 2003.

[89] Report of the UN Secretary-General, "on the situation in Afghanistan", 6 December 2001.

However, since that time, the international community has proved unwilling to take any concrete steps to ensure accountability for past human rights violations and abuses. Despite the clear policy decision of the Secretary-General that ending impunity for the worst possible crimes is a priority for the UN, UNAMA has shied away from the issue and the human rights' component of the mission has had no involvement in investigating past violations of human rights.

Even though the criminal justice system is beginning to function again and foreign military forces have the power and duty under international law to arrest persons suspected of war crimes, in public statements, UNAMA SRSG, has indicated that he believes that it is "too early" to support robust measures to end impunity. The SRSG has also expressed the opinion that thorough investigations into crimes committed prior to 2001 threaten to de-stabilise the Bonn process. The SRSG has stated that his "responsibility to the living" has to take precedence over justice for the dead.[90]

However, the failure of the UN to take effective steps to start to address impunity also ignores the rights of the living - the "disappeared", those unlawfully detained, those being tortured and the families of those persons and their suffering. Other UNAMA officials in conversations with Amnesty International delegates contended that security concerns, including an absence of a peacekeeping force outside of Kabul, mean that investigations into past war crimes, crimes against humanity and other human rights violations and abuses cannot commence at this time.

However, not only does UNAMA's view conflict with the priority set by the Secretary-General, it also conflicts with that of many members of Afghan civil society and prominent human rights activists and organisations. Afghan human rights activists, including members of the AIHRC, have consistently called for measures to be taken to end impunity and they have underlined the importance of including accountability for past human rights violations and international crimes into the transitional agenda. They have stressed that the international community must assist Afghans in bringing suspected perpetrators of international crimes to justice. At the 2003 Commission on Human Rights, Afghan human rights activists lobbied in support of a motion proposed by the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions to create an International Commission of Inquiry to examine crimes committed over the past 23 years.

In her report to the Human Rights Commission, the Special Rapporteur stated that "it is the obligation of the international community to take a lead in bringing them on the record with a view to move towards a mechanisms for transitional justice…inaction on this issue is only likely to entrench a culture of impunity and promote reoccurrence of grave human rights violations in Afghanistan".[91] However, the Special Rapporteur's recommendation was rejected by a majority of governments, including the United States of America.

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[90] Cited on BBC, 27 August 2002. Reproduced in Conflict, Security and Development Group, "A Review of Peace Operations – A Case for Change, Afghanistan", March 2003.

[91] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to the Commission on Human Rights, 3 February 2003.

Since the 2003 Commission on Human Rights, the issue of ending impunity has slipped from the international agenda. As a consequence, the AIHRC has been left to devise a strategy for dealing with past human rights violations without appropriate international support. Amnesty International is seriously concerned that without the full support of the international community, no effective steps to end impunity will be taken and the cycle of human rights violations and abuses will continue unchecked.

The AIHRC has recently established a unit that is assigned the task of dealing with "transitional justice". The AIHRC has commenced collecting information regarding past human rights violations and international crimes. The AIHRC has also been asked by UNAMA to conduct a "public consultation" in order to determine the manner in which the Afghan people wish to address the past violations of human rights and international crimes. Although the AIHRC "transitional justice" unit has started to collect information compiled by human rights organisations over the past 23 years, it does not have the mandate to commence criminal investigations into past violations of human rights and international crimes. Moreover, the security situation in Afghanistan means that it is extremely dangerous for Afghan members of the AIHRC to start to conduct comprehensive interviews with victims and their families without the support of international staff. In addition, the AIHCR has no capacity to conduct forensic or other technical investigations into past human rights violations and international crimes.

Amnesty International believes that the transitional process in Afghanistan should reflect the obligations that Afghanistan and all states have under international law with regard to accountability for the particularly serious human rights violations that have taken place in the country.[92] The organisation is concerned that without international support, including effective victim and witness protection programs and effective extradition and mutual legal assistance agreements permitting the pursuit of suspects abroad and locating assets and information outside the country, the AIHRC will not be able to ensure that proper investigations into past violations are conducted effectively and without serious risk to AIHRC staff.

The international community is obliged to ensure that violations are investigated, whenever they were committed, whoever the perpetrator, and irrespective of the time that has elapsed. All those suspected of being responsible for human rights abuses should be brought to justice in proceedings that conform to international fair trial standards. No amnesties may be given for such crimes, and full reparation must be awarded to victims and their families.

Under international law, it is the responsibility of the governmental authorities of a country where war crimes, crimes against humanity and other crimes under international law have occurred to investigate those crimes and, where there is sufficient admissible evidence, to prosecute them. The governments of other countries also have obligations under international

[92] Afghanistan is a party to a number of important international treaties that prescribe mandatory prosecution for persons suspected of committing crimes under international law, including the Convention against Torture and the four Geneva Conventions.

law to cooperate with the authorities of the country where such crimes took place and with each other to ensure that the perpetrators are brought fairly to justice. Since such crimes are crimes against the international community itself, not just against the Afghan victims, the international community has the obligation to support the development of a fair and effective method for ensuring accountability for past human rights violations This includes an obligation to assist in the development of the criminal justice system in Afghanistan as a means of developing national capacity for ending impunity. The international community should treat such crimes under international law with the same seriousness it gives to other serious crimes, such as drug-trafficking, counter-"terrorism" and money laundering, and provide the same resources.

Amnesty International believes that bringing the perpetrators of gross human rights violations in Afghanistan to justice in a manner that also safeguards their human rights will contribute greatly to preventing future human rights violations in the country. While recognising and appreciating the need for national reconciliation in Afghanistan, past experience elsewhere in the world demonstrates that whenever new political authorities ignore the need for accountability for past serious human rights violations, the problem does not disappear: victims or their relatives continue to raise their grievances, or the same violations sooner or later recur because inadequate deterrent action was taken.

In Amnesty International's experience, if people reasonably suspected of committing gross human rights violations are allowed to escape criminal responsibility and hold positions of authority, human rights violations are likely to continue to be committed. The perpetrators are given a sense of impunity, as are others who may subsequently be involved in formulating government policy or in law-enforcement.

10.1. Recommendations:

- **Justice:** It is the first duty of the state in which crimes against humanity and other serious human rights violations have been committed to prosecute these crimes. Fair and effective prosecutions of past human rights violations and abuses by the Afghan criminal justice system offers one means of ending impunity. However, the Afghan courts require international assistance to ensure that they are able to investigate past violations of human rights in a fair and effective manner in the course of proceedings that meet international standards for a fair trial. In particular, the judiciary must be provided with training in international humanitarian law and human rights law and standards, the police must be provided with the capacity to conduct thorough investigations and measures to ensure the security of victims and witnesses must be devised.
- **Ensure that crimes under international law are crimes under Afghan law:** Afghanistan must ensure that it incorporates crimes set out under Articles 6, 7 and 8 of the Rome Statute as crimes under Afghan law. Genocide, war crimes and crimes against humanity must be clearly defined as criminal offences in Afghanistan in order

to ensure that the Afghan courts have jurisdiction to prosecute such crimes. In addition, the principles of criminal responsibility in national legislation for crimes under international law must be consistent with customary international law. Afghanistan must also ensure that fair trial guarantees are fully incorporated into national law and that the death penalty is abolished.

- **Enact legislation to facilitate co-operation with the International Criminal Court:** Afghanistan ratified the Rome Statute on 10 February 2003. Afghanistan is required to enact legislation to ensure that it is able to co-operate with the International Criminal Court. Such legislation must ensure that the legal personality of the International Criminal Court is recognised in Afghanistan and that officials of the court are able to operate within the country. In addition, legislation must recognise the privileges and immunities of the court, its personnel, counsel, experts and witnesses. Enabling legislation must also include a basic provision allowing the Afghan courts and authorities to fully co-operate with any order issued by the International Criminal Court including the provision of documents, records and physical evidence, locating of victims and witnesses and facilitating searches by the court and the execution of international arrest warrants.[93]
- **UN commission of inquiry:** Amnesty International believes that a first step towards ending impunity would be the creation of a UN commission of inquiry. The commission should study the situation of the Afghan criminal justice system and the manner in which the judicial system could be assisted in order for it to have the capacity to initiate investigations and prosecutions of international crimes. In addition, the commission of inquiry should advise on safe and effective methods for ending impunity, pending the reform of the Afghan criminal justice system.
- **No impunity:** Amnesty International underlines the fact that under international law there can be no impunity for persons suspected of committing war crimes, crimes against humanity and other serious violations of international law. The ATA must ensure that it eliminates any bars to prosecutions under national law and that there are no amnesties for crimes under international law.

11. Independent monitoring of the criminal justice system from a human rights law perspective

Public scrutiny of the judicial system is a key measure that can increase public confidence and accountability. In post-conflict situations, effective independent monitoring of the criminal justice system from a human rights law perspective provides a tool for developing respect for the rule of law. Monitoring also enhances the ability of all persons involved in judicial reform to identify and remedy structural problems within the legal system. It can also assist in

[93] See: Amnesty International "*International Criminal Court: Summary Checklist for Effective Implementation*", IOR 40/15/00.

ensuring that the rights of victims and suspects are protected in individual cases. Amnesty International spent two months monitoring the Afghan criminal justice system. The organisation noted keen interest on the part of the judiciary in international human rights law and observed that the presence of delegates in places of detention and courtrooms tended to encourage transparency and adherence to law.

UNAMA was provided with a mandate to monitor and investigate human rights violations. UNAMA is ideally placed to provide independent oversight of the legal system. However, thus far UNAMA has lacked the strategic direction and capacity to engage in monitoring of the criminal justice system from a human rights law perspective. In an interview with Amnesty International, the former senior adviser on human rights to the SRSG stated: "we don't have the capacity to monitor the legal system - we don't even have the capacity to monitor human rights properly". The lack of capacity within the human rights components of UNAMA has been caused, in part, by low-levels of staffing and recruitment problems. In addition, a lack of commitment on the part of the senior UNAMA officials to human rights work which is not strictly linked to the political transitional process, has undermined the already weak human rights components.

The rule of law component of UNAMA has also struggled to operate effectively and carry out its mandate. The rule of law office, currently staffed with one junior official, lacks the capacity to ensure oversight of the judicial system. The minimal attention devoted to rule of law issues by UNAMA has led to marginalisation of UNAMA within the judicial reform process and a failure on the part of UNAMA to effectively execute its mandate to assist in the legal reform process. Furthermore, the artificial fragmentation of the human rights and rule of law components of the mission has prevented the development of any cross-cutting strategy that seeks to promote adherence to human rights within the criminal justice system.

The AIHRC has recently commenced monitoring the prison system from a human rights perspective. However, the AIHRC requires capacity building and technical support to undertake comprehensive monitoring of the criminal justice system, including court monitoring. Delays on the part of OHCHR and UNDP in ensuring that a planned program of technical assistance is delivered has stalled the delivery of promised technical assistance projects. When Amnesty International asked one UN official why technical assistance had not been delivered they stated that "the bureaucracy makes you want to die".

In the absence of the full commencement of the program of technical assistance, the government of Canada recently engaged the assistance of a legal expert with expertise in international human rights law to produce a legal systems monitoring manual for the AIHRC. The manual provides practical guidance on monitoring the judicial system and its adherence to international human rights standards. Amnesty International commends this initiative and urges the international community to ensure that resources are made available to provide the AIHRC with follow-up training in legal systems monitoring, including trial observation. Amnesty International also welcomes the recent deployment from OHCHR of a senior technical advisor to the AIHRC. It is hoped that this positive development will assist in the development of capacity within the AIHRC to engage in an all-encompassing program of judicial monitoring.

11.1. Recommendations:

- **Capacity building for the AIHRC:** The international community must ensure that it pledges long-term financial and political support to the AIHRC in order to build its capacity to engage in monitoring of the criminal justice system from an international human rights law perspective. Effective training in monitoring the legal system is essential in order that the recently drafted monitoring manual can be fully utilised.
- **Political support for the AIHRC:** The AIHRC is a key institution that must be supported. The ATA must ensure that the AIHRC is given unrestricted access to documents, courtrooms and places of detention. In addition, the AIHRC must be fully consulted in the transitional process. Moreover, a legal basis for the AIHRC must be set out in the new constitution in order to ensure the development of a sustainable independent Afghan institution that is capable of providing independent human rights oversight.
- **UNAMA to fully commit to human rights protection:** UNAMA must demonstrate its commitment to human rights by ensuring that staffing levels within the mission are increased and that there are no further delays in recruiting staff. In particular, UNAMA must ensure that the posts of senior advisor on human rights and senior advisor on the rule of law are filled as a matter of urgency. In addition, the human rights components of UNAMA must work closely with the rule of law unit to develop an effective strategy for promoting human rights within the criminal justice system. The human rights components of UNAMA must be allowed to develop activities that go beyond the process of political transition.

12. Conclusion

Amnesty International recognises that rebuilding and reforming the criminal justice system in the wake of 23 years of conflict is an extremely complex task. Developing legal frameworks and judicial structures that are able to adhere to the highest standards of human rights will be a lengthy process. Ensuring respect for the rule of law in Afghanistan can only be successful if there is sustained commitment and support from the international community and key Afghan actors.

Amnesty International offers this report in the spirit of cooperation and hopes that its findings and recommendations will assist the ATA and the international community in identifying priorities to be addressed within the context of the judicial reform program currently underway.

13. Recommendations

Judicial reform and reconstruction

- **Strategy for justice:** Afghanistan's judicial institutions and the JRC, with the assistance of the international community, must immediately utilise the results of the judicial survey to formulate clear and precisely defined proposals for both short and long-term judicial assistance projects. These projects must be clearly set out and form part of an overall strategy for justice, which includes clear priorities for the short and long-term. A strategy for justice must be immediately presented to the donor community for funding.
- **Prioritise the establishment of Juvenile and Family Courts:** The establishment of properly functioning Family and Juvenile courts is essential for ensuring that the rights of vulnerable groups are protected. The Supreme Court and the JRC, with the assistance of the international community must immediately establish the Family and Juvenile courts outside of Kabul.
- **Donor co-ordination:** Under the strategic leadership of the government of Italy, the donor community must increase its efforts to co-ordinate judicial assistance. The Italian government must ensure that regular information on the judicial reform process is disseminated to the donor community and that regular co-ordination meetings are held in Kabul.
- **Long-term financial assistance for judicial reform and reconstruction:** The international community pledged to support judicial reconstruction as a means of facilitating peace and security in Afghanistan. The international community must ensure that it provides long-term financial assistance to ensure the re-establishment of the rule of law in Afghanistan. Donor governments who have pledged to provide financial assistance must deliver these funds as a matter of urgency.
- **Relations between Afghan judicial institutions:** The breakdown in relationships between the Afghan judicial institutions is an extremely serious problem. Effective co-operation between the Supreme Court, Ministry of Justice and the Attorney General's office is a pre-requisite for judicial reform. The ATA must immediately take steps to facilitate better working relationship between these three key judicial institutions.
- **Strengthen UNAMA's role:** UNAMA is mandated under the Bonn Agreement to provide assistance and support to the judicial reform process. The rule of law component of UNAMA must be strengthened and staffing levels increased in order to ensure that it is able to effectively carry out its mandate. In addition, there must be no further delays in recruiting a senior advisor on the rule of law. UNAMA should also consider placing an expert in international human rights law under the senior advisor on the rule of law to ensure that human rights are fully integrated into rule of law

activities. All UNAMA rule of law activities must be properly co-ordinated with the human rights components of the mission.

The Afghan judiciary

- **Cease appointments of unqualified judges:** The Supreme Court and the President must ensure that all persons appointed as judges possess the qualifications required by law. The President's office must compile a public register of judicial qualifications. In addition, the qualifications of each candidate must be viewed by the President's office prior to judicial appointment.
- **Fast track program for women judges:** In order to remedy gender imbalance within the judiciary a fast track program for women lawyers must be initiated. Female graduates from the law school and qualified female lawyers should be identified for recruitment to the LEC. There should be no requirement that these women lawyers are employees of the Ministry of Justice, Supreme Court or Attorney General's office. The international community must assist in the establishment of this program, by providing financial assistance to both the LEC and women lawyers targeted by the program. Those candidates who successfully complete the LEC program should be targeted for recruitment into the judiciary.
- **Institutionalise and support the development of the Legal Education Centre (LEC):** The international community must fully support the development of the LEC. The LEC young lawyers program must be institutionalised and provided with a legal basis. The international community must ensure that the LEC is able to properly able to oversee and co-ordinate all legal training programs, including the IDLO legal training centre, in association with Afghanistan's Universities. In addition, the LEC must develop a training program for independent lawyers as a matter of urgency.
- **Training:** The JRC, IDLO and donor governments must co-ordinate judicial training projects. In addition, judicial training projects outside of Kabul must be implemented as a matter of urgency. Judges and prosecutors should be provided with separate training courses that reflect their different professional needs. All judicial trainings must include practical legal skills. Furthermore, all training programs must include human rights, including the rights of women. Amnesty International offers this report, specifically Chapter 7 on violations of the right to a fair trial as a diagnostic tool highlighting relevant areas of international and domestic law that should be incorporated into human rights training.[94]

[94] See also: '*Amnesty International's 12-point guide for good practice in the training and education of human rights for government officials*' AI Index: ACT 30/1/98.

The Independence of the judiciary

- **Increase security throughout Afghanistan:** Security is a pre-condition for the rule of law and it is essential for creating an environment in which the judiciary can operate independently. The international community must take immediate steps to institute measures to ensure an effective level of security and human protection throughout Afghanistan, including by giving active consideration to the extension of ISAF's mandate. In addition, the demobilisation, disarmament and reintegration process must be strengthened and expanded.
- **Security for Afghan courts:** The ATA and the international community must devise effective measures to ensure the security of the courts and judicial personnel in consultation with international courts and with states that have effective court security programs, particularly witness protection programs. Effective measures to protect judicial personnel, witnesses and victims must be developed as a part of the judicial reform strategy. In addition, trained and accountable police must be attached to the Afghan courts in order to ensure basic security.
- **Review staffing requirements within Afghanistan's judicial institutions with a view to streamlining:** A comprehensive review of staffing levels within the Supreme Court, Ministry of Justice and Attorney General's office must be initiated. This review must seek to identify the number of judges, prosecutors and judicial personnel required to staff Afghan courts with a view to streamlining. Within the context of the review, those persons found not to possess the required qualifications must be removed from office in procedures that guarantee the process and preserve the independence of the judiciary. Amnesty International recommends that this review be overseen by the Civil Service Commission within the context of the planned reform of the civil service. After reviewing and streamlining staffing within judicial institutions the ATA should raise judicial salaries.
- **Establish a judicial services commission:** In order to ensure effective oversight of judges and prosecutors, a judicial services commission should be established. The judicial services commission should be given a mandate to investigate misconduct, hold a central record of judicial qualifications and be responsible for the establishment of a public complaints' mechanism. The judicial services commission should have the power to trigger a criminal investigation into any cases of alleged criminal activity by judges and prosecutors.

Violations of the right to a fair trial

Building the capacity for defence:

- **Capacity assessment of defence:** The JRC, with the support of the international community, should undertake an assessment of defence lawyers throughout Afghanistan in order to identify existing and potential independent lawyers, including

those able to engage in criminal defence work. This review should also identify the geographical location of lawyers and determine the measures that are necessary to increase their availability throughout Afghanistan.

- **Legal assistance program:** The international community should support efforts to ensure that detainees who do not have financial means are able to engage the assistance of legal counsel. Amnesty International recommends that until the creation of an Afghan bar association, assistance should be channelled to the Ministry of Justice in order to immediately build capacity to provide detainees with their right to defence.
- **Independent bar association:** The international community should support the JRC and independent lawyers in creating an independent bar association that is able to oversee the registration and organisation of independent lawyers.
- **Training for defence lawyers:** The LEC and IDLO with the support of the international community, must immediately devise and implement a training program for independent lawyers. Training should focus on criminal defence work and include practical skills such as case management, legal reasoning and defending. The international community must ensure that financial resources are provided to initiate such training as a matter of urgency.
- **Legal aid clinic:** The international community should fund the establishment of legal aid clinics at Afghan universities in order to build capacity and knowledge of criminal defence work amongst upcoming lawyers.
- **Public education:** The JRC, with the support of Afghan judicial institutions and the international community must initiate a program of public education on the criminal justice system, paying particular attention to the rights of detainees and the rights of women.

Legal reform:

- **Codification of law:** In order to ensure that there is no further ambiguity regarding the law, the Ministry of Justice with the assistance of the JRC and the international community should facilitate a process of codification of the law.
- **Dissemination of law:** The international community should provide the financial resources to ensure that the compilations of laws are disseminated without further delay to the courts and lawyers.
- **Review of Criminal Code and Criminal Procedure Code to ensure that the rights of the accused are fully protected**: The criminal laws should be amended as a matter of urgency to ensure that they fully comply with Afghanistan's international legal obligations relating to the right to a fair trial. In particular, the rights to liberty and security of person, the right to be brought promptly before a judge and the right to defence must be fully incorporated. The criminal procedure code must also include procedural guarantees for detainees, especially a procedure to challenge the legality

of detention before a judge who is able to order release if detention is unlawful and for public and transparent detention reviews.

- **Expeditious placement of legal experts in the Ministry of Justice and the JRC**. Amnesty International welcomes the government of Canada's commitment to place legal experts in the Ministry of Justice. Amnesty International believes that other donor governments, particularly Islamic states, should consider providing legal experts to assist the Ministry of Justice in amending applicable law.

The Constitution:

- **Place human rights at the centre of the new Afghan Constitution:** Afghanistan's obligations under international law must be incorporated into the new Constitution. In particular, the Constitution must contain an unambiguous non-discrimination clause which guarantees equality of al people regardless of their sex, religion or ethnicity. The constitution must also incorporate Afghanistan's international legal obligations related to the right to a fair trial. In order to ensure that all Afghans are able to access their rights, the constitution must guarantee the right to an effective remedy, including judicial review, for all rights set out in the Constitution.
- **Full consultation with the AIHRC on the Constitution:** In order to facilitate the incorporation of Afghanistan's international legal obligations into the new Constitution, the Constitutional Commission must fully consult with international and national human rights experts, including the AIHRC.

The failure to protect the human rights of women

- **Legal reform to protect women's human rights:** The ATA and the international community must act immediately to ensure that the new Constitution and existing legislation are in full conformity with CEDAW and provisions of the ICCPR that guarantee equality and non-discrimination. In particular, steps should be taken to ensure that violence against women, including rape, the sale or handing over of women and girls to settle disputes or as compensation, and forced marriage, are criminalized. The ATA should abolish laws, including those which proscribe *Zina* crimes that discriminate against women and girls, lead to imprisonment on the grounds of gender, the prosecution of rape victims, and which proscribe cruel, inhuman and degrading punishments.
- **Build capacity within the criminal justice system to protect the human rights of women victims and accused:** Capacity must be developed within law enforcement and judicial agencies to ensure that the criminal justice system is able to effectively bring the perpetrators of violence against women, including forcible marriage, to justice. Amnesty International urges the ATA with the assistance of the international community to incorporate the investigation and prosecution of crimes against women into all training programs for the police, prosecutors and judges. Furthermore, all programs must also include training on appropriate methods of dealing with women

victims and accused. In addition, the ATA must develop codes of conduct for the judiciary and law enforcement officials that fully incorporate procedures that aim to ensure respect and protection of women victims and accused. Effective oversight mechanisms must be put in place to ensure that codes of conduct are respected. Women and girls facing violence in the family for perceived social transgressions must receive protection. Shelters should be established for women and children and their purpose should be only protective; they should be available all over the country, adequately resourced, and linked to legal aid and vocational training.

- **Affirmative measures to increase the number of female police officers, prosecutors and judges:** The lack of access to justice for women and the discrimination against women in the criminal justice system is compounded by the lack of female professionals working in the Afghan criminal justice system. CEDAW and the ICCPR place an obligation on the ATA to ensure that women hold public positions. Amnesty International urges the ATA, with the assistance of the international community to ensure that women have equal access to employment in the police and judiciary. The ATA must ensure that affirmative action is taken to increase women's participation in the police and judiciary.
- **Ensure that the international community places a focus on women's rights:** International efforts to assist reconstruction and reform of the criminal justice system in Afghanistan have placed little emphasis on the protection of women's rights. The international community must ensure that measures to prevent serious violations of human rights against girls and women are fully incorporated into the judicial reform strategy, including all proposed activities of the JRC and all Afghan judicial institutions. In particular, steps must be taken to end impunity for violence against women. Furthermore, the international community must not condone or assist in the perpetuation of practices within the criminal justice system that discriminate against women.

Informal justice systems

- **Undertake a comprehensive review of the informal justice systems**: Any efforts to review the justice system in Afghanistan must include an analysis of existing informal justice mechanisms. Reviewing the informal systems, including the diversity of such mechanisms, the frequency of use and determining the practices that they carry out is an essential component of the criminal justice strategy. This review must assess whether these systems apply procedures and laws that are in conformity with human rights protections, including the right to a fair trial, the prohibitions against torture, and ill-treatment and non-discrimination. Particular attention must be paid to the rights of women and girls under international and national law.
- **Regulate the informal justice system:** The competence of informal justice systems must be clearly set out in the law in order to remove any ambiguity regarding the role

of Afghan informal justice mechanisms. The relationship between informal systems and the formal judicial system must be set out by law. In order to fulfil its obligation to exercise due diligence in protecting human rights, the ATA must ensure that *jirgas* and *shuras,* if they are allowed to continue to function, fully conform to international human rights law. If this cannot be ensured then these informal justice mechanisms must be abolished. All case in which there are indications that a *jirga* or *shura* has perpetrated human rights abuses must be thoroughly investigated and all those participating in them must be brought to justice.

- **Criminalisation of the exchange of girls and women**: The exchange of girls and women as a means of resolving disputes in the community and dealing with criminal offences is a clear violation of international human rights law. The practice must be stopped immediately and the exchange of girls and women criminalized under Afghan law.
- **Disseminate information on the formal justice system**: In order to strengthen the formal justice system and to ensure that people are aware of how they can access justice, a comprehensive awareness raising campaign on the formal legal system must be commenced. It must also include an emphasis on international human rights law.
- **Outreach to rural communities**: The formal justice system must be extended to rural communities. All members of the formal criminal justice system, including the police and the judiciary, must be provided with the resources to enable them to establish a presence in rural areas. Members of rural communities must be provided information on how to access the formal system. Moreover, male and female members of rural communities must be consulted on judicial reforms.

Delays in ending impunity

- **Justice:** It is the first duty of the state in which crimes against humanity and other serious human rights violations have been committed to prosecute these crimes. Fair and effective prosecutions of past human rights violations and abuses by the Afghan criminal justice system offers one means of ending impunity. However, the Afghan courts require international assistance to ensure that they are able to investigate past violations of human rights in a fair and effective manner in the course of proceedings that meet international standards for a fair trial. In particular, the judiciary must be provided with training in international humanitarian law and human rights law and standards, the police must be provided with the capacity to conduct thorough investigations and measures to ensure the security of victims and witnesses must be devised.
- **Ensure that crimes under international law are crimes under Afghan law:** Afghanistan must ensure that it incorporates crimes set out under Articles 6, 7 and 8 of the Rome Statute as crimes under Afghan law. Genocide, war crimes and crimes against humanity must be clearly defined as criminal offences in Afghanistan in order

to ensure that the Afghan courts have jurisdiction to prosecute such crimes. In addition, the principles of criminal responsibility in national legislation for crimes under international law must be consistent with customary international law. Afghanistan must also ensure that fair trial guarantees are fully incorporated into national law and that the death penalty is abolished.

- **Enact legislation to facilitate co-operation with the International Criminal Court:** Afghanistan ratified the Rome Statute on 10 February 2003. Afghanistan is required to enact legislation to ensure that it is able to co-operate with the International Criminal Court. Such legislation must ensure that the legal personality of the International Criminal Court is recognised in Afghanistan and that officials of the court are able to operate within the country. In addition, legislation must recognise the privileges and immunities of the court, its personnel, counsel, experts and witnesses. Enabling legislation must also include a basic provision allowing the Afghan courts and authorities to fully co-operate with any order issued by the International Criminal Court including the provision of documents, records and physical evidence, locating victims and witnesses and facilitating searches by the court and the execution of international arrest warrants.[95]
- **UN commission of inquiry:** Amnesty International believes that a first step towards ending impunity would be the creation of a UN commission of inquiry. The commission should study the situation of the Afghan criminal justice system and the manner in which the judicial system could be assisted in order for it to have the capacity to initiate investigations and prosecutions of international crimes. In addition, the commission of inquiry should advise on safe and effective methods for ending impunity, pending the reform of the Afghan criminal justice system.
- **No impunity:** Amnesty International underlines the fact that under international law there can be no impunity for persons suspected of committing war crimes, crimes against humanity and other serious violations of international law. The ATA must ensure that it eliminates any bars to prosecutions under national law and that there are no amnesties for crimes under international law.

[95] See: Amnesty International "*International Criminal Court: Summary Checklist for Effective Implementation*", IOR 40/15/00.

Independent monitoring of the criminal justice system from a human rights law perspective

- **Capacity building for the AIHRC:** The international community must ensure that it pledges long-term financial and political support to the AIHRC in order to build its capacity to engage in monitoring of the criminal justice system from an international human rights law perspective. Effective training in monitoring the legal system is essential in order that the recently drafted monitoring manual can be fully utilised.
- **Political support for the AIHRC:** The AIHRC is a key institution that must be supported. The ATA must ensure that the AIHRC is given unrestricted access to documents, courtrooms and places of detention. In addition, the AIHRC must be fully consulted in the transitional process. Moreover, a legal basis for the AIHRC must be set out in the new constitution in order to ensure the development of a sustainable independent Afghan institution that is capable of providing independent human rights oversight.
- **UNAMA to fully commit to human rights protection:** UNAMA must demonstrate its commitment to human rights by ensuring that staffing levels within the mission are increased and that there are no further delays in recruiting staff. In particular, UNAMA must ensure that the posts of senior advisor on human rights and senior advisor on the rule of law are filled as a matter of urgency. In addition, the human rights components of UNAMA must work closely with the rule of law unit to develop an effective strategy for promoting human rights within the criminal justice system. The human rights components of UNAMA must be allowed to develop activities that go beyond the process of political transition.