

**AFGHANISTAN: JUDICIAL REFORM
AND TRANSITIONAL JUSTICE**

28 January 2003



Asia Report N°45
Kabul/Brussels

TABLE OF CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS	i
I. INTRODUCTION	1
II. BACKGROUND	3
III. LEGAL INSTITUTIONS	7
A. THE 1964 CONSTITUTION	7
B. THE JUDICIARY	8
1. The Court System	9
2. The Supreme Court and the Chief Justice	10
C. THE MINISTRY OF JUSTICE	10
IV. THE JUDICIAL AND HUMAN RIGHTS COMMISSIONS	12
A. THE JUDICIAL COMMISSION	12
B. THE HUMAN RIGHTS COMMISSION	13
V. TRANSITIONAL JUSTICE	15
A. OBSTACLES TO JUSTICE.....	15
B. THE POLITICAL TRANSITION	17
C. GATHERING EVIDENCE	18
D. PROSECUTION PARAMETERS.....	19
VI. CONCLUSION	20
APPENDICES	
A. MAP OF AFGHANISTAN.....	22



AFGHANISTAN: JUDICIAL REFORM AND TRANSITIONAL JUSTICE

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Afghanistan's legal system has collapsed. Never strong to begin with, it has been nearly destroyed by 23 years of conflict and misrule. There are few trained lawyers, little physical infrastructure and no complete record of the country's laws. Under successive regimes, laws have been administered for mostly political ends with few protections of the rights of individuals to a fair trial. Although the country has signed up to most international agreements on human rights, abuses have been widespread, and military commanders have enjoyed impunity.

The challenges in remedying the situation are enormous. No justice system can thrive in a state of insecurity and corruption since judges and prosecutors will be intimidated or bribed. There are deep divisions between those who favour a very conservative interpretation of Islamic law and those who want to revive the more progressive ideas in the 1964 Constitution. The loss of trained staff has been such that it will take a generation at least to rebuild a system that even before the conflict only really functioned in the main cities and towns.

Nevertheless, moving towards the rule of law is a vital part of peace building in Afghanistan. Abuses of ethnic and religious groups and the treatment of women suggest that no group can feel secure unless protected by a body of law and a functioning judicial system. The economy will be more likely to grow if property is protected; a fair system to adjudicate the many property disputes that have stemmed from war will be vital if this is not to become a new source of grievance and conflict. A functioning judicial system will also be essential for dealing with drug production. The country will likewise have to find a way of addressing past human rights abuses if it is to gain a durable peace.

The Bonn Agreement signed in December 2001 re-established the 1964 Constitution as Afghanistan's key legal document and laid out a plan to rebuild the system. That plan called for the establishment of independent commissions to oversee the rebuilding of the judiciary, monitoring of human rights, drafting of the constitution and selection of civil servants. These bodies were to provide both expertise and some measure of oversight to a government in which executive and legislative powers are concentrated in the hands of the president and his cabinet.

So far the commissions have achieved little. Most of those named to the first Judicial Commission were linked either to ministries or the Supreme Court. That commission bogged down in bureaucratic and political rivalries and was disbanded after three months. A new commission, appointed in November 2002, appears more independent but begins with an ill-defined mandate and is handicapped by the fact that several critical laws were drafted or adopted in the intervening months. The Human Rights Commission has been more successful but faces formidable security concerns, which the Transitional Administration and the international community have not adequately addressed, and has been delayed in establishing a nation-wide presence. The Civil Service Commission is not yet functioning.

The commissions were an obvious channel for international technical and financial assistance, and the delay in establishing them has meant many lost opportunities. Their performance to date does not bode well for the future since they will have to tackle even more thorny issues such as disarming military forces, writing a new constitution and managing elections due in 2004.

While the international community has dithered on judicial development, the factions within the

Transitional Administration that control the judiciary have moved swiftly to promote their interests. The Supreme Court is controlled by Fazl Hadi Shinwari, an ally of the Saudi-backed fundamentalist leader Abd al-Rabb al-Rasul Sayyaf. Shinwari was appointed in December 2001 by former president Burhanuddin Rabbani. President Hamid Karzai re-appointed him in June 2002, much to the surprise of many as the constitution requires that a Chief Justice be under 60, while another provision has been interpreted as requiring that the Chief Justice be educated in all sources of Afghan law, religious and secular. Shinwari is believed to be in his 80s and does not have formal training in secular sources of law.

Shinwari has rapidly placed political allies in key positions, even expanding the number of Supreme Court judges from nine to 137. Of the 36 Supreme Court judges whose educational qualifications are known, not one has a degree in secular law. Shinwari's actions, together with the re-emergence of a ministry to promote Islamic virtue, have added to fears that the judicial system has been taken over by hard-liners before the Afghan people have had a chance to express their will in a democratic process. The Supreme Court has also established new National Security Courts that will try terrorist and other cases although it is unclear whether it had the right to create courts that are not mandated in law.

Tensions have emerged between the Supreme Court Chief Justice and the Minister of Justice, whose ministry drafts laws and who under the Law of Saranwal (Attorney General or Public Prosecutor), is the country's chief prosecutor. Although the Attorney General was established as a separate office in the 1980s, the Minister of Justice disputes the constitutionality of this move.

The United Nations has done little to press accountability for past human rights abuses as senior figures believe it is more important to consolidate the peace process. Donors have been slow to embrace the issue – at the Tokyo conference there were no specific commitments. President Karzai has dismissed transitional justice as a “luxury” the country cannot afford until it is more settled. But taking justice for past crimes off the agenda has almost certainly contributed to a sense among commanders that they can act as they wish with no risk of punishment. Human rights abuses by

commanders, many officially part of the government, continue across the country.

Most advocates for a process of transitional justice recognise the difficulties but believe that training and resources need to flow into the country now so that Afghans can eventually make informed decisions about which mechanisms might best address past abuses and help end the cycle of impunity. Training lawyers and investigators, protecting evidence and establishing archives are all essential if Afghans are to choose in the future from an array of possibilities that includes trials of abusers and a truth and reconciliation commission. Many difficult decisions about what to include and where to draw geographical or temporal boundaries can be put off until peace is more established but unless the international community builds a capacity among Afghans to deal with the issue themselves, all choices could be lost for good.

Rebuilding the justice system needs to move higher up the political agenda. The process requires conspicuous support from the United Nations and full implementation of the Bonn Agreement, which offers a mechanism to build a new justice system. Donors need to provide technical and financial support in a timely manner to ensure that Afghanistan develops a legal system that serves and protects all its people and reduces the risks of a return to conflict.

RECOMMENDATIONS

To President Hamid Karzai and the Afghan Transitional Administration:

1. Request the retirement of Fazl Hadi Shinwari as Chief Justice and appoint a successor who meets the constitutional requirements on age and education.
2. Issue a decree affirming the independence of the new Judicial Commission, giving it the authority to issue binding recommendations, and establishing a formal process whereby the Commission will report on its work to the President.
3. Protect members of the Human Rights and Judicial Commissions, when requested, to ensure they are not intimidated.

4. Issue a decree clarifying the constitutional status of the Attorney General's office, on the basis of the Judicial Commission's recommendation.
5. Disband the National Security Courts and halt establishment of any new courts or justice related bodies until these can be reviewed by the Judicial Commission.
6. Establish the membership of the Civil Service Commission, as mandated by the Bonn Agreement, ensure that it has a secretariat staffed by independent experts to set appointment standards, and encourage it to review all appointments made since the signature of the Bonn Agreement.
7. Suspend use of the death penalty at least until defendants are guaranteed due process.
- (d) the institutions drafting new laws, procedures and codes;
- (e) law faculties, libraries and other facilities for legal education; and
- (f) the Afghan Human Rights Commission and any regional branches that it may establish; and human rights and legal aid NGOs, bar associations and other elements of civil society.

To the Afghan Human Rights Commission:

8. Give serious consideration to and indicate whether the Commission supports the establishment of a UN-mandated International Commission of Inquiry to document crimes against humanity committed during the past 24 years, as proposed by the UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions.
12. Support the consultative process on transitional justice to be undertaken by the Human Rights Commission by:
 - (a) helping Afghanistan benefit from the similar experiences of other countries;
 - (b) providing expert and technical help to enable Afghans to organise consultations and design a way to account for past crimes that fits the situation in the country;
 - (c) providing assistance for the collection and preservation of evidence of human rights abuses by the United Nations and other groups; and
 - (d) providing sufficient funding for a widespread public information campaign on the consultation process to ensure that expectations are reasonable.

To the International Community, in particular Donors and the United Nations:

9. The Italian government should ensure that funds pledged during the 19-20 December 2002 Conference of Rome on Justice in Afghanistan are expeditiously channelled.
10. Raise the public profile of efforts to promote the rule of law and human rights by offering to expand technical and financial support to all the commissions provided for in the Bonn Agreement.
11. Ensure that technical and financial assistance is provided to all sectors of the government and civil society involved in the administration of justice and law enforcement, and coordinate such assistance so as to ensure the parallel development of each sector, including:
 - (a) courts, the public prosecutors and judges;
 - (b) local traditional institutions for resolving disputes;
 - (c) the police; jails and other detention and correction facilities;
13. Express readiness to support establishment of a UN-mandated International Commission of Inquiry to document those war crimes and other violations of international humanitarian law, since April 1978, that are serious enough to warrant consideration as crimes against humanity and thereby assist the Human Rights Commission's consultative process on transitional justice.
14. Provide, where deficiencies are identified in the existing record, such an International Commission of Inquiry with financial support, channelled through a trust fund, to carry out investigations as thoroughly as possible in view of the passage of time, to include, as necessary, support for the provision of:
 - (a) forensic specialists and other technical assistance;
 - (b) security for sites believed to contain graves and other material evidence; and
 - (c) security for witnesses and their families believed to be at acute risk of retaliation.

15. Condemn forcefully ongoing human rights violations, press for accountability and publicly name commanders who are persistent abusers of human rights.
16. Support the rebuilding of law libraries and translation of foreign law texts, and make available foreign faculty to teach courses on international human rights law.
17. Work urgently with the Transitional Administration in connection with security sector reform to develop human rights guidelines on the selection of officers and new codes of conduct for the military and police.

Kabul/Brussels, 28 January 2003

AFGHANISTAN: JUDICIAL REFORM AND TRANSITIONAL JUSTICE

I. INTRODUCTION

Afghanistan's judiciary, like every other institution in the country, is in a shambles after 23 years of war. Successive regimes imprisoned or executed scholars of Islamic law and Western jurisprudence, drove others into exile, or banned them from practising their profession. The years of fighting have left the country without any complete set of its own laws and codes; law libraries have been burned and ransacked and land registers lost or manipulated.

For years, secret police answering to communist, mujahidin or Taliban intelligence agencies carried out arrests and summary proceedings without pretence of due process. Political detainees have filled the country's jails, from the notorious Pul-i-Charkhi prison outside Kabul in communist times to the shipping containers used today by individual commanders.

The Bonn Agreement, signed by the main political factions in December 2002, identified legal reform and the rule of law as key elements to peace building in Afghanistan. It established its own terms and the Constitution of 1964 as the fundamental legal documents and set up a number of commissions to lead the process. UN officials, representatives of donor countries and Afghan leaders all identified judicial development as a vital step in peacebuilding.

As the rule of law underlies every reconstruction project planned or underway, it must be a central priority for the government and donors. Afghan and UN officials have described the reform process as encompassing a wide range of activities: review of the 1964 Constitution and existing laws; drafting of new laws; training of judges, lawyers and police; building of prisons and refurbishing of offices; and initiation of accountability for past human rights abuses.

Likewise, the goals of judicial reform intersect such vital elements as constitutional development, legislative reform, expansion of civil society and development of human rights institutions and their protection and education capacities. Genuine security for Afghans will depend on whether their country becomes one where those in power govern not by decree but by law, where police do not answer to one political leader or warlord but are accountable to legal institutions and ultimately to the citizens, and where those citizens understand they have rights under the law, and there are consequences for those who violate those rights.

If the rebuilding of Afghanistan's economy is to succeed, investors must feel secure that their assets are protected under the law, while donors and citizens alike must be able to trust that assistance will not be eaten away by corruption.

If abusive institutions and individuals are shielded from effective judicial scrutiny, donors may reasonably be unwilling to direct assistance where it is needed most – precisely at those institutions with the greatest potential for abuse.¹ It would be perilous to neglect the more difficult challenges of redrafting and monitoring criteria for judicial appointments, retraining the police, rebuilding and reforming corrections facilities, and confronting abusive authorities.

A sustained commitment is essential. The reform process must be dedicated to building and strengthening Afghan institutions that can carry on the reform effort. In addition to the government's judicial institutions – the courts, Ministry of Justice, and prisons – those involved must look to ways to rebuild bar associations and other associations of

¹ International Council on Human Rights Policy, "Local Perspectives: Foreign Aid to the Justice Sector", (Geneva, 2000), *passim*.

judges and lawyers, particularly those for women judges and lawyers, who have been cut out of the system for so long and whose participation will be vital in order to address entrenched discrimination. The ultimate test of judicial reform is whether it benefits those “whose rights are in jeopardy” and who need protection.²

Judicial reform efforts must not be divorced from the overall security framework. But little has been done to confront the political obstacles, in both Kabul and the provinces, that threaten any serious effort to rebuild the judiciary. The factionalism that characterises the Transitional Administration³ as a whole also impedes the functioning of the judicial system.

Each of the three major components of the judicial system – the Ministry of Justice, the Supreme Court, and the Attorney General’s office – is dominated by rival political or ideological camps which, while sharing an Islamic background, have been unable to define a common set of objectives. Many provincial judges were appointed or confirmed by the militias that are now dominant in their areas, and are often simply madrasa-educated mullahs. Resolving the internal disputes within the judicial system and professionalising the judiciary will require confronting powerful political actors and should proceed in tandem with demobilisation and disarmament.

Under the Bonn Agreement, the 1964 Constitution provides authoritative guidance until a new constitution is drafted. Finding the right balance between Western jurisprudence and Islamic law has been a challenge for Afghanistan’s legal community since well before the Soviet occupation and subsequent civil wars. The Judicial Commission will need to embrace both traditions.

Rebuilding the justice system also raises the issue of how to address the war crimes and crimes against humanity that occurred during the decades of conflict. Transitional justice is always difficult but it should not be swept aside. Speaking at the Loya

Jirga in June 2002, President Hamid Karzai told delegates that “we must have peace, stabilise peace, make it certain, make it stand on its own feet and then go for justice. But if we can have justice while we are seeking peace we’ll go for that, too”. This realistic assessment was undercut later in the same speech when he said: “So... justice becomes a luxury for now. We must not lose peace for that”.

Justice – in terms of an accounting for the past and legal protections for the present – is not a luxury. It is a vital component of any lasting peace and durable reconstruction and so should be a priority for the Transitional Administration and the international community.

This report examines key issues relating to the development of the rule of law in Afghanistan, including transitional justice as part of peacebuilding. It surveys events since the Bonn Agreement was signed in December 2001 and assesses some of the successes and failures in the development of a justice system.

Many other issues, particularly those relating to the writing and approval of a new constitution and selection of an electoral system, will be dealt with in a future report. Most Afghans still have deep concerns about their security if they speak out in public in a critical manner. For that reason most of the Afghan sources cited in this paper are anonymous.

² Ibid., p. 92.

³ The governing authorities in Afghanistan from the time of the Bonn Agreement in December 2001 until the Loya Jirga in June 2002 were known collectively as the Interim Authority. Subsequently, the government has been referred to as either the Transitional Administration or the Transitional Authority. For consistency and simplicity, it is referred to in this report as the Transitional Administration.

II. BACKGROUND

Before the quarter century of conflict from which Afghanistan is now emerging, its legal institutions and legal elites fell into two divided camps: those that drew on Islamic jurisprudence and those that were based in Western secular law.

The introduction of secular law began with independence in 1919. In 1923, King Amanullah gave the country its initial constitution, which defined for the first time Afghan citizenship and described the attached rights. In a pattern that would be repeated by his successors, Amanullah's efforts to modernise the state brought him into conflict with local, tribal leaders. He courted foreign aid and foreign ideas to reform education, while cutting government allowances to tribal leaders. He also attempted to increase government supervision of the judiciary by establishing licensing requirements for mullahs and local judges.⁴ His successor, Nadir Shah, employed a less confrontational approach, giving religious and tribal leaders a role in reviewing proposed legislation through a National Council.⁵

Foreign assistance continued to be vital in education, however. Kabul University was founded with considerable foreign aid; each faculty had a foreign sponsor that provided financial support, professors, scholarships and training.⁶ The Faculty of Law and Political Science had French help; al-Azhar University in Egypt sponsored the Faculty of Sharia.⁷

But foreign aid also deepened divisions between Islamic and Western law. In theory, "secular law [was] expected to be in harmony with Sharia law and

to supplement it, and both overlay indigenous tribal codes or customs (*adat*)".⁸ Throughout Afghanistan's history, however, the two formal systems have been at odds. Jurists trained in Western law have seldom been conversant in the Sharia, and vice versa.⁹

Another and perhaps greater gulf has divided urban and rural society and the bases of authority in each. Afghan rural society also has a long history of resisting interference from a centralising state. In most of the country outside larger urban areas, traditional institutions for resolving disputes have largely relied on elders and other influential people.

Throughout the country such institutions are commonly called *jirgas*, a Turkic word meaning circle, or *shuras*, which comes from the Arabic *mashwara* meaning to discuss. When two parties seek to have a dispute resolved, including such crimes as murder and theft, they must first agree to abide by the decision of the *jirga*. If they subsequently fail to do so, they risk being cast out of the tribe or village.¹⁰

Central government courts are generally not permitted to interfere in tribal disputes but the relationship between local institutions and urban-based formal legal institutions is not necessarily oppositional. In some cases, deciding which should adjudicate a particular dispute depended on whether the parties believed they stood to benefit more from one than the other. However, particularly in tribal areas, the blood feud has remained "the main institution for the enforcement of justice".¹¹

The reforms of the 1960s reflected the changes that had been wrought by the expansion of Afghanistan's educational system and the creation of new educated urban elites who wanted to shape political change in the country. The New Democracy period, as it came to be known, included a new Constitution, which had been debated by representatives to a Loya Jirga convened in Kabul by the king, Zahir Shah, in 1963. The drafters drew on the U.S. Bill of Rights and the Universal Declaration of Human Rights to include guarantees for fundamental freedoms, including speech, association, and press, and due process. The

⁴ These and other measures that eroded the role of tribal leaders in the administration, particularly the abolition of government allowances, lost him crucial support. After a series of revolts he was forced into exile in January 1929. Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven, 1996), pp. 55-58.

⁵ The National Council was selected by the 1930 Loya Jirga (national assembly) from among its own members. In practice, the Council "simply rubber-stamped Cabinet proposals". Louis Dupree, *Afghanistan* (Princeton, 1980), p. 463.

⁶ Rubin, *op.cit.*, p. 62.

⁷ "In the early 1970s half of the teachers in the Sharia Faculty had degrees from al-Azhar, and two-thirds of those in the Faculty of Law and Political Science had degrees from French universities". Presaging its current role, West Germany sponsored the Police Academy. *Ibid.*, p. 70.

⁸ Marvin Weinbaum, "Legal Elites in Afghan Society", *International Journal of Middle Eastern Studies*, 12 (1980), p. 39.

⁹ *Ibid.*, p. 41.

¹⁰ ICG interview with Afghan lawyer, Kabul, April 2002.

¹¹ Rubin, *op. cit.*, p. 10.

constitution also stipulated an independent judiciary for the first time.¹²

The major flaw in the reform effort was with respect to political participation. Although parties could organise, Zahir Shah never signed legislation allowing them to contest elections. The government apparently feared that giving them access to power might promote ethnic divisions.¹³ The new bicameral consultative parliament could debate legislation and advise the king but not hold him or his government accountable. The reforms fostered, in effect, “a rudimentary civil society” but not the political institutions that could challenge state power. Activists of various stripes could express their views within certain limits but not threaten the political order.¹⁴

Two major movements emerged out of the newly educated elite: the communists, who founded the People’s Democratic Party of Afghanistan (PDPA),¹⁵ and the Islamists, who launched their own movement at about the same time to counter growing foreign, particularly communist, influence at the university and elsewhere.¹⁶ By 1970 they had enough clout to defeat leftists in elections to the student council.¹⁷ It is no accident that among the early mujahidin leaders were several professors in the Sharia Faculty at Kabul University, including Burhanuddin Rabbani and Ghulam Rasul (now Abd al-Rabb al-Rasul) Sayyaf.

In 1973, the king’s cousin, Mohammad Daoud Khan, seized power, bringing the monarchy to an end. Daoud had relied on support from the Parcham (“flag”) faction of the PDPA in carrying out the coup. But he soon distanced his government from the Soviet Union, instead courting Iran for support and advice on setting up a secret police. He cracked down on the Islamists, jailing many and driving others into exile in Pakistan where they began to organise for armed resistance. Within a few years, he had banned all political organisations except his own party, including both factions of the PDPA.¹⁸

While Zahir Shah had striven to bring limited democratic reform to Afghanistan, Daoud emphasised economic development and the social and economic discipline that would be required to achieve it – including limitations on freedom of the press and other rights guaranteed under the 1964 Constitution.¹⁹ At a 1977 Loya Jirga that was largely seen as a rubber stamp, he promulgated a new constitution to provide the basis for a one-party republican form of government.²⁰ It was never ratified, however; the PDPA overthrew Daoud on 28 April 1978.

The reforms of the 1960s had little impact in the countryside, where traditional moral authority remained vested in the mullahs and khans (tribal leaders and landowners). Zahir Shah’s government made no effort to challenge agrarian relations or this rural power structure. During the New Democracy period and under Daoud alike, tribal leaders participated in Loya Jirgas but were largely left alone to manage local affairs.

After the PDPA seized power, however, one of its aims was to take over the legal institutions and use them to carry out its social and political agenda to transform society. The PDPA specifically sought to “curb the power of local jurists and the authority of Islamic legal reasoning through secularising administration of the law”.²¹ In the countryside, it attempted to impose radical reforms by decree. Its most controversial initiatives challenged the control

¹² The Supreme Court demonstrated that independence on several occasions in the 1960s when it was called on to adjudicate disputes between government ministries and the legislature. ICG interview with Afghan lawyer, Washington, D.C., May 2002.

¹³ Ibid.

¹⁴ Rubin, op. cit., p. 81.

¹⁵ The PDPA was divided into two factions, Parcham (flag) and Khalq (masses). Although they united for the purposes of the coup, the leading Khalqis soon purged the new government of Parchamites only to be ousted by the Soviets and replaced by the Parchamites.

¹⁶ Rabbani was the leader of the first Islamist party at Kabul University, *Jamiat-i-Islami*, which was founded in 1973. He fled to Pakistan after Daoud’s coup. In June 1992, he became president of the Islamic State of Afghanistan. Sayyaf was imprisoned by Daoud, narrowly escaped execution after the 1978 revolution and was finally released during the brief amnesty that followed the Soviet invasion. He, too, fled to Pakistan where he attracted support from Saudi Arabia and founded the *Ittihad-i-Islami*, a conduit for Arab fighters. See Rubin, op. cit., pp. 83, 221.

¹⁷ Ibid, p. 101.

¹⁸ Ibid, p. 104.

¹⁹ He also modified certain provisions of the criminal code, which was being drafted at the time, to strengthen the rights of victims of crime over those of defendants. ICG interview with Afghan lawyer, Washington, D.C., May 2002.

²⁰ Ibid. Also Rubin, op. cit., pp. 74-75.

²¹ Rubin, op. cit., p. 39.

exerted by local religious leaders over family life and social organisation.

By November 1978, the regime had announced new regulations on rural land ownership and tenancy, debt, and customs regulating marriages and bride price, and had attempted to carry out these decrees by force. In June 1979 the government established “popular committees”, dominated by state bureaucrats, to resolve legal disputes related to land ownership.²²

The reaction revealed how alienated the new leadership was from rural society. The reforms found little support in the countryside; instead, they provided much of the motivation for revolts that erupted almost immediately throughout the country. Rural tribal and religious leaders joined with urban-educated Islamists to reject the imposition of alien concepts of state and religion that threatened their power.

Thousands of opponents of the new reforms – the tribal leadership, religious leadership, intellectuals and non-Pashtun minority leaders – were killed by the Khalq administration.²³ The counter-insurgency was spearheaded by the Khalq Deputy Prime Minister, Hafizullah Amin, who had quickly become the dominant figure in the new government.

The intensity of the opposition was not simply due to the fact that the government had attempted to intervene in rural society, where “local traditions rather than state law played the primary role”,²⁴ but that it had employed such brutal means. Although the government did not alter the ordinary courts or laws governing civil and criminal procedure, it bypassed them, employing secret police and summary proceedings to eliminate its opposition.

The Soviet Union was prompted to intervene, on 27 December 1979, as rapidly spreading army revolts undermined state authority. Under its occupation, all important state institutions were modelled on their Soviet counterparts with the principal aim of ending resistance to the state. Soviet advisors established an internal security agency, the State Information

Services (*Khidamat-i-Ittila‘at-i-Dawlati*, or KhAD), which reported directly to the prime minister and carried out arrests, interrogation and torture of political detainees suspected of supporting the resistance. “KhAD also wielded de facto judicial authority via the Special Revolutionary Court”, replacing the regular courts altogether.²⁵

It continued even after the completion of the Soviet withdrawal, on 15 February 1989, renamed the Ministry of State Security (*Wizarat-i-Amaniyyat-i-Dawlati*, or WAD). Indeed, one profound legacy of the Soviet Afghan and civil wars has been the extent to which secret police activities and intelligence agencies have replaced ordinary criminal investigations and civilian police procedure.²⁶ KhAD was one of the few institutions built by the Soviets that survived their withdrawal. Much of WAD’s intelligence apparatus, including some personnel, continued through the mujahidin and Taliban periods.

Under the mujahidin, each party vying for power in Kabul maintained its own intelligence department, and carried out arrests, interrogations and summary executions for its own purposes. Ordinary courts did function some of the time; judges (including women) were appointed and presided over civil, criminal and family law cases. But real power rested with extra-judicial proceedings that replaced due process.

Reports by the UN Special Rapporteur on Afghanistan reflect the chaos of the early years under the mujahidin. In 1992 and 1994, the Special Rapporteur reported that rival factions were secretly detaining people in houses throughout Kabul. Ordinary courts were operating at the district and provincial levels but could not refer cases to the High Court in the capital.²⁷ Some Kabul police stations were notorious for torture.²⁸

²² Ibid., pp. 116-117.

²³ “The [Afghan] government later published a list that named twelve thousand people purportedly killed in Kabul prisons during this period. In response to rural uprisings the government also engaged in such collective reprisals as the killing of an estimated 1,170 villagers in Kerala, Kunar, on April 20, 1979”. Rubin, op. cit., p. 115.

²⁴ Ibid., pp. 111-119.

²⁵ Ibid., p. 133.

²⁶ There had been other secret police agencies. Amir Abdul Rehman, who ruled from 1880 to 1901, created the first, which was notorious for crushing resistance by the country’s non-Pashtun minorities. Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven, 2000), p. 12.

²⁷ The Special Rapporteur reported that “proper judicial norms and procedures were reportedly not followed and ... there is no consistency in the judicial hierarchy”. Final report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1992/68. The use of private detention centres continued through the mujahidin

By 1996, the situation had improved somewhat. Although secret detentions continued, the Rabbani government had reportedly drafted laws to deal with the property rights of returning refugees. The most positive development in this period was the emergence of the Lawyers Association of Afghanistan, whose activities included providing free legal aid to defendants and to returning refugees seeking to reclaim property. It also translated and distributed copies of international human rights instruments.²⁹

There were regional variations and autonomy in the judiciary at this time. In Bamiyan, the highest legal authority was the judicial commission, composed of religious scholars and judges but controlled by different political parties. The parties themselves would investigate a case before referring it to the judicial commission. Cases were not referred to Kabul.³⁰

When the Taliban came to power, they dismissed all women judges and replaced local judges with mullahs who agreed with their interpretation of the Sharia. In theory, criminal cases were referred to the department of police for investigation and subsequently to the Saranwal (Public Prosecutor), who presented them to the courts. The Supreme Court remained the court of final appeal. Ordinary appeal processes could be bypassed if the Taliban supreme leader, Mullah Mohammad Omar, were to take interest in the case and issue a death sentence. The Taliban did not necessarily draw a clear line between criminal and military jurisdictions.³¹ Like their mujahidin predecessors, members of the

Taliban also engaged in arrests for extortion, frequently targeting minorities.

Trials were often summary, with specific penalties for the so-called *hudud* crimes of Islamic law, such as the amputation of a limb for theft. The Taliban purged the universities of suspected opponents, including members of the Law Faculty,³² and banned groups like the Lawyers Association of Afghanistan.³³

The most powerful agency within the Taliban state (the Islamic Emirate of Afghanistan) was the Ministry of Enforcement of Virtue and Suppression of Vice (*al-Amr bi al-Ma'ruf wa al-Nahi 'an al-Munkir*), which was responsible for enforcing all decrees regarding moral behaviour. The "Vice and Virtue" police, as they came to be known, patrolled city streets on the lookout for improperly dressed or inappropriately employed women, men with scant beards or improper haircuts, and evidence of imported videos or music cassettes. In most cases, punishment would be meted out on the spot.

One legacy of the Taliban's repressive rule is a strong sentiment among many Afghans to avoid returning to a harsh legal system that combined an idiosyncratic interpretation of Islamic law with *Pashtunwali*, the Pashtun tribal code. At the same time, there is consensus that the reform process must be inclusive; for that reason the Bonn Agreement states that international standards, Islamic law and Afghanistan's own legal traditions will all guide the process. In the effort to balance Afghanistan's competing legal traditions, the Constitution of 1964 and other legislation from that period provide a useful starting point.

period. In 1994 the Special Rapporteur reported on "the existence of prisons run by political parties and field commanders in areas under their control, mostly at undisclosed locations". February 1994: Final report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1993/66.

²⁸ Final report on the situation of human rights in Afghanistan submitted by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1994/84, 20 January 1995.

²⁹ Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1995/74, 27 February 1996; Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75, 20 January 1997.

³⁰ Ibid.

³¹ Ibid.

³² ICG interview, Kabul, April 2002.

³³ Final report on the situation of human rights in Afghanistan submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75, 20 January 1997.

III. LEGAL INSTITUTIONS

A. THE 1964 CONSTITUTION

While Zahir Shah's constitution is often seen as one of the most progressive of its time for Afghanistan, its reforms were modest, providing a modicum of political freedom without genuinely threatening the power of the government. The latter comprised a prime minister, appointed by the king, and other ministers, also appointed by royal decrees. The king, as the head of state, was custodian of the constitution but not accountable to it. Candidates stood for election to the bicameral legislature as individuals, not party members, but the government was not elected.³⁴

Despite those limitations, the constitution did provide for a number of basic civil rights, which were largely upheld by the courts,³⁵ including due process guarantees such as the presumption of innocence and the right to defence counsel. It prohibited coerced confessions, arbitrary detention, torture, and other forms of punishment "incompatible with human dignity".³⁶ It offered protection against arbitrary search and seizure³⁷ and prohibited government surveillance of private communications without a court order (although the order could be obtained after the fact "in urgent cases, defined by the law").³⁸

It guaranteed freedom of thought and expression and "the right to print and publish ideas ... without submission in advance to the authorities," although these rights were still required to be "in accordance with the provisions of the law."³⁹ And it guaranteed the right of freedom of association⁴⁰ and affirmed several basic economic and social rights, among them free education.⁴¹

The actual codes governing criminal and civil procedure were finalised between 1965 and 1976. These included the Criminal Procedure Code of 1965, the Commercial Code of 1965, the Civil Code

of 1976, and the Penal Code of 1976. No complete set of these codes and other laws is presently available in Afghanistan. Those that existed in the libraries of the Ministry of Justice, the Supreme Court and the Kabul University Law Faculty have been destroyed. International non-governmental and inter-governmental organisations, such as the International Development Law Institute based in Rome and the Consortium for Response to the Afghan Transition, an association of four U.S.-based groups, have undertaken to locate and copy these legal texts.

Under the Bonn Agreement, the applicable legal framework until adoption of a new Constitution is:

- (a) the 1964 Constitution "to the extent that its provisions are not inconsistent" with the provisions of the Bonn Agreement and with the exception of those provisions related to the monarchy, the executive and the legislative bodies; and
- (b) existing laws and legislation to the extent they are not inconsistent with the provisions of the Bonn Agreement or international legal obligations to which Afghanistan is a party, or with those applicable provisions of the 1964 Constitution, "provided that the Interim Authority shall have the power to amend or repeal those laws and regulations".

Thus, the Interim Administration established in Bonn was to review existing laws and legislation. However, because the Judicial Commission was to be the vehicle for this process, as of June 2002 when the Loya Jirga met, no systematic review had yet taken place.

President Karzai on 5 October 2002 established a nine-member Constitutional Drafting Commission, which is charged with the task of drafting a new constitution. That draft, in turn, is to be debated and presumably ratified at a Constitutional Loya Jirga to be held in October 2003. Much of the 1964 Constitution may be used as a starting point; there was a consensus among the Afghan lawyers and judges interviewed for this report that much of that document and many laws from the New Democracy

³⁴ Constitution of Afghanistan 1964, Article 89; Rubin, *op. cit.*, p. 73.

³⁵ ICG interview with Afghan lawyer, Washington, D.C., May 2002.

³⁶ Constitution of Afghanistan 1964, Article 26.

³⁷ *Ibid.*, Article 28.

³⁸ *Ibid.*, Article 30.

³⁹ *Ibid.*, Article 31.

⁴⁰ *Ibid.*, Article 32.

⁴¹ *Ibid.*, Article 34.

period could form the basis of new laws after appropriate amendments and updating.⁴²

Importantly, these laws already on the books provide due process guarantees. As one lawyer argued, by defining some form of due process, the laws enable people to have some faith that the system is capable of treating citizens equally and consistently.⁴³

At the same time, new laws will be needed to address economic, political and social changes. Those involved in some of the preliminary discussions identified laws on nationality and citizenship, as well as on investment, as priorities.⁴⁴

Under the Bonn Agreement, the authorities must fulfil the country's international legal obligations on human rights.⁴⁵ Afghanistan has ratified and is accordingly bound by the following relevant instruments: The Geneva Conventions of 1949; the Genocide Convention of 1948 (acceded 1956); the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 (acceded 1983); the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (acceded 1980); the International Covenant on Civil and Political Rights of 1966 (acceded 1983, but not to the optional protocol); the Convention on the Elimination of All Forms of Racial Discrimination of 1966 (acceded 1983); the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment of 1984 (ratified 1987); and the Convention on Rights of the Child of 1989 (ratified 1994).

Many of these instruments were ratified while Afghanistan was at war and had no impact on the conduct of fighting forces. However, the Interim Administration vowed to honour the country's international obligations as part of the Bonn Agreement, and the Transitional Administration is expected to do the same. This has implications for transitional justice and for the drafting of a new constitution. Whether it will be able to fulfil its

obligations will depend on whether it is able to establish a genuinely independent judiciary.

B. THE JUDICIARY

The Bonn Agreement states that the "judicial power of Afghanistan shall be independent and vested in a Supreme Court of Afghanistan and such other courts as may be established by the Interim Administration".

Italy was designated, in April 2002, as the lead donor state for work on the judicial system. Its record in that capacity has drawn, at best, mixed reviews. Many international observers view Rome as insufficiently engaged in the reform process.

The lack of activity for most of 2002 is not entirely Italy's fault; the long delay in establishing a functioning Judicial Commission – the logical partner in any reform effort – is partly to blame, as are the obstacles posed by the political rivalries between the three main components of the justice system. But some activities that Italy could have initiated earlier, such as assessment of institutional and training needs in Kabul and the provincial centres, did not take place.

Part of the failure to do so may lie in Italy's decision to subcontract judicial reform assistance to the Italian government-supported International Development Law Organisation (IDLO). Although IDLO has extensive experience in providing training for legal systems in developing countries and emerging democracies, it had only one full-time representative in Afghanistan in December 2002. Those Italian government institutions that may have the technical capacity to assist, such as the Justice Ministry, have been only peripherally involved.

Simultaneously with the appointment of the second Judicial Commission, Italy has begun to address these criticisms and play a more active role. On 17 December 2002, IDLO convened a two-day seminar for Afghan judges, prosecutors, and commission members in Rome. This was immediately followed by a two-day donors conference, also held in Rome, during which representatives of the various Afghan government institutions concerned with justice and law reform presented summaries of their own needs assessments. Donors attending the conference, including Italy, the U.S., Canada, the UK, Germany,

⁴² ICG interviews with judges in Kabul, April 2002, and Afghan lawyer, Washington, D.C., May 2002.

⁴³ ICG interview with Afghan lawyer, Washington, D.C., May 2002.

⁴⁴ *Ibid.*

⁴⁵ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (hereafter, "the Bonn Agreement"), II, 1, ii.

and Austria pledged a total of U.S.\$30 million for justice sector reform.⁴⁶

Opposition from other donors and the United Nations Assistance Mission in Afghanistan (UNAMA) precluded Italy's attempts to define a role for IDLO as the lead implementing agency. A judicial reform strategy document drafted by IDLO and distributed by the Foreign Ministry to attendees of the Rome donors conference – was never tabled for discussion. According to attendees of the donors conference, there was a consensus that the judicial commission needed time to define its own strategy for justice sector reform.⁴⁷ A statement issued at the conclusion of the conference accordingly affirmed that “the primary responsibility for the rebuilding of the justice sector rests with the Judicial Reform Commission”.⁴⁸

Attendees of the conference also agreed to “strengthen” a coordinating committee in Kabul chaired by the president of the judicial commission and including representatives of Afghan government institutions, Italy and other donors, and UNAMA and relevant UN agencies. According to the final statement of the conference, the coordination committee “should agree to a single, unified framework for donor assistance in the justice sector”.⁴⁹

1. The Court System

Afghanistan has two parallel court systems: the general courts and the special courts. The former comprise the district, provincial and Supreme Courts. The Supreme Court has a number of departments, including penal law, civil and public law, commercial law, and public security law. The provincial courts fall into several categories. The major provincial courts are in Kabul, Herat, Kandahar, Nangrahar and Balkh and deal with penal law, public security law, civil and public law, traffic law and commercial law. The other provincial courts include all these departments except traffic. Finally, each district and each city zone has one primary

court. Kabul has sixteen such primary courts. These courts have jurisdiction only within their zones.⁵⁰

Family and children's courts form a separate system. The juvenile court in Kabul was functioning by May 2002. The family court was not. Women judges identified family law as an urgent area for reform, as many of the laws, particularly those governing divorce, are discriminatory against women. However, they were also aware that these issues would be among the most sensitive, and observed that it would take some time before the Afghan leadership, and society as a whole, was ready to address reform of family law.⁵¹

According to the 1964 Constitution, the Loya Saranwal (Attorney General or Public Prosecutor) is under the executive branch.⁵² The Law of Saranwali (Attorney General's office) states that the Loya Saranwal “is the person of the Minister of Justice”,⁵³ a position maintained by the present minister, Abdul Rahim Karimi, during a meeting with ICG.⁵⁴ In 1981, however, the Attorney General was established as a separate office, and this has been upheld by the Interim Authority and the Transitional Administration.

The Attorney General's office is presently dominated by the legal department of the *Shura-yi Nazar*,⁵⁵ which predominates in the security organs of the Transitional Administration and consequently has much at stake in retaining control over it.

⁴⁶ ICG interview with an attendee of the Conference of Rome on Justice in Afghanistan (19-20 December 2002), Kabul, 13 January 2002.

⁴⁷ Ibid.

⁴⁸ Final Statement, Conference of Rome on Justice in Afghanistan (19-20 December 2002), p. 2.

⁴⁹ Ibid.

⁵⁰ ICG interview with Afghan lawyer, Kabul, April 2002.

⁵¹ ICG interviews with Afghan women judges, Kabul, April 2002.

⁵² Constitution of 1964, Article 103. It specifies that “investigation of crimes shall be conducted, in accordance with the provisions of the law, by the Attorney General, who is part of the executive organ of the state”.

⁵³ Law of Saranwali, Article 1(b).

⁵⁴ ICG interview with Abdul Rahim Karimi, 5 September 2002.

⁵⁵ The *Shura-yi Nazar-i-Shamali* (Supervisory Council of the North) is a regional military and political structure that was founded by the late Ahmad Shah Massoud within the predominantly Tajik *Jamiat-i-Islami* party. Although it encompasses the northeastern provinces, power is concentrated among authorities from the Panjshir Valley. The ministers of defence, education, and foreign affairs all belong to the *Shura-yi Nazar*, which also has effective control of the Interior Ministry and the intelligence services.

2. The Supreme Court and the Chief Justice

The 1964 Constitution provided for an independent judiciary, the first time the principle had been officially adopted, but it did not spell out checks on the executive and other measures necessary to preserve that independence. In that period, the Supreme Court reportedly did exercise independence to adjudicate a number of disputes between government ministries and the legislature.⁵⁶

According to the Constitution, the Chief Justice was to be appointed by the King; the other eight members of the Supreme Court by the King upon recommendation of the Chief Justice.⁵⁷ All members were required, under article 105 to have “sufficient knowledge of jurisprudence, the national objectives, and the laws and legal system of Afghanistan”.⁵⁸ Some Afghan jurists argue that this obligates Supreme Court judges to be trained in both Sharia and secular jurisprudence.⁵⁹

The current Chief Justice, Fazl Hadi Shinwari, is the former head of a Peshawar madrasa and a close associate of Abd al-Rabb al-Rasul Sayyaf, leader of the puritanical, Saudi-funded *Ittihad-i-Islami* party. He was appointed by President Burhanuddin Rabbani shortly before the Bonn Conference and retained by President Karzai after the formation of both the Interim Authority in December 2001 and the Transitional Administration in June 2002. Shinwari’s re-appointment has disturbed many who believe that Afghanistan needs to return to the relatively progressive values outlined in the 1964 Constitution. Some observers speculate it was a concession to Sayyaf, whose party did not get a cabinet ministry.

There are a number of problems with Shinwari’s appointment. He is well over the maximum age of 60 set by the 1964 Constitution for a new Chief Justice, and his lack of training in secular law means he may not satisfy the requirements of article 105.

Shinwari has moved rapidly to appoint a large number of judges, expanding the Supreme Court to 137 by December 2002 – far in excess of the nine envisaged in the 1964 Constitution. The identities

of 36 of Shinwari’s appointees are publicly known; most appear to have minimal qualifications in Islamic law and none in Afghan or Western secular law. Some have clearly been chosen because of their connections to political leaders. Shinwari has not appointed any women, some of whom fear they will be excluded from the judiciary.⁶⁰

The appointment of conservatives to senior judicial positions could have long-term consequences. Under the 1964 Constitution the King can review Supreme Court justices after ten years or they can be impeached in a complex process involving two branches of a legislature that is not yet in place. For decades there have been wide divisions in Afghanistan over how Islamic law should be implemented, and these were only widened by the Taliban’s imposition of a version of Sharia that was deeply influenced by retributive tribal justice codes. Many Shia Muslims – who are roughly one-fifth of the population – favour recognising Jafari Shia jurisprudence as a valid source of Islamic law in the new constitution. They would be ill-served by a judiciary favouring exclusive reliance on Hanafi Sunni jurisprudence and with little tolerance for Shias.

C. THE MINISTRY OF JUSTICE

The Ministry of Justice in both the Interim Authority and the Transitional Administration has been headed by Abdul Rahim (Abbas) Karimi, a professor of Sharia from Takhar Province. Though previously associated with Islamist parties – in turn, Gulbuddin Hikmatyar’s *Hizb-i-Islami* and former President Rabbani’s *Jamiat-i-Islami* – Karimi casts himself as a relative moderate. In a speech delivered during the inauguration of the second Judicial Commission on 28 November 2002, Karimi said that the Quran leaves large areas of law open to *ijtihad* (interpretation) and added that “anyone who says we can’t draw upon the experience and laws of other countries is mistaken”. He also identified several areas in which new laws were needed, including those governing the police and the rights of defendants.

But in the absence of a functioning judicial commission, the ministry has drafted laws in a number of areas that may have critical implications

⁵⁶ ICG interview with Afghan lawyer, Washington, D.C., May 2002.

⁵⁷ Constitution of Afghanistan 1964, Article 99.

⁵⁸ *Ibid*, Article 105.

⁵⁹ ICG interviews with Afghan lawyer and Afghan judges, Kabul, April 2002. ICG interviews with UN officials and officials of the Ministry of Justice, October 2002.

⁶⁰ ICG interviews with Afghan women judges, Kabul, April 2002.

for democratic development. During a meeting with ICG, Karimi said his ministry had drafted laws on municipal elections and political parties – the latter “on the basis of the laws of developed countries” – and had submitted them to the cabinet for approval and promulgation.⁶¹ The UN had not been consulted. In addition, Radio Afghanistan reported on 10 November 2002 passage of a law on social organisations,⁶² which was confirmed to UNAMA by the legislative department of the ministry.⁶³

At the time of writing of this report, the draft laws were not available for review. However, a press law of the Interim Authority illustrated the risks of drafting and enacting legislation in the absence of an independent advisory body. That law, approved by President Karzai in February 2002, lifted the government’s monopoly on broadcast media but included restrictions on press freedom ranging from onerous licensing and registration requirements to prohibitions on material that might be considered blasphemous or “weaken the army of Afghanistan”.⁶⁴

It further provided that “if there is no penalty anticipated against the crimes in this law, the violators will be punished in accordance with the orders of Hanafi religious jurisprudence of Islamic Sharia”, and subjected the distribution of foreign press and films imported from abroad to prior permission from the Information Ministry.⁶⁵ Critics argue that the law has chilled hopes that the press might play a vibrant role in encouraging public debate as well as greater transparency and openness in government.⁶⁶

The Transitional Administration hosted in early September 2002 an International Seminar on Promoting Independent and Pluralistic Media in Afghanistan. On its final day, the Deputy Minister of Information and Culture, Abdul Hamid Mobarez, endorsed a declaration that recommended including

the right of free speech and free media in the new constitution and initiating:

thorough and time-bound review of the legal system ... with the goals of creating laws and procedures that promote freedom of expression, protecting the rights of journalists, and guaranteeing their freedom to do their work in safety, including publishing critical reports and opinions ... [and] suspend[ing] immediately licensing provisions for publications as required by the February 2002 Press Law.⁶⁷

As of December 2002, however, the legal review and the revision of the press law had not yet been initiated.

⁶¹ ICG interview with Abdul Rahim Karimi, Minister of Justice, Transitional Islamic State of Afghanistan (Transitional Administration), 29 October 2002, Ministry of Justice, Kabul.

⁶² Radio Afghanistan (Pashto), “Afghan leader approves law on social organisations”, 10 November 2002.

⁶³ ICG interview with UNAMA official, Kabul, December 2002.

⁶⁴ Press Law, Article 30.

⁶⁵ Ibid, Articles 4, 39.

⁶⁶ See World Press Freedom Committee, “WPFC expresses concern”, *op. cit.*; International Press Institute, “IPI concerned about draft media law”, 15 March 2002, at International Freedom of Expression Exchange (IFEX), www.canada.ifex.org/alerts.

⁶⁷ Letter from Ann Cooper, Executive Director, Committee to Protect Journalists, to Hamid Karzai, President, Transitional Islamic State of Afghanistan (Transitional Administration), 12 September 2002.

IV. THE JUDICIAL AND HUMAN RIGHTS COMMISSIONS

The Bonn Agreement provided for establishment of commissions that would be responsible for rebuilding the justice system, monitoring and investigating human rights violations, assisting in the preparation of a constitution, and reforming the civil service.

As of late December 2002, the Civil Service Commission was not yet functioning, nor had the UN named an officer to work with it. By shortlisting candidates for appointments to key administrative posts, including provincial governors and district administrators, the commission was to ensure development of a professional civil service rather than distribution of posts by patronage. Disrupting the ability of factional leaders to dole out jobs is essential in developing a government that is seen as representing the whole nation and not just narrow ethnic, sectarian, or ideological interests.⁶⁸

Part of the difficulty in establishing the Civil Service Commission may lie in its ambitious mandate; unless the central government can ensure that its appointments are recognised in the provinces, the Commission shortlist will remain purely notional. Establishing civil service criteria would, nevertheless, challenge the legitimacy of many who have either occupied posts or been appointed through political patronage or by the threat or use of force.

A. THE JUDICIAL COMMISSION

Under the Bonn Agreement, the Judicial Commission was to be set up with UN help to “rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions”. President Karzai established it on 22 May 2002 without consulting the UN on membership.⁶⁹ Most of those named had links to ministries or the Supreme Court. Almost all came from Kabul, and there was little minority representation. There were turf battles from the start; according to an Afghan civil servant, the Chief Justice warned that any Afghan who wanted to be involved with the Commission had to work

through the Supreme Court – a clear attempt to control the direction of judicial reform.⁷⁰

The Commission was disbanded in August 2002, once it was apparent that no progress was being made, and a new body was named by Karzai on 2 November. Faulted for failing to appoint any representatives of the Shia minority, Karzai added two more members immediately prior to its inauguration on 28 November. The eleven members now strike a rough balance between degree holders in Islamic and secular law, and include Najiba Hussaini, a Shia Hazara woman, who is the director of the legal affairs department in the Ministry of Women’s Affairs.⁷¹

The decree establishing the new Commission empowers it to develop a “comprehensive program for the reform of law with the close coordination and cooperation of the Supreme Court, Ministry of Justice and other relevant organs” and “to propose any amendment for the improvement of laws and regulation[s] to the competent authorities”.

The Commission is also charged with designing and implementing “training programs for professionals, lawyers and law enforcement authorities in Afghanistan with the cooperation of international organisations”.

There is no indication in the decree as to whom the Commission reports to or whether its proposals must be considered by that authority. Whereas the decree establishing its predecessor specifically referred to it as independent, there is no mention of this in the present decree. Rather, there are provisions that bind the Commission closely to the government’s legal institutions. For example, it is to “consult with judicial organs for selection and recruitment of professionals”, while the working groups it establishes may include experts from both “governmental and non-governmental organisations”. Consultation with government officials may, however, facilitate adoption and enforcement of Commission recommendations.

The commission is presently reviewing and compiling judicial sector needs assessments prepared by the German development agency Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ),

⁶⁸ ICG interview, Kabul, April 2002.

⁶⁹ ICG interviews, October 2002.

⁷⁰ ICG interview with Afghan civil servant, Kabul, May 2002.

⁷¹ ICG interview, Kabul, 6 December 2002.

which covered different provinces, the Coalition Civilian-Military Coordination Centre (CMCC) and UNICEF.

The Judicial Commission has also established four working groups, which will respectively focus on:

- law reform;
- surveying and developing human, technical, logistical, and physical resources, including physical rehabilitation of courts and training of judges;
- the structure of the justice system, including the constitutional status of the Attorney General's offices and the size and structure of the Supreme Court; and;
- legal aid, access to justice, and NGO activities.⁷²

As of mid-January 2003, the Commission was considering alternate proposals for the training of judges. One would involve tailoring training programs to the educational levels and professional experiences of different judges – a plan that would be costly to develop and implement, and whose effectiveness would be highly uncertain.

It is critical that training instead be linked to the establishment of selection criteria by the judicial commission for appointments to judicial offices. Otherwise, substantial training resources are likely to be expended on judges and other officials who lack basic formal education and will inevitably fail to meet professional standards that may be recommended by the Commission. A durable strategy would be to start with the development of selection criteria, assess the capabilities of the existing judiciary on the basis of those criteria, and then address the shortfall by assisting Afghan universities to train new graduates to work as judges or prosecutors.

The delays in the establishment of the Judicial Commission have had serious consequences; judicial appointments already made will be difficult if not impossible to alter, while laws and presidential decrees have been promulgated without reference to their place in a coherent reform program.

B. THE HUMAN RIGHTS COMMISSION

The Bonn Agreement stipulated that the legal framework to be applied during the interim period included “international legal obligations to which Afghanistan is a party”,⁷³ and bound the Interim Authority to adhere to a code of conduct based on international standards.⁷⁴ It also gave the UN the right to investigate human rights violations and, where necessary, recommend corrective action.⁷⁵

The Bonn Agreement further provided for an independent Human Rights Commission whose responsibilities would include monitoring human rights and investigating violations, as well as developing domestic human rights institutions.⁷⁶ The Commission was established in the first week of June 2002. Chaired by Sima Samar, who was the Minister of Women's Affairs in the Interim Administration, its eleven members include five women and representatives of each of the major ethnic groups.

The presidential decree establishing the Commission elaborated significantly on its mandate, making it potentially a powerful mechanism for human rights protection and accountability. In addition to the powers listed in the Bonn Agreement, the Commission is tasked with engaging in consultations on, and proposing a national strategy for, “transitional justice and addressing the abuses of the past”. It must also work to ensure that national laws are consistent with Afghanistan's human rights treaty obligations and provide “advice and information to the country's human rights treaty monitoring practices”.⁷⁷

Critically, the Commission is authorised to initiate inquiries and investigations into both individual cases and “general situations”.⁷⁸ It is aided by quasi-judicial powers, including the ability to summon anyone living in Afghanistan, to examine such persons as witnesses and to “compel them to produce documentary or material evidence in their possession or under their control”.⁷⁹ It is permitted to establish

⁷² ICG interview, Kabul, January 2003.

⁷³ Bonn Agreement, II (1)(ii).

⁷⁴ Ibid., III(C)(7).

⁷⁵ Ibid., Annex Two, Article 6.

⁷⁶ Ibid., III(C)(6).

⁷⁷ “Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission”, June 2002, Annex One, Article 9.

⁷⁸ Ibid, Article 10.

⁷⁹ Ibid, Article 11.

regional offices in Kandahar, Herat, Mazar-i Sharif, Faizabad, Jalalabad, Gardez, and Bamian.⁸⁰

Implementation thus far has been uneven. The seven regional offices have yet to be created. According to a UNAMA official, the Commission should have established most of the offices by February 2003 and had identified several sites for them. However Commission officials expect that no more than two of the seven will be functional in early 2003.⁸¹

The working groups – which were to include human rights education, monitoring and investigations, women’s human rights, and transitional justice – have been largely ineffective, hobbled in part by changed assignments for individual members.⁸²

On the other hand, the Commission has become increasingly integrated into the human rights monitoring and investigative work of the United Nations, affording its members both opportunities for field experience and greater security. During November 2002, the Commission took part in joint investigations with UNAMA of conditions in Shiberghan Prison and in the police response to student demonstrations at Kabul University in which several students were shot dead; in fact, it initiated the latter investigation.

The Human Rights Commission is also represented in the Return Commission for the North, established on 17 October 2002 to facilitate the return of Pashtun civilians who were displaced by ethnically targeted violence across northern Afghanistan following the collapse of the Taliban, and has taken part in field missions by a working group of the Return Commission.⁸³

Both UNAMA and the Office of the High Commissioner for Human Rights (OHCHR) are engaged in fundraising for the Human Rights Commission; UNAMA officials report that they

have had a good initial response from donors for a proposed U.S.\$3.4 million budget.⁸⁴

The Commission has also signed a two-year work program with UNDP and OHCHR aimed at administrative and financial capacity building. A senior representative of OHCHR arrived in Kabul in December 2002 to train Commission members and UNAMA’s Afghan human rights investigators; the previous month, OHCHR engaged a former member of New Zealand’s Human Rights Commission to help the Afghan Commission develop its work program, set priorities, and process complaints. (As of late November 2002, the Commission had received 500 complaints, some directly, others through UNAMA. The complaints included both ongoing and past abuses, although none predated the emergence of the Taliban.)⁸⁵

⁸⁰ Ibid, Article 6.

⁸¹ ICG interview with a UNAMA official, Kabul, January 2003.

⁸² ICG interview, Kabul, November 2002.

⁸³ The Return Commission is to be chaired by Enayatullah Nazari, the Minister for Refugees and Repatriation, and also includes representatives of UNAMA and UNHCR. ICG interviews, Mazar-i Sharif and Kabul, November 2002.

⁸⁴ According to a Commission member, the governments of Denmark and Switzerland had pledged U.S.\$1 million for the Commission, but this was to be channeled through UNDP – which the Commission member viewed as bureaucratic and slow to release funds. ICG interview, 5 September 2002.

⁸⁵ ICG interviews with UNAMA officials, Kabul, November 2002 and January 2003.

V. TRANSITIONAL JUSTICE

In all the distinct phases of the armed conflict in Afghanistan, warring parties have committed war crimes and other serious abuses that could be considered crimes against humanity. The first phase was precipitated by the Saur Revolution in April 1978, in which army and air force officers affiliated with the People's Democratic Party of Afghanistan deposed and killed President Daoud Khan, and established the Democratic Republic of Afghanistan. As the Khalqi faction of the PDPA consolidated power, it summarily executed thousands of civilians who were perceived as real or potential opponents of the regime.⁸⁶

The Soviet invasion that followed ushered in a decade of repression that included summary executions in the cities and bombing campaigns in the countryside that resulted in massive civilian casualties. The Geneva Accords that resulted in the withdrawal of Soviet troops made no provision for an accounting.

Following the fall of the communist government in 1992 and the takeover of Kabul by mujahidin factions, the capital was engulfed in a civil war that saw a third of the city destroyed. Internecine fighting, mass rape, "disappearances" and summary executions were widespread into 1995 as changing alliances of mujahidin forces fought for control of the capital and carved up the rest of the country among themselves. A distinct feature of this period was the deliberate targeting of civilians on the basis of both ethnicity and political allegiance.

The Taliban emerged in 1994 and for seven years steadily consolidated control over most of the country, while pockets of resistance remained throughout much of the central highlands and the Northwest. Like their communist predecessors, the Taliban adopted police state measures in the cities and scorched-earth policies in the countryside, including civilian massacres, to quell opposition. Hazara, Tajik, and Uzbek civilians in the North took the brunt of Taliban offensives.

Reports of abuses have persisted under both the Interim Authority and the Transitional Administration, including rape and summary

execution of civilians and detainees.⁸⁷ President Karzai acknowledged as much in a speech to judges in late October 2002, in which he said, "We gave them [the commanders] a chance to bring peace and Islam to the country, but now I see the same old behaviour".⁸⁸

The pattern of impunity continues in part because of Karzai's inability to project his authority outside Kabul and also because of his reluctance to challenge the *Shura-yi Nazar*, the faction that dominates the central government's security organs. Karzai's widely publicised dismissal of some twenty provincial officials in early November⁸⁹ for maintaining unauthorised checkpoints as well as unspecified abuses and illegal activities was tempered by the refusal of some officials – particularly in the Southwest – to relinquish their posts.⁹⁰ His directive also conspicuously avoided officials linked to *Shura-yi Nazar*, including some known to have committed the same offences cited for the dismissal of others.⁹¹ An investigation into the attacks on ethnic Pashtuns in the North ordered by Karzai in February 2002, similarly avoided the provinces of Baghlan and Takhar, where *Shura-yi Nazar* forces were implicated in the violence.⁹²

A. OBSTACLES TO JUSTICE

The first national workshop on human rights was convened in Kabul on 9 March 2002. With Minister of Justice Karimi participating, one session focused on a national strategy for human rights monitoring, investigations, and transitional justice. The meeting established a standing national working group to continue planning.

In his opening statement to the workshop, President Karzai stated:

⁸⁷ Physicians for Human Rights, "Preliminary Assessment of Alleged Mass Gravesites in the Area of Mazar-i-Sharif, Afghanistan", 2 May 2002.

⁸⁸ Pamela Constable, "Karzai Toughens Stance on Feuding by Militia Leaders", *The Washington Post*, 30 October 2002, p. A18.

⁸⁹ Radio Afghanistan (Pashto), "Afghan Government Orders Shake-Up of Local Officials", 3 November 2002.

⁹⁰ ICG interviews, Kandahar, December 2002.

⁹¹ Information provided to ICG by UNAMA official, November 2002.

⁹² Human Rights Watch, "Paying for the Taliban's Crimes: Abuses against Ethnic Pashtuns in Northern Afghanistan" (New York, 2002), pp. 44-45.

⁸⁶ Rubin, op cit, pp. 105, 115.

... another important matter to consider is the question of the violations of the past. I cannot say whether the current Interim Administration has full authority to address this. But it is my hope that the Loya Jirga government will have the authority to establish a truth commission and ensure that the people will have justice. The people of Afghanistan must know that there will be a body to hear their complaints.

Indeed, we must hear what the people have to say. Mass graves have been found in which hundreds were buried, houses and shops burnt, so many cruel acts, and about which nothing had been heard or known before. So many of our people have been murdered, mothers killed as they embraced their children, people burnt, so much oppression, so many abuses. This is why a truth commission is needed here: to protect our human rights, and to heal the wounds of our people.⁹³

Karzai's remarks were apparently unanticipated. What prompted him is not clear; some observers suggest that discussions he had had regarding the experience of the South African Truth and Reconciliation Commission had been the inspiration.⁹⁴ Others have expressed alarm about the dangers of inappropriate models, particularly one involving amnesties, before Afghans have had the opportunity to address the issue.⁹⁵ On 25 May 2002, at the final meeting to establish the Human Rights Commission, Dr. Sima Samar, then the Minister for Women's Affairs, argued that there should be no amnesties for leaders responsible for serious human rights violations, even if they supported the interim government. Her statement was apparently in response to concerns raised at the meeting that the Human Rights Commission would not address abuses by the governing authorities.⁹⁶

The controversy underscores the need for the UN, the donor community and NGOs to assist in providing information about lessons learned from other societies dealing with past abuses. For example, a dilemma that underlies all such efforts is how to

encourage people to have faith in the process without raising expectations that cannot be met. Almost inevitably expectations for truth commissions are unrealistically high.

With prosecutions, on the other hand, victims and their advocates must recognise that the standard of evidence required for conviction will be high, and serious effort will be needed to obtain the necessary testimony and documentation. Witness protection is one of the most important concerns in any such process, and must be considered particularly when choosing a public forum for the sake of broadening participation.⁹⁷

The greatest obstacle to establishing any kind of accountability for past war crimes and human rights violations is the fact that many perpetrators continue to wield power either within the Transitional Administration or outside it. Whether evidence of war crimes will be used to force them to step down or eventually prosecute them depends to a great extent on whether the international community can identify and support individuals and institutions in Afghanistan capable of carrying that effort forward: a judiciary that is independent and able to hand down indictments or impeach abusive leaders; the press and human rights groups who provide documentation; governmental and non-governmental agencies who offer technical support; political leaders who are not under the control of a warlord's gun.

In the months before the Loya Jirga, political leaders and local warlords were able to carry out arrests, threats and even murder of their opponents, including elected delegates. Elsewhere the lack of security has left minorities vulnerable. Attacks on ethnic Pashtun communities in the North and West have been well-documented, yet little has been done to punish those responsible.⁹⁸

Under these circumstances, rebuilding a professional police force and introducing and monitoring international standards in detention procedures and facilities have become all the more urgent. In order to avoid political controversy, those involved in legal reform may opt to postpone these more difficult

⁹³ UNAMA, Advisory Note: "Toward an Afghan National Strategy for Human Rights Monitoring, Investigations and Transitional Justice".

⁹⁴ ICG interview, Kabul, April 2002.

⁹⁵ ICG interview, Washington, D.C., May 2002.

⁹⁶ BBC, "No Amnesty' for Afghan Warlords", 25 May 2002, at news.bbc.co.uk/hi/english/world/south_asia.

⁹⁷ David C. Anderson, "What Kind of Justice? Experts Probe the Power of Truth after Political Trauma", Ford Foundation Report, Summer 2001, at www.ictj.org.

⁹⁸ Human Rights Watch, "Paying for the Taliban's Crimes", op. cit., and Physicians for Human Rights, "New Survey Finds Persistent Attacks", op. cit.

tasks. That would be a mistake; the longer the abuses escape scrutiny, the more likely they are to erode hopes for peace.

B. THE POLITICAL TRANSITION

The brutal conduct of the war has led to speculation that seeking justice for the many atrocities is simply impractical because “everyone is guilty”. This is not the case. Afghan civilians never joined in mass killing in any significant numbers, unlike Rwanda, which is dealing with the practical difficulties of trying enormous number of alleged “genocidaires”. The most serious war crimes were committed by forces with identifiable leaders and command structures.

This is not to say that every act of rape or execution was sanctioned, or that individual combatants did not act of their own accord. They did, and problems of discipline will no doubt plague a new national army and police as well. But the worst incidents – the large-scale massacres and rapes – were not the work of rogue commanders and were carried out with the knowledge or on the order of senior military and political leaders who can be identified.⁹⁹

The Afghan leaders who ultimately signed the Bonn Agreement include a number who are widely believed to have been responsible for war crimes. Many Afghans are unhappy about the return of the warlords and the role that the United Nations, and even more the U.S., has played in bringing them back. While they may recognise that for the time being options for pursuing accountability are limited by the fragility of the transitional process and the fear of plunging the country back into civil war, they also know far too well that peace will be elusive so long as impunity persists.

The chicken-and-egg dilemma of peace and justice may not be resolved by careful sequencing alone, that is, getting to peace first, with justice to follow when there is both the opportunity and political will to pursue it. Steps can and should be taken now not only to prepare the ground for a later institutional response to transitional justice, but also to curb

activities that threaten the transition to a more stable, representative government.

U.S.-led Coalition forces have supplied local and regional commanders with arms so that they can assist in the campaign against al-Qaeda. However, some have used these to equip militias for their own political purposes.¹⁰⁰ There is evidence implicating some of these commanders in past war crimes. Many have paid only lip service to the Transitional Administration; others are part of it.

The problem stems from the fact that the U.S. objective in Afghanistan remains limited to defeating al-Qaeda and its Taliban supporters, and only in a very limited sense to “nation-building”. With calculation, the U.S. has chosen partners on the ground who share that goal (or who at least agree to it for the short term) – regardless of what they have done before and whether they are likely to cooperate on issues that should be of long-term concern.

These regional commanders are accountable to no one and as such pose the greatest immediate threat to security and to long-term hopes for curbing abuses and creating a more accountable military and government. Delegates to the Loya Jirga often expressed their concern at the growing power of war lords and their anxiety that the authorities in Kabul had done too little to control them.

Ongoing human rights abuses erode the credibility of the entire transitional process and deepen ethnic divisions. Condemnation of violence against Pashtuns in northern Afghanistan by the UN and the diplomatic community has forced the Transitional Administration to acknowledge the problem and begin to address it. Criticism is not enough by itself, however, to stop the abuses. Coalition forces are in the best position to pressure regional commanders they work with to control their troops.

UNAMA and donor states involved in rebuilding the national army and police will need to develop criteria to exclude war criminals from security forces or other government positions. This will not be easy. The pool of potential recruits for the army and police could include members of demobilised militias who have been involved in grave abuses over the years. The U.S. has taken the lead on building a national army but has been unable to show how it will ensure that the officer corps, in particular, does not include

⁹⁹ Although international human rights groups did not maintain a regular presence in Afghanistan, they did document a number of major incidents. The UN Special Rapporteur on Afghanistan and the Office of the High Commissioner for Human Rights have also collected evidence of serious war crimes.

¹⁰⁰ ICG interview, Kabul, May 2002.

commanders who ordered abuses amounting to war crimes or crimes against humanity.

It was hoped that the Human Rights Commission would provide new impetus to the collection of evidence about past war crimes and other human rights violations but the range of its activities is broad, and it has proved difficult for it to devote sufficient time and resources to all objectives. The Commission will need much more political as well as financial support to pursue the most controversial parts of its mandate: investigating abuses, addressing past war crimes, and establishing a national program of human rights for women.¹⁰¹

There are many pitfalls in developing a successful program of transitional justice. The process needs to begin with a well-designed consultation under which the public is informed of the realistic options available. This needs to take into account the demands for justice without raising expectations too high. It will need to deal with issues such as amnesties, reparations, memorials and time limits both for the crimes to be examined and the length of the process.

Given the chaotic state of judicial institutions, development of a program of accountability needs to go hand in hand with the rebuilding of the state. If consultation begins with training of those who will gather views and continues over a few years, there is greater likelihood it will remain in step with political and judicial developments. It would also provide a body of trained officials with a deep understanding of the legal issues and the local situation, who would constitute a source of personnel for any commission. This would enable a transitional justice process to be designed and run primarily by Afghans. However, it will require long-term donor support and willingness to accept a lengthy process with few quick results.

Establishing a consultative process is the first step. The Human Rights Commission is to spearhead such a process to survey public opinion. On the basis of this, those involved would need to decide which judicial institutions would be appropriate for handling what could potentially be many cases. What mechanisms would be needed to protect witnesses and ensure that testimony was heard? If there are to be prosecutions, should there be a special court? While a national court has certain

advantages such as greater citizen access, it also raises concerns about what can be done to minimise political influence. The process would probably draw off lawyers, judges and police, who may be needed to deal with other concerns, including ongoing human rights abuse.¹⁰²

C. GATHERING EVIDENCE

Although there has not been any systematic collection of evidence of human rights violations and war crimes committed by different forces over the years, important documentation does exist. International groups visited to document specific incidents, as did experts operating under the UN Special Rapporteur. It was never possible for Afghan human rights groups to function freely in the country (even today they proceed carefully) but those who worked from Pakistan undertook considerable risks to produce a range of reports of varying quality and detail.

Some efforts have been made to identify the sites of mass killings but forensic evidence will be available for only a limited number of incidents. For the most part, compiling evidence will entail labour-intensive interviews with witnesses who are likely to be reluctant to give testimony so long as those responsible for the crimes remain in power.

The international community can help with the collection and preservation of evidence now so that it is available at such time as Afghans are ready to decide what kind of transitional justice mechanism they want. Asma Jahangir, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, concluded a visit to Afghanistan in October 2002 with a call for creation of an “independent and impartial international commission of inquiry” to map and document grave human rights violations committed during the last 23 years and thus provide a basis to establish an accountability mechanism.¹⁰³

¹⁰² Ibid.

¹⁰³ UN Commission on Human Rights, “UN Expert Recommends International Inquiry into Grave Rights Violations in Afghanistan over Last 23 Years”, 24 October 2002, at www.unhcr.ch. The Special Rapporteur also called on the international community to strengthen the judicial system so that perpetrators of current abuses could be brought to justice, and to support Afghanistan’s Human

¹⁰¹ For a fuller listing of the Commission’s responsibilities, see Section IV B above.

Authorised, as in the case of the East Timor Commission, by the UN, an independent commission of inquiry could systematically compile information on human rights abuses, restricting its work on those cases, since 1978, that potentially amount to crimes against humanity.¹⁰⁴ With its mandate also limited to the collection of credible, documented evidence, such a commission could provide the basis for more informed consultations by the Human Rights Commission, and help allay concerns about politicisation of the accountability process. An independent inquiry commission could also avoid duplication of effort by first reviewing and compiling testimony and material evidence already gathered by investigators working for UN agencies and credible Afghan and international human rights NGOs.

The creation and the effectiveness of such a commission would depend on UN authorisation and support from the international community. The Commission should receive financial support from donors, channelled through a trust fund to carry out investigations as thoroughly as possible in view of the passage of time. This should include, as necessary, support for the provision of forensic specialists and other technical assistance; security for sites believed to contain graves and other material evidence; and security for witnesses and their families believed to be at acute risk of retaliation.

D. PROSECUTION PARAMETERS

Once Afghans are ready for decisions, they will need to set basic parameters that will be crucial for determining the institutional response:

What sort of threshold? Given the potentially vast numbers who could be charged with breaches of international humanitarian law or human rights violations, what would be the cut-off point? For example, senior officers as opposed to rank and file, and the severity of the crime – those that qualify as crimes against humanity perhaps? If

limited to serious violations where there is reason to believe that senior officers or political leaders permitted or ordered the actions that were taken, the number of potential suspects drops from the thousands to possibly no more than 100.

The Taliban had a relatively centralised military, with a few significant commanders who were consistently responsible for serious abuses. The compactness of the organisation would facilitate the compilation of comprehensive dossiers. There is also considerable evidence to support claims that individual military and political leaders from the major factions supporting the Transitional Administration have been responsible for war crimes.

Temporal jurisdiction is also an issue. There is no statute of limitations for war crimes; thus any process aimed at promoting justice ought not give the impression that it is only Afghans who should answer for their crimes. Even if only selected incidents from the Soviet period were examined, it would be crucial in order to communicate that justice is not selective.

International or national? An entirely international process removed geographically from Afghanistan is the least likely option. Afghans argue from a range of perspectives, from the position that only a process that is entirely their own will be acceptable to most citizens, to the contrary viewpoint that a judicial process of any kind undertaken by Afghan courts would lead to new and dangerous political divisions.¹⁰⁵ A position falling between the two extremes might be an Afghan process with significant international technical and political support.

Rights Commission “in accelerating the process of identifying a transitional justice strategy”.

¹⁰⁴ The East Timor Commission of Inquiry was authorised by the UN Human Rights Commission upon request from the Secretary General, Kofi Annan, and a recommendation by the then High Commissioner for Human Rights, Mary Robinson. Since the Security Council is at present regularly seized with Afghanistan issues, it might be appropriate for it to be the authorising body in this instance, upon a request from the Secretary General.

¹⁰⁵ ICG interview with Afghan lawyer, Kabul, April 2002.

VI. CONCLUSION

There are as yet no institutions in Afghanistan capable of gauging public opinion on how best to rebuild the justice system or to deal with past human rights abuses. More important, at this point in the transition, there is not yet sufficient security for Afghans to feel safe in openly discussing their opinions or events of the recent past.

The fragmented nature of authority in the country and limited writ of President Karzai have meant that many Afghans live under the control of commanders who may have been responsible for serious human rights violations. The fact that leaders who have reportedly been responsible for war crimes still hold positions of power sends a discouraging message to those who believe that ending impunity is the key to Afghanistan's transition to peace.

Nevertheless, there is no question that there is a strong sentiment among Afghans that the past must be addressed, and the decision about how best to pursue justice must be made by Afghans, not imposed from outside. With that there is also recognition that any course will take time to develop the institutions and ensure adequate consultation. No action will succeed without international engagement as well as political and financial support. International engagement that supports or shields abusive commanders from scrutiny, however, will undermine the process.

Afghanistan is still at war, and the limited peace in some areas is fragile. Many political compromises have already been made to bring the process this far, and more will be made. But Afghanistan will only find lasting peace if it can develop a government based on laws, not guns. It is important to build a system under which all are equal under the law. In the absence of political will to disarm them, commanders who have committed human rights abuses have been drawn into the political process in order to move it forward. There should, however, be no collective or individual immunity from legal prosecution for such figures. The Afghan people should retain the option of bringing abusers to trial eventually.

A crucial first step is to find a way to allow Afghans to give their more views on how to deal with the past. While anecdotal evidence suggests that many do want some kind of accounting, it is impossible to

say what type of justice mechanism that entails until ordinary Afghans have the opportunity to speak out.

It is obvious that these questions have a bearing on judicial reform more generally. If reform and rebuilding of the justice sector are to succeed, government officials, the UN agencies and donors must make establishing the mechanisms for transitional justice part of an integrated approach to judicial reform. Transitional justice may be the ultimate test of the independence of the judiciary; consequently, donors would do well to avoid piecemeal approaches to reform that shy away from such "testing" issues. Judges and prosecutors must also be trained in transitional justice.

Afghans have long been frustrated by the international community's selective approach to protection of their rights, its penchant for condemning certain abuses but not others, its acquiescence in the power plays of Afghan warlords. The next few months provide an opportunity for Afghans to begin the long process of securing justice, at every level.

The Judicial, Human Rights and Civil Service Commissions all require substantial financial and technical assistance. They also need to develop close institutional links, which could be promoted by cross membership.

The beginning in this process is for donors to support a fully staffed professional secretariat for the Judicial Commission and provide the resources for it to have a presence throughout the country. This requires consultation and review of institutional resources and needs early on. Given the range of problems that must be analysed and addressed urgently, even a large Judicial Commission simply cannot take on all the pressing issues but its secretariat will need to be able to undertake specific aspects of the work with considerable foreign funding and technical help.

Donors also need to maintain close political contact with the Human Rights Commission at all levels. Leaders who visit Kabul should meet with it to express their enduring concern about human rights in the country. Without international support and ISAF protection in Kabul, the Human Rights Commission is likely to be intimidated into silence.

Of particular importance will be the consultation process on transitional justice that is to be carried out by the Human Rights Commission. Donors should

support the process but avoid imposing any particular model. Afghans need access to information, particularly on the experiences of other countries that have gone through similar processes, but should be allowed to develop their own model of post-conflict justice. This will take time and not satisfy everyone but donors should remain patient and understand that an indigenous process is more likely to bring lasting peace.

Although it is premature to decide on exactly how any process of transitional justice will move forward, it is important to make a rapid assessment of what evidence might be available and to preserve it. This is a function the international community can and should begin now, including by demonstrating readiness to support an independent, UN-mandated international commission of inquiry.

Afghan women played significant roles within the justice system under Zahir Shah, Daoud Khan, and the successive PDPA governments, even serving as judges. Women need a strong institutional voice to protect their rights. They were also victims of particular abuses under the Taliban and should be at the centre of any efforts to address those through the legal system.

As Afghanistan seeks a balance between secular and religious law, modernity and tradition, it is essential that women are fully represented in the process at all levels. Therefore, they must be involved in all efforts at consultation and the drafting of laws, the commissions, the teaching of law and the rebuilding of courts. This should start with the appointment of more women to the three key government commissions, particularly the Judicial Commission, which has only two woman members.

All interlocutors with the Transitional Administration should impress on its leadership the importance of allowing the commissions the independence and strong mandate to involve themselves in sensitive issues such as judicial appointments, illegal detentions and the role of intelligence operatives. The

International Security Assistance Force should be aware of possible dangers faced by those working on these issues and be prepared to protect them.

The legal system should ultimately underpin the efforts to create peace and reconstruct the country. Donors should be prepared to make long-term commitments to this process and spend money on all the institutions that comprise the justice sector.

As so much damage has been done to these institutions, there is an opportunity to rebuild them with safeguards and better practises than existed before. Particular areas of concern include:

- ❑ legal education at Kabul University and other colleges to produce students versed in all aspects of law, which also involves development of law libraries, translation of foreign texts and support for short-term faculty appointments by Afghans living overseas and other experts;
- ❑ training of public prosecutors and defenders;
- ❑ training of judges and other court staff;
- ❑ police training on issues such as human rights, evidence gathering, forensics, legitimate questioning techniques and court procedures;
- ❑ dismantling and reform of internal intelligence services;
- ❑ training of prison staff and the improvement of jail conditions;
- ❑ preservation of land records;
- ❑ development of traditional means of dispute settlement, particularly in rural areas; and
- ❑ establishment of human rights and legal aid NGOs, bar associations and other branches of civil society connected to the law.

Kabul/Brussels. 28 January 2003

APPENDIX A

MAP OF AFGHANISTAN

