



SPECIAL REPORT

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ABOUT THE REPORT

Two years into the process of re-building Afghanistan, and in the wake of the adoption of a new Constitution in January 2004, this report evaluates the progress that has—and has not—been made in establishing the rule of law in Afghanistan. The report assesses efforts by Afghan institutions and international donors to develop the apparatus of law enforcement and administration of justice necessary to ensure that the rights and protections guaranteed to Afghans in their new Constitution can be meaningfully implemented. Both the reform process and priorities are analyzed with respect to police, courts, judges and lawyers, law reform, legal education, and corrections. Key cross-cutting challenges to rule of law development, such as narcotics and organized crime, are also addressed. The report is based principally on approximately 70 interviews conducted by the authors in Kabul and Washington during October and November 2003. Interviewees included officials of the Afghan government, judiciary, and commissions created under the Bonn Agreement, the United Nations, the United States and other donor governments, and non-governmental organizations, as well as independent observers. This report was written by Laurel Miller and Robert Perito of the Institute's Rule of Law Program.

The views expressed in this report do not necessarily reflect views of the United States Institute of Peace, which does not not advocate specific policy positions.

SPECIAL REPORT 117

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CONTENTS

Introduction	2
Background	3
Development of the Rule of Law in Post-Taliban Afghanistan	5
Key Challenges	13
Recommendations	15

Establishing the Rule of Law in Afghanistan

Summary

- In most of Afghanistan, the rule of law has never been strong, but after 23 years of warfare it has been displaced almost completely by the 'rule of the gun.' In most of the country, regional power-holders, whether they hold official positions or not, effectively exercise political, police and judicial authority through their control of militia forces.
- The justice system and law enforcement suffer from a very low level of human resource and physical infrastructure capacity. In addition, the discontinuity of regimes over the last quarter century has left a patchwork of differing and overlapping laws, and an incoherent collection of security structures. Rebuilding and reform will require the commitment of Afghan authorities and foreign donors over a long haul.
- No national civilian police force yet exists in Afghanistan. The approximately 50,000 men working as police are generally untrained, ill-equipped, poorly paid, and illiterate, and they owe their allegiance to local warlords and militia commanders rather than to the central government. U.S. and German police training programs have begun efforts to shape a national force. From July 2003 through 2005, the United States plans to conduct in-service training for 50,000 police in Kabul and at regional centers. Germany will train a much smaller number of officers in a more comprehensive program at a reconstructed Police Academy in Kabul. No efforts appear underway to reform the parallel and secretive intelligence police under the control of the National Security Directorate.
- Though Afghan and international officials often refer to rule of law development as a high priority, the necessary measures are not being treated with urgency, except for police training. In the justice sector, no strategy has been agreed upon for the reform and rebuilding process. Donors have left this task largely to "lead nation" Italy, whose performance and approach is seen by other donors and Afghan officials and observers as more narrowly focused. Fractious relations among the Afghan stakeholder institutions and the inability of the Judicial Reform Commission to play the coordinating and facilitating role envisioned for it have hobbled the process.
- Some progress has been made in law reform, some legal training programs are underway, and a minimal amount of infrastructure repair has been performed.

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Virtually nothing has been done to update the court structure, establish and apply qualifications for judicial personnel (Afghan legal experts consider many judges to be unqualified), ensure widespread access to legal texts for practitioners and students, develop court administration, improve the poor quality of legal education, or address deep-rooted corruption. Defense attorneys are essentially unheard of. The vast needs for improvement in the corrections system have been almost entirely ignored.

- The burgeoning narcotics trade presents a fundamental challenge to the future of Afghanistan, and specifically to efforts to develop a culture of rule of law. The trade earns Afghan traffickers an amount equal to half the country's legitimate GDP and nearly five times the government's budget. Nearly all elements of local and regional power structures use the proceeds from trafficking to fund their activities and maintain their independence from the central government. Though important steps have been taken to create a legal and institutional framework for counter-narcotics work, it will be years before the Afghan government has an operational capacity robust enough to put a dent in the narcotics trade. Unless U.S.-led Coalition military forces become willing to undertake at least some counter-narcotics actions, traffickers will continue to operate with utter impunity, and the perceived message of tolerance of this activity will continue to undermine efforts to build the rule of law.
- Warlordism—control of local populations through force and intimidation by provincial governors, militia commanders, police chiefs, and other power-holders—continues to destabilize Afghanistan and impede reform of justice and law enforcement institutions. The most powerful warlords continue to exercise influence over key ministries and institutions including the judiciary.
- The slow pace of efforts to establish the rule of law has resulted in part from the inherent difficulties of conducting a post-conflict reconstruction operation in a country that has suffered over two decades of modern warfare. But it is also a consequence of the decision of the United States and United Nations to limit the international presence and to place primary responsibility upon the Afghans for providing their own security and directing their own reconstruction—responsibilities they have had little capacity to execute.
- A corollary to the UN's "light footprint" approach has been to assign certain donors "lead nation" responsibility for particular sectors. In the rule of law area, this has not worked well. The United States already has significantly augmented "lead nation" Germany's efforts in police training, putting in place a much larger program. A similar recognition is needed that greater international leadership and political attention from a broader array of donors is required in the justice sector. At the same time, Afghan authorities should undertake to reform the judicial reform process, either dissolving or significantly enhancing the stature and capabilities of the Judicial Reform Commission.
- An integrated, holistic approach to establishing the rule of law is needed. Though significant funds are being put into police training, even a well-trained force will not be able to provide genuine law enforcement if there is no functioning criminal justice system or corrections system in which to place offenders. At best, such a force will be able to provide some public order; at worst, the international community will have enhanced the ability of power-holders to control and abuse the population without creating mechanisms to protect the rights of Afghans. A substantial investment in one area of rule of law will not have a meaningful pay-off in terms of real democratic governance and stability unless other pieces of the puzzle are put in place as well.

Introduction

Two years after the fall of the Taliban, Afghanistan is at a defining moment concerning its future. The adoption of a new Constitution on January 4, 2003, delineated the per-

manent shape of national institutions and set the stage for holding national elections. At the same time, security remains an overwhelming concern of Afghans, and a desire to get out from under the control of warlords remains their primary aspiration. The country faces the combined challenges of resurgent terrorism, factional conflict, and rampant narcotics production. In the south, U.S.-led Coalition forces are engaged in a running fight against al Qaeda remnants along the border with Pakistan and against a reconstituted Taliban that retains support among the Pashtun majority. In the north, the Afghan government is challenged by recurrent armed conflict among regional warlords, and by the refusal of provincial governors to turn over revenues to the center. Throughout the country, there is a near-explosion in the cultivation of poppy. Traditional growing areas have been augmented by vast new areas brought under cultivation in the past year. In the absence of disincentives, production of opium has returned to record levels and the production of refined heroin has expanded, as has local drug consumption. With earnings from narcotics amounting to an about half of the country's gross domestic product, Afghanistan is in critical danger of becoming a "narco-state."

In most of Afghanistan, the rule of law has never been strong, but after 23 years of warfare, it has been displaced almost completely by the 'rule of the gun.' Moreover, the discontinuity of regimes over the last quarter century has resulted in a patchwork of differing and overlapping laws, elements of different types of legal systems, and an incoherent collection of law enforcement and military structures. Provincial governors, militia commanders, police chiefs, and other power brokers now exercise control through fear and intimidation, and through manipulation of the traditional *shuras* (village councils). In most of the country, regional power holders—whether they hold official positions or not—exercise political, police, and judicial authority through their control of militia forces. Their activities are financed by profits from production and trafficking in opium, and through their control of roadblocks on transportation routes at which they exact 'taxes' on travelers and commodities.

In the final days of his tenure, UN Special Representative of the Secretary General Lakhdar Brahimi stated at the closing ceremony of the Constitutional *Loya Jirga* (grand assembly) that, "[t]he people of Afghanistan are afraid of the guns that are held by the wrong people and used not to defend them and not to wage a *jihad*, because the time for *jihad* is finished, but to terrorize people, to take advantage for their own and the people who are close to them." The current year will be critical in determining whether Afghanistan will continue its slow progress toward representative government, the rule of law, and a responsible role in the international community, or whether it will lose ground and slide back toward political and religious extremism and economic chaos.

Background

The Transitional Islamic State of Afghanistan

Following the U.S.-led military operation that ousted the Taliban regime in the fall of 2001, the starting point for rebuilding Afghanistan was the "Agreement on Provisional Arrangements in Afghanistan Pending Re-establishment of Permanent Institutions"—the Bonn Agreement—signed by representatives of the Afghan people on December 5, 2001. The Agreement established an Interim Afghan Authority, and provided the basis for an interim system of law and governance, employing the 1964 Constitution as its foundation. The Agreement also laid out a timetable for further steps toward establishing a new government, constitution, and ultimately elections. The Emergency *Loya Jirga* of June 2002 installed a Transitional Administration, with Hamid Karzai as its president; Karzai later appointed a cabinet of four vice-presidents, four special advisors, and 28 ministers. Karzai's government, through a constitutional commission, drafted a new constitution, which was released in early November 2003 and adopted with amendments by a constitutional *Loya Jirga* on January 4, 2004.

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Foreign Military Forces

Annex I of the Bonn Agreement called for the deployment of an international military force to maintain security in Kabul, with possible expansion to other areas of the country. In response, the UN Security Council authorized the creation of an International Security Assistance Force (ISAF). ISAF deployed in January 2002, and by summer had 5,000 troops from 19 countries. ISAF's responsibility was limited to providing security in the capital, where it conducted routine patrols with local police. ISAF's purpose was to provide "breathing space" during which the Afghans could create their own security forces. In October 2003, the UN Security Council, responding to requests from President Karzai, expanded ISAF's authorized area of operations to include all of Afghanistan, but did not further define ISAF's mandate. NATO, now in command of ISAF, so far has been unable to generate the forces needed for a significant expansion.

ISAF operates separately from "Operation Enduring Freedom" (OEF), the U.S.-led military mission focused on destroying the remnants of the Taliban and al Qaeda. With 11,500 troops participating, OEF is the most potent military force in Afghanistan. While OEF does not conduct peacekeeping activities, it has occasionally engaged in settling disputes between warlords, usually by dispensing cash or issuing veiled threats of force. OEF forces have not taken action against narcotics traffickers or supported law enforcement.

In Spring 2003, the Pentagon responded to the continuing deterioration of the security situation in Afghanistan by authorizing a somewhat greater involvement in civil affairs and reconstruction by U.S. military forces. American troops began providing humanitarian assistance and took on some road and school construction projects. The Defense Department initiated a program to deploy "Provincial Reconstruction Teams" (PRTs) near major cities throughout Afghanistan. The PRTs are designed to provide assistance in rebuilding local infrastructure and ensuring local security, but not to perform police functions. Of eight PRTs currently operational, one is under NATO command (the first NATO presence outside Kabul) and will have up to 240 personnel, two are 100-person teams commanded by the United Kingdom and New Zealand, and the remainder are 30-person U.S. teams commanded by a senior U.S. officer and including personnel from Special Forces, Civil Affairs, Army engineers, the State Department, USAID, and the U.S. Department of Agriculture. The PRTs are the centerpiece of the international community's strategy for stabilizing areas outside of Kabul and enabling the central government to extend its reach, but given their limited number and sizes, some observers have questioned their real impact. In some areas, the central government has relied on the presence of the PRTs in beginning to remove problematic local officials, while not challenging the most powerful warlords.

United Nations Assistance Mission in Afghanistan (UNAMA)

The UN mission has limited material resources and no operational role with respect to the Afghan police, judicial, or corrections systems.

The UN model for its mission in Afghanistan is vastly different from that used in Kosovo and East Timor. In those missions, the UN established an interim authority that was responsible for civil administration and for guiding the local population toward democratic self-government. In Afghanistan, the UN has sought to limit its involvement and to encourage Afghans to assume responsibility for their own political reconciliation and economic reconstruction. As a consequence, the UN mission has limited material resources and no operational role with respect to the Afghan police, judicial, or corrections systems.

Under the leadership of Special Representative of the Secretary General Brahimi, the UN advocated a "light footprint," a euphemism for a minimalist UN mission. The light footprint was publicly advocated as a way to ensure space for Afghans to take the leading role in rebuilding their country, in contrast to the outsider-dominated approaches of the Kosovo and East Timor missions. The main underlying rationale,

however, was that a light UN footprint would force donor nations to accept their responsibility for assisting Afghanistan, rather than putting responsibility on the UN and then underfunding the mission and blaming it for the resulting failure—as has occurred in other circumstances. As part of this approach, certain donors have taken on “lead nation” responsibility for assistance to particular sectors. The “light footprint” approach, however, has to some extent been reflected in the nature of the international community’s involvement in Afghanistan more generally. Despite initial promises of billions of dollars in foreign largess and a rhetorical commitment not to neglect Afghanistan once again, international assistance has been characterized by a relatively light wallet. The ‘peacekeeping-light’ mode is also seen in the international community’s approach to ensuring internal security and assisting Afghan law enforcement—for example, the lack of peacekeeping forces outside of Kabul and the absence of a foreign police mission.

Development of the Rule of Law in Post-Taliban Afghanistan: Overview and Evaluation

The Justice System

Afghanistan cannot be said to have a genuine *system* of justice at present. To be sure, there are many appointed judges and prosecutors in the country, there are laws on the books, and there are occasional trials, but there is no functioning *system*. Court management is archaic or non-existent, central judicial and prosecutorial authorities often have no technical means of communicating with colleagues in the provinces, and judicial appointments are routinely made on the basis of personal or political connections without regard to legal training or other qualifications. Moreover, the organization of the judicial apparatus fails to comply with existing law in important respects (e.g., both the 1964 Constitution—in force until recently—and the new Constitution call for a Supreme Court of nine members, but the current Chief Justice has added several more justices); judges routinely make decisions without reference to written law; there are effectively no means of enforcing decisions; and despite a theoretical right to counsel, there are virtually no defense lawyers in the country. To a great extent, the written law in Afghanistan is not applied—or even widely known, including by judges and lawyers. As one senior Afghan judicial official put it, Afghanistan “has many laws, but no implementation.” With apparent good reason, Afghans do not trust the judiciary, and avoid recourse to it as much as possible.

Though Afghan and international officials often refer to rule of law development as one of the highest priorities in the reconstruction process, the necessary measures are not being treated with urgency (other than recently in the police sector). U.S. funding, for example, for rule of law activities other than police or counter-narcotics for FY2004 is \$10 million in State Department funds, plus some limited (but not yet decided) portion of USAID’s \$54 million in “democracy and governance” funds for Afghanistan, the majority of which will be used for elections support, compared to over \$110 million for police training. In 2003, the U.S. spent about \$13 million on rule of law activities other than police, including support for the Judicial Reform, Constitutional, and Independent Human Rights Commissions. (As insufficient as these amounts are relative to the needs of the Afghan justice sector, they make the U.S. the second largest donor to the sector.) Money aside, relatively little political attention is being paid to the justice sector; the field has been left largely to “lead nation” Italy, which is widely seen as focused mainly on implementation of its own projects, rather than coordination of broader efforts. As a consequence, and despite the presence of some Afghan officials who are committed to reform, since the fall of the Taliban little progress has been made toward building a functioning justice system.

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Key issues that need to be addressed in order to turn around this situation include a flawed reform process, inadequate international capacity and attention, and a desperately low level of Afghan capacity in terms of both physical and human resources. The latter—a result of 23 years of war and a low level of development before that, and a limiting factor in every area of Afghanistan’s reconstruction—can only be addressed over the long haul and through sustained international commitment. But the first two obstacles can be addressed in the near term.

Institutional Architecture and the Reform Process

The justice sector in Afghanistan is administratively complex and highly factionalized.

The justice sector in Afghanistan is administratively complex and highly factionalized. The three main permanent institutions—the Ministry of Justice, the Supreme Court, and the Attorney General’s office (Saranwali)—are coequal in stature, and for a variety of political, personality, and turf-consciousness reasons have fractious relations with each other. While police perform a central role in criminal justice, the Ministry of Interior has not played an active role in the justice rebuilding process. The lack of clear legal guidelines regarding proper institutional roles, and the absence of steps to provide clarity, has allowed this fractiousness to persist. The Judicial Reform Commission (JRC) created under the Bonn Agreement to guide the reform and be a facilitator among the permanent institutions and between them and the donor community, has instead become a fourth faction in the sector. The Italian government operation in Kabul, which, as leader of the donor effort, will need to work to bridge the differences among the other players, has to an extent become a fifth faction, having very difficult relations with its natural partner, the JRC, in particular.

In principle, the JRC should have become the driving force behind the reform and reconstruction process in the justice sector. In practice, partly as a result of lack of buy-in from the permanent institutions, this has not occurred. No consensus has been developed regarding the proper role of the JRC—whether it should be a policy body or a project implementer, whether it should take a leading role in setting the agenda or facilitate support for the priorities of others. Moreover, the JRC’s efforts have been hampered by lack of resources and a sluggish pace of support from UNDP, the main conduit for the JRC’s funding (of \$6 million available for support to the justice sector, UNDP had expended only \$500,000 as of November 2003). Regardless whether the JRC itself is at fault or whether it has been ill-served by its partners, it is apparent that the JRC is not performing as intended. Meanwhile, building the JRC from scratch has been a major task in a resource-poor situation, and has consumed resources and donor attention that otherwise could be devoted to building the capacity of the permanent institutions. Other than some limited provision of equipment and infrastructure repair in Kabul, the permanent institutions have received little direct support from foreign donors. A reform of the reform process is needed.

The international effort to support the justice sector suffers from a lack of strategy and a lack of capacity.

Coupled with these difficulties, the international effort to support the justice sector suffers from a lack of strategy and a lack of capacity. Other donors have deferred to Italy to develop a strategy, but no clear strategy has been coordinated among donors and stakeholders. UNAMA in early February 2004 released a “Proposal for a Long-Term Strategic Framework” that offers its view on priorities for improving the justice system, highlighting the need to strengthen capacity in the permanent institutions; it remains to be seen whether the proposals will be adopted or funded. The Consultative Group (CG) for the justice sector—in which Afghan stakeholders and donors are supposed to meet to air and address priorities and obstacles—does not function, unlike the CGs for some other sectors. Furthermore, the justice sector—including infrastructure repair, institutional capacity building, training, law reform, and corrections—is relatively lightly funded. As of November 2003, according to official Afghan government figures, just over \$19 million in assistance was “disbursed” during that year for the justice sector, but with \$4.7 million of that amount unallocated to any projects (and some of the “disbursements” not clearly identified and therefore questionable). In addition, key posts such as the UNAMA senior rule of law advisor and the UNDP justice sector project director have been vacant for many months.

Courts, Judges and Prosecutors

The nearly uniform view of observers inside and outside the justice system in Afghanistan is that the greatest need in building the system is to improve the quality of judicial personnel. To some extent, the lack of qualified personnel is part of the broad human resource capacity deficit plaguing Afghan reconstruction in general. But particular to the justice system, many judges appointed in the post-Taliban period, including some on the Supreme Court, do not have a legal education (secular or *Shari'a*), and have been educated only in *madrassas*. Having little—and in some cases in the provinces no—access to legal texts, many judges are unfamiliar with the law and make decisions without reference to it. Moreover, corruption in the judiciary is considered to be rampant—not surprising in light of salaries of about \$36 a month. Bribery aside, one senior judicial official commented that it is not possible at present to hold judges accountable for their conduct because they are under pressure from and control of “commanders.” Some judges and others report that judges assigned to the provinces are able to perform their duties only if they are personally in favor with the local power-holder. Corruption and pressure from local power-holders is similarly widespread among prosecutors.

Assessing the actual level of activity among judges and prosecutors is difficult. Reliable data on caseloads appears to be unavailable. Some who have visited courts in the provinces have reported no apparent sign of legal proceedings at particular courthouses. According to the Attorney General’s office, there are 3,274 prosecutors in the country, and they are actively prosecuting a variety of criminal cases—murder, adultery, rape, and, mostly, theft—with an 85% conviction rate. But, though there are 341 prosecutors in Kabul center and the districts of Kabul province, there are only 600 persons (“men, women, and infants,” according to the Attorney General’s office) in detention in Kabul—a small number for a city of over two million persons, and an apparently small caseload for the prosecutors.

In addition to improving the human resource capacity of the judiciary, a tremendous need exists to begin the arduous process of determining a sound structure for the court system and developing basic court management techniques. No work has yet been done to analyze the number of judges and courts, and their locations, that makes sense for Afghanistan. The current organigram of the judiciary was developed haphazardly during the Najibullah and Mujahedeen periods (approximately 1986–1996) in order to create jobs for people in particular places based on political exigencies. Similarly, no work has been done to develop a court management system suitable for conditions in the country. This should include establishing technical means of communication between the central justice authorities and the provinces; currently, days, months, or more are required to send or receive information.

In some other post-conflict/transition situations (most notably East Germany, and more recently Bosnia and Herzegovina), the problem of corrupt and/or inefficient judicial personnel has been handled by serving notice to all, allowing them to re-apply, and re-hiring selectively. This approach probably is not feasible politically in Afghanistan.

Under the country’s current judicial appointment structure, improving the quality of judicial personnel will prove difficult. The Supreme Court is responsible for administering the entire judiciary, and the Chief Justice has authority (nominally as chair of a committee) to nominate all judges. The Supreme Court is headed by a Chief Justice who is a noted religious conservative originally appointed by the “mujahadeen” government of President Burhanuddin Rabbani and reconfirmed by President Karzai. Notably, the Supreme Court has created within its administrative structure a “Fatwa Council” composed of clerics. The Council reviews questions of Islamic law, and has, on its own initiative, issued rulings even in matters not actually brought to the Supreme Court by any parties. Although the President has

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the final appointment power under the law, President Karzai reportedly has not rejected any of Chief Justice Shinwari's judicial nominees, many of whom do not meet the education and experience requirements of Afghan law. At a February 2003 U.S. Institute of Peace symposium on rule of law in Afghanistan, the Afghan participants (including the Minister of Justice, JRC chairman, two Supreme Court justices, and other senior legal officials) concluded that judicial appointments should be based on merit and education, and proposed new minimum qualifications that should be established; these recommendations have not been implemented. While there are some differences of opinion within the Supreme Court, the leadership of the institution is regarded as opposed to any consideration of enhancing judicial qualification requirements, purging the judiciary of unqualified personnel, or reforming the structure of the court system.

As the centerpiece of their efforts to strengthen the justice sector, Italian officials have decided that the most urgent need is to extend the justice system to areas of the country where courts presently are not functioning. They plan to address this need through a focus on selected district (primary) courts. They have developed a new, streamlined interim code of criminal procedure, which was promulgated into law by Presidential decree in February 2004. This interim code has been the subject of some controversy, as it was prepared by Italian officials with help from U.S. military lawyers but relatively little input or support from the Afghan justice institutions, and was reportedly adopted under strong foreign political pressure. The interim code officially now replaces the pre-existing code of criminal procedure throughout the country.

The Italian project will focus first on introducing the interim code in selected district courts, i.e., those located in provincial capital cities, which in theory could also hear cases from other districts in the province where courts are not functioning. They plan to train an initial corps of 20 judges and 20 prosecutors in this new code, after which these persons would be assigned to the selected districts. The Italian program will first be implemented in a pilot project in Gardez. The remaining districts in which they will pursue this effort remain to be identified, as does the number of districts they intend to target and over what time period. Italian and Afghan officials also need to determine clearly how they will amend or work around the existing procedure for appointment and assignment of district judges. Some Afghan and foreign observers have expressed skepticism regarding this plan, suggesting that an approach that focuses on use of a new code in a small number of district level courts could produce inconsistency and isolated pockets of administration of justice. An alternative strategy would focus on Kabul plus the five major provincial capitals (Mazar-i-Sharif, Herat, Jalalabad, Kandahar, and Kunduz), and outside of Kabul would focus on the provincial courts rather than district (primary) courts. (The provincial courts are appellate level, but have some first-instance jurisdiction.) An approach that is focused on provincial courts would have a wider potential impact than one focused on district courts. Outside of these urban centers the population generally relies on and has much greater trust in informal systems of dispute resolution (such as decisionmaking or mediation by *shuras* and tribal elders). Inside these centers, the traditional, informal systems tend not to function, and the need is therefore greater for access to a formal justice process that works. A soundly functioning provincial court could provide a check on unreformed district courts throughout its jurisdiction.

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Defense Attorneys

Though Afghans have a legal right to defense counsel, defense attorneys are virtually unknown in Afghanistan. Even in criminal proceedings, defendants are almost never represented by counsel. Traditionally, clients have used lawyers for

commercial matters, but even these could be characterized better as brokers or agents, who, for example, handle payments of bribes to judicial officials. A legal aid department within the Supreme Court is supposed to provide assistance to indigent defendants, but according to multiple sources, the office exists in name only. Understanding of the role of defense counsel is lacking as well. For example, a senior prosecutorial official said that a lawyer is only necessary for a defendant who is not literate. Apparently the only work to build defense lawyering capacity is being undertaken by a U.S. NGO, the International Legal Foundation, which launched a small training program in Kabul in August 2003, and which also provides some training through other organizations.

Legal Reform

Legal reform in Afghanistan has been complicated by lack of clarity regarding what laws exist in the country. The Bonn Agreement called for existing law, with some exceptions, to continue to apply, but this provision ignored the fact that there are significant overlaps and contradictions among different laws promulgated during different periods. In addition, all existing significant collections of legal texts were destroyed during the wars. The International Development Law Organization in October 2003 completed a digital chronological compilation of Afghan laws going back to the 1920s, but this has not yet been indexed or distributed. In 2002, the Institute together with the American Bar Association and International Resources Group, collected authenticated versions of several key legal codes, and with the cooperation of the Ministry of Justice and the U.S. Army, printed and distributed 1,000 copies. The U.S. Army delivered most of the copies to regional governors.

While the lack of clarity regarding existing law is likely to persist for some time, some progress has meanwhile been made in revising laws and writing new ones. According to the Ministry of Justice, 12 amended or new laws have been approved by the government as of November 2003, and several others are in progress. Many of these are focused on commercial law, and other areas related to regulation of the economy. In current circumstances, law reform may be the easiest area of justice sector development; relatively few resources are required, there is no parliament to contend with (laws are adopted by Presidential decree after cabinet review), and results can be achieved just on paper. The real test of law reform, however, will be whether new and improved laws are actually implemented, and in that regard, there is so far little change. In order to create a possibility of implementation, a system will have to be devised for distributing, and providing training regarding, the new and revised laws to judges, prosecutors, and legal educators.

Legal Training and Education

As already noted, improvement of the quality and professionalism of judges and prosecutors is the greatest need in the justice sector. Legal training and education is fundamental to meeting this need, particularly in the current situation where purging unqualified personnel is not politically feasible. Both short-term fixes and long-term investments are needed. Some attention is being paid to the former, as several training programs are underway, but no attention is yet being paid to the latter, which requires taking steps to improve the currently dismal state of university law faculties. Short training programs can provide benefits, but major gains in the quality of administration of justice can only be achieved if investments are made in the preparation of the next generation of legal professionals.

The largest training program underway for current judges and prosecutors is being conducted by the International Development Law Organization (IDLO). This program will provide 50 days (300 hours) of training to 450 persons over a 16-

month period ending in September 2004. There does not appear to have been any outside evaluation of the quality or impact of this training as yet. The professional skill level of the participants—even those with 25 or more years of experience—is very low. They have no experience in producing written opinions, no experience with defense advocates in the courtroom, and are accustomed to disposing of issues without any reference to legal texts. Working to impart the basic idea of making judicial decisions based on actual law has been an important element of the training. Separately, the Judicial Reform Commission has initiated a nine-month training program for new judges and prosecutors. The first class of 150 students began training in 2003 and is still in progress. A common understanding exists that responsibility for this program needs to be moved to a permanent institution, preferably with creation of a national judicial training center, but no concrete steps have yet been taken in this direction.

The needs of the university law faculties, both secular and *Shari'a*, are huge. These include books (libraries were destroyed and students cannot afford their own texts, even when available), infrastructure repair, faculty training (most have no more than an undergraduate degree), curriculum development, and visiting professors from abroad. Virtually no assistance has yet been provided to law faculties in Kabul or in provincial capitals.

One factor limiting opportunities to provide training and assistance for law faculties (as well as law reform and other efforts) is the lack of trained interpreters and translators who have knowledge of legal vocabulary. The dearth of qualified linguists in general is a challenge in Afghanistan's reconstruction process, but it is a particular problem in justice sector projects where precise use of legal terminology is essential. A program to train a cadre of individuals in the necessary skills could facilitate the execution of many projects.

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Customary Law

Outside of the major cities, village councils or tribal elders have for generations played the predominant role in resolving disputes and meting out justice. There are indications that this customary system of law—which varies in form and substance throughout Afghanistan—has been subverted and manipulated by local wartime and current power-holders, but to what extent and effect has not yet been closely examined. Though the issue has not been greatly considered, there appears to be broad agreement that legal reform should include limiting the authority of customary law mechanisms, particularly in areas of criminal justice. Some also believe it will be important to design connections between the formal and informal systems, perhaps by crafting procedures for courts to confirm results of customary dispute settlements. In rural areas for the foreseeable future, fostering the informal system will be both more realistic and more sensible in the cultural context than trying to push the formal justice system into remote areas. In the near term, it will be constructive to study the nature and current state of customary law practices in order to provide an information base for future action. USIP is currently conducting one such study.

There are estimated to be about 50,000 men working as police, but they are generally untrained, ill-equipped, illiterate, and owe their allegiance to local warlords and militia commanders.

Police

Historically, the police were organized as a quasi-military force on the Soviet model with a two-track system of career officers and conscripts who chose to serve for two years as police patrolmen rather than join the army. During the past decades of conflict there has been no national civilian police force in Afghanistan. Though figures are uncertain, there are estimated to be about 50,000 men working as police, but they are generally untrained, ill-equipped, illiterate (70-90%), and owe their allegiance to local warlords and militia commanders and not to the central government. Many of those serving as police are former Mujahedeen who have expe-

rienced a lifetime of armed conflict and are accustomed to acting with impunity. A few professional police officers remain from the Afghan National Police of the Soviet period, but these officers have little understanding of the role of police in a democratic society. In Kandahar, for example, 120 officers out of 3,000 police had received some police training, but it was more than a decade ago.

The Bonn Agreement provided for the creation of an Interior Ministry responsible for police and corrections. The border police were transferred to the Ministry of Defense in January 2002, and responsibility for corrections was moved to the Ministry of Justice during 2003. The Kabul police have cooperated with ISAF and helped reduce the number of armed militia fighters in the city.

In addition to a lack of training and questionable loyalty, the Afghan police suffer from a lack of uniforms, inadequate equipment and transportation, dilapidated facilities, and little or no pay. The UN-administered Law and Order Trust Fund, established in 2002, has received only \$11.2 million of the \$65 million requested for two years. Failure of the international community to provide the required funding means that the central government lacks the resources to fund the police outside of the capital, and thus the ability to reduce the influence of regional leaders. Even within Kabul, as of November 2003, police had not been paid since May 2003. Low or no pay has resulted in widespread corruption, further undermining public confidence in police, who are generally regarded with a mixture of fear and disdain.

For purposes of creating a capacity to handle internal security, Afghan authorities and the international community determined that it would be more cost-effective to focus on training and equipping a national police force than a national army. Given Afghanistan's size and population, creating a national police force represented a far greater challenge than any police-related program the international community has ever attempted. At the request of the UN and the Interim Authority, Germany assumed responsibility as "lead nation" for training and equipping the Afghan police. This request was based upon the Afghans' positive experiences with German police assistance programs prior to the Soviet intervention. Germany's goal was to create an ethnically balanced force that was familiar with human rights standards and modern police methods and capable of assisting with the country's transition to democracy.

Germany developed an initial plan for police training and announced the commitment of \$70 million toward renovating the police academy in Kabul, providing 11 police instructors, refurbishing Kabul police stations, and donating 50 police vehicles. The first team of 14 German police advisors arrived in Kabul on March 16 and the German Coordination Office was opened on March 18, 2002. The Coordination Office advised the Interim Authority on police training and reform and supervised the reconstruction of the Police Academy that formally reopened on August 22, 2002, with 1,500 cadets in residence. The Academy provides a five-year recruit training course for officers and a three-month recruit course for non-commissioned officers.

In November 2003, the Academy had 1,000 officer cadets and 500 non-commissioned officers in residence. Education requirements for admission were 12 years for officers and six years for non-commissioned officers. The student body was composed of 60 percent Pashtuns, 30 percent Uzbeks and 10 percent others. Students came from 26 provinces, but most were from the Kabul area. Only 11 members of the officer class and 22 members of the non-commissioned officer class were women. Germany accepted responsibility for training an Afghan border patrol as well, but as of November 2003 had trained only 125 officers, who serve as guards and immigration inspectors at the Kabul international airport. The future of the new border police is dependent upon the central government's ability to remove the local commanders and heavily armed military forces that now control the border and the smuggling of drugs and other contraband across it.

In 2003, the U.S. State Department established a police assistance program to provide in-service training for currently serving Afghan police in Kabul. There are three

American and six international instructors, plus Afghan staff. When fully operational, the facility will graduate 700 police officers every eight weeks. The U.S. program aims to train 7,000 police, including 3,000 officers and 4,000 patrolmen, for Kabul. Students in the U.S. program are selected by the Interior Ministry, and are not vetted by U.S. program administrators. The program offers the following basic courses that the U.S. has provided in other post-conflict situations, such as Kosovo and Bosnia:

- Transitional Policing (policing in a democracy for officers) 2 weeks
- Basic Police Skills (for NCOs and patrolmen) 8 weeks
- Instructor Development 2-4 weeks

The Kabul site will be a prototype for seven regional training centers that will be located around the country and staffed by international and Afghan instructors. The U.S. expects to train 50,000 police by 2005. The regional sites will be co-located with the Provincial Reconstruction Teams, but will be larger in size, housing up to 500 students and trainers. The U.S. Congress has provided \$110 million in funding for this program.

Corrections

Typical for a post-conflict reconstruction situation, the corrections system in Afghanistan is the neglected step-child of justice sector reform. Though corrections nominally falls within Italy's lead, it has paid limited attention to this area and other donors have paid none. Afghan authorities also have applied few resources to address the huge needs of the prison system.

Except for a few limited NGO projects, the UN Office of Drugs and Crime (UNODC) is the only organization working on prison and jail improvement projects in Afghanistan. UNODC is currently spending \$2 million provided by the Italian government over two years on very basic renovation (e.g., water, sanitation, kitchens) of the male and female detention centers in Kabul and three cellblocks of the Pul-e-Charki prison outside Kabul, and limited training of administrative staff in the Ministry of Justice, to which responsibility for prisons was transferred during 2003 from the Ministry of Interior. The International Committee of the Red Cross has regularly visited prisons, and to some extent has provided food and water to detainees. Though information on the situation outside of Kabul is inconsistent, it appears that all or most actually functioning prisons and detention facilities (with an unknown number of detainees) are effectively controlled by commanders or other regional power-holders, rather than the central government. Prison conditions generally in Afghanistan have been harshly criticized by those who have examined them, but other than the work described above, no concrete measures are underway to address the situation.

Transitional Justice and the Human Rights Commission

Transitional justice—the process of dealing with the legacy of atrocities and human rights abuses—has taken a backseat in post-Taliban Afghanistan. Political support, both within and outside the country, for documenting such crimes and developing mechanisms to deal with them has been minimal. According to one senior Afghan official, a serious effort to pursue a war crimes agenda could implicate half the current cabinet. While the legacy of past atrocities and continuing human rights violations fail to be addressed, the culture of impunity will continue to undermine development of a culture of rule of law.

Transitional justice is included within the broad human rights mandate of the Afghan Independent Human Rights Commission established under the Bonn Agreement. Recognizing the reality of the present environment—that it is difficult to envision a full-fledged transitional justice process while probable violators hold the reins of power – the Commission is undertaking two categories of activities to lay the groundwork for future efforts in this area. First, the Commission is beginning work on documentation of past

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crimes, and, second, the Commission is preparing to launch a “national consultation” on transitional justice that will consider what types of mechanisms should be adopted. The Commission does not see the Afghan judicial system as being capable of handling war crimes or other serious human rights matters any time soon, given that the judiciary is politicized, many judges are poorly qualified, and corruption is widespread.

The documentation work has been slowed by security risks for witnesses and Commission staff, as well as, in the Commission’s view, by the lack of political support, particularly from the United States, for investigations of past crimes at the current time. Nevertheless, the process has begun in select areas, where the security situation is satisfactory and where probable perpetrators are not in official local positions of power.

The Commission is preparing for the national consultation process by consulting first with civil society groups. Commission staff hope to start the national consultation early in 2004. The consultation is expected to include a media campaign, public presentation of options, and use of civil society groups and *shuras* to organize discussions around the country. The Commission hopes to conclude the process by the time of elections—now slated for June 2004, but likely to slip until the late summer or fall. Commission staff predict the consultation will show popular interest in a combination of a limited number of trials for major perpetrators, and some form of truth and reconciliation process, probably using traditional *shuras*, for most perpetrators. Such conclusions would reflect the deep-rooted Afghan traditions of both revenge and forgiveness. This approach would also recognize the need to balance legal accountability for past abuses with the limitations of the criminal justice system and the imperative of dealing with the past through complementary processes that can move Afghan society forward in a constructive fashion.

Key Challenges

Narcotics and Organized Crime

A fundamental challenge to the future of Afghanistan, and specifically to the effort to develop a culture of rule of law, is the growing domination of the economy by, and the dependence of most power-holders on, the production of opium and the international traffic in narcotics. In a situation where there are no disincentives and no equally lucrative alternatives (opium provides farmers ten times the income of wheat or other crops), Afghanistan’s rural population is turning increasingly to farming poppies and the production of opium and its derivatives. Opium production fuels the rural economy and provides livelihoods for seven percent of the population. At the same time, nearly all elements of local and regional power structures, who take most of the profits, use the proceeds from narcotics trafficking to fund their activities and maintain their independence from the central government.

Afghanistan is the world’s largest producer of illicit opium. The UN Office of Drugs and Crime reported in its “Afghanistan Opium Survey 2003” that Afghanistan produced 3,600 metric tons of opium, or three-fourths of the world’s supply. This amount of opium earned Afghan traffickers, and to a lesser extent farmers, \$2.3 billion, an amount equal to half the country’s legitimate GDP and nearly five times the government’s annual budget. Production was six percent greater than the previous year, despite poor weather, disease, and limited government efforts at eradication. In the past, cultivation was concentrated in only three provinces; by 2003, it had spread to 28 of Afghanistan’s 32 provinces. At present, 80 percent of Afghanistan’s opium production is consumed in the region. Pakistan and Iran have an estimated two million addicts each, and there are growing addict populations in the former Soviet republics on the Afghan border. At the same time, Afghanistan supplies 70 percent of the heroin consumed in Western Europe. According to the UNODC, the international trade in Afghan opiates generates a total turnover of \$30 billion worldwide.

Expansion is fueled by a lack of restraints and the encouragement of provincial governors, warlords, corrupt officials, and even some Islamic clerics. In addition, the

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return to the countryside of large numbers of refugees with no employment opportunities other than laboring in poppy fields has contributed to increased production. As central government authority does not extend beyond Kabul, poppy growing is not subject to interference by law enforcement authorities. Experts uniformly agree that counter-narcotics efforts must combine 'carrots' and 'sticks,' but essentially no sticks are now being wielded. While large-scale interdiction and eradication programs may not be feasible in present circumstances, close observers have said that even targeted, sporadic seizures and other enforcement measures would provide some deterrent.

The opium economy also benefits from a well-organized 'agricultural extension' system sponsored by drug brokers and traffickers that provides farmers with seeds, fertilizer, advance credit, technical assistance, and an assured market. Credit may be used for production of legitimate crops as well as opium, but repayment must be in the form of opium. Drug brokers buy directly from farmers or from opium merchants in small towns and village markets. They resell to drug traffickers, who either supply refiners or exporters. Local refining of opium into morphine base and production of heroin is increasing.

The U.S. Drug Enforcement Administration (DEA) has identified some ten major ethnic-Pashtun traffickers engaged in moving drugs over the traditional smuggling route between Kandahar and Quetta in Pakistan. Major traffickers from other ethnic groups are also involved and control the trade in areas where their kin live on both sides of the Afghan border. Transportation of narcotics frequently is carried out in police or military vehicles controlled by provincial governors, commanders, or other power-holders.

Over the past two years, the Afghan government has put in place the legal and institutional framework to begin an effective counter-narcotics program. In January 2002, President Karzai issued a Presidential decree outlawing the cultivation, production, trafficking, and abuse of narcotics. In October 2002, the Counter-Narcotics Directorate (CND) was created as part of the National Security Council. In May 2003, a National Drug Control Strategy was adopted. In October 2003, a modern, national narcotics control law was enacted. Also in 2003, an initial Afghan government enforcement program resulted in the claimed eradication of 21,000 hectares of opium in the major growing areas of Helmand, Kandahar, and Ningarhar provinces. As the central government had no capacity, the eradication effort was undertaken by provincial governors, but without independent verification. This raised suspicions that any poppies actually destroyed probably belonged to political rivals or farmers who refused to pay for protection.

The government's program has been supported by the United Kingdom, which is the "lead nation" among international donors on counter-narcotics efforts. The British have provided effective coordination of international and Afghan initiatives, and have contributed funding and political support for the government's eradication program. The UK has pledged \$12 million over the next three years to create an anti-narcotics task force. British customs agents are training a new police enforcement unit of the CND. They have also promised drug-related equipment for the Afghan border police.

The UNODC has also played a valuable role in supporting the CND, particularly in the area of research and advising on strategies for creating alternative livelihoods. For the first time this year, the UN's annual report on opium production was produced in cooperation with the Afghan government. For its part, the U.S. government has promised to provide assistance for eradication, alternative crops, and effective law enforcement. Some U.S.-trained Afghan police will be assigned to controlling opium production, providing the missing 'shock troops' for a local war on drugs. That said, a robust operational capacity on the part of the Afghan government is years away.

Taliban and al Qaeda Resurgence

Nearly two years after their defeat by U.S. and allied Northern Alliance forces, the Taliban has re-emerged as a growing security threat along Afghanistan's southeastern border with Pakistan. Taliban forces have staged attacks and have tried to regain political influence

in Pashtun areas. Similarly, al Qaeda's training camps in Afghanistan have been destroyed and a substantial proportion of its cadre eliminated, but it retains the capacity to conduct military operations. From sanctuaries in Pakistan's lawless tribal areas, bands of al Qaeda extremists have staged cross-border raids on U.S. bases. At the same time, forces loyal to renegade militia commander Gulbuddin Hekmatyar operate in the northern border provinces of Kunar and Nuristan, where they have declared their own *jihad* against the United States and Coalition forces. Taliban insurgents have also attacked and killed foreign aid workers, Afghan police, and road crews. These events have caused a dramatic scaling back by international agencies, and a consequent lack of capacity to provide assistance to a significant portion of the country.

Warlordism

Other than in the southern and eastern areas, the blame for the lack of security in Afghanistan falls on a number of heavily armed regional warlords and their subordinate militia commanders. These local leaders also remain a major impediment to national unity. They have refused to disband their private armies, and routinely engage in armed clashes over control of territory, border crossings, and transportation routes. They also use intimidation and violence to control the local population, and rely upon criminal activities including narcotics trafficking and extortion to finance their activities. In many cases, the most senior warlords serve as provincial governors or hold other official positions, but refuse to accept direction from or provide revenue to the central government. The problem of regional warlords is particularly serious in the north, where ethnic divisions and personal rivalries among commanders persist. Conflicts among these leaders pose a problem for the United States, as the American military provided money and military support to these leaders in the battle against the Taliban. The United States continues to provide these regional commanders with financial support and to rely upon their forces to engage Taliban remnants. Observers note that many ordinary Afghans question the U.S. approach and have been disappointed that the Coalition has not taken a harder stand against the warlords, whom people consider to be their abusers.

To help deal with the warlord problem, the UN, with Japan in the "lead nation" role, has begun implementing a program to disarm, demobilize, and reintegrate as many as 100,000 soldiers and militia members. The program began by demobilizing a group of 1,200 fighters in Kunduz and Paktia provinces in October 2003. On December 9, two thousand former Northern Alliance soldiers surrendered their weapons in Kabul and agreed to participate in a job-training program to prepare for civilian life. Many regard disarmament to be of critical importance to the stabilization of Afghanistan; whether the efforts that have only recently been set underway will prove to be substantial and effective remains to be seen.

As with many areas of the reconstruction process, the warlordism problem is a direct impediment to efforts to build the rule of law. Warlords, whether they hold official positions or not, currently subvert both formal and informal justice processes through intimidation and interference in areas from the capital to rural districts, and they largely control whatever law enforcement apparatus exists outside of Kabul. Even in Kabul, militia men are able to assert control on the streets, despite a semblance of central government police presence.

Recommendations

- *Move beyond the "lead nation" approach for the rule of law.* After two years, it is clear that the "lead nation" approach has not worked effectively in the rule of law area. The significant and multiple challenges in restructuring and rebuilding Afghanistan's justice sector requires the intensive involvement of more than one foreign donor. "Non-lead" donors need to engage more dynamically with Afghan institutions on these issues, rather than leaving Italy to shoulder most of the task. The lack of strong international leadership in energizing reform, bridging differences among the Afghan

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The lack of strong international leadership in energizing reform, bridging differences among the Afghan institutions, and coordinating donors has resulted in drift.

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institutions, and coordinating donors has resulted in drift. Three steps should be taken to introduce stronger leadership:

- Donors other than the “lead nation” should work more proactively with Afghan authorities and Italy to help define and drive a reform strategy for the justice sector and undertake initiatives where they are needed, as the United States has done recently in police training. Though the United States already has significant commitments in other sectors and is already the second largest donor in the justice sector, it also has the most at stake and invested in Afghanistan’s reconstruction and the greatest political influence of any international player in the country, and should not wait for other donors to act in this area. Other donors should also step up for particular aspects of the rule of law portfolio, such as corrections.
- UNAMA should immediately fill its vacant position of a senior rule of law advisor. The institutional weaknesses of UNAMA (e.g., its lack of operational capacity) might limit the ability of such a person to play a significant role, but a dynamic, highly qualified individual could still make a difference in working with the Afghan institutions to push reform, and in stimulating donors’ interest in key priorities.
- The Ministry of Justice and donors should activate the moribund Consultative Group (CG) for the justice sector. Consideration might be given to putting a revitalized Judicial Reform Commission in the chair of the justice sector CG, instead of the Ministry of Justice, in view of the persistent institutional rivalries in the sector. Some criticize the CG process as being a bureaucratic talk shop, and the usefulness of Groups for different sectors appears to vary. But the CG does provide a forum for a variety of donors’ voices to be heard, and for questions to be raised about the lead nation’s approach. It also provides a mechanism for regular communication between Afghan stakeholders and donors.
- *Devote greater resources to developing human resource capacity through professional education and long-term training.* Realistically, it will be difficult to make significant headway in improving the quality of law enforcement, judicial, and legal personnel without extensive efforts to improve literacy and provide basic education, including for adults. At present, much of the training provided is wasted or lost on students who lack the basic understanding and skills necessary to make the best use of the training provided. There is a specific need to improve the legal education system, which is being almost entirely ignored. While quick-impact training has a useful role, a long-term and deep impact will be achieved only by preparing the next generation of legal professionals. In addition, given the relatively short period of training most police will receive through the U.S. program, regular follow-on training will be necessary to ensure a lasting impact. Finally, donors should initiate a program to train a cadre of high-quality translators/interpreters with knowledge of legal terminology; the current lack of such capacity is a bottleneck for all other capacity-building projects.
- *Work, where possible, to improve the quality of judicial and law enforcement personnel through professionalized selection procedures.* While a comprehensive weeding-out process for current personnel is not realistic at present, Afghan authorities should take steps wherever possible to professionalize judicial and prosecutorial selection procedures in accordance with established standards. Any progress on this front would begin the essential process of reducing the impact of *madrassa*-educated personnel in the system, and would complement short- and long-term training. Similarly, steps should be taken to adopt a transparent and merit-based recruiting and selection system for police, who are now mostly converted militia members. This would include a mechanism for vetting to ensure that human rights abusers and criminals are rejected.
- *Focus the rule of law reform strategy on Kabul and the five major provincial cities.* Efforts toward improving law enforcement and the judiciary should focus on the major cities

in Afghanistan because that is where the formal justice system is most used and most needed. Bearing in mind the reality of limited resources, judicial reform should be focused on the provincial (rather than district) level courts in order to have a broad impact in ensuring a reasonable quality of justice. An improved provincial court could provide a check on as-yet unreformed district courts throughout the province. The strategy should include intensive training of police, judges, prosecutors, and court administrators; enhanced salaries; improvement of facilities; provision of equipment; improvement of court management; and replacement of poorly qualified personnel.

- *Require Coalition military forces to perform limited law enforcement functions until Afghan police and law enforcement capacities come on line.* Unless the U.S.-led OEF is willing to expand its mandate to include at least a minimum of counter-narcotics activities, it will be years before the Afghan police are prepared to undertake on their own the kind of high-risk operations that are required. At present, OEF forces rarely interfere with narcotics trafficking or heroin production even if they discover such activity in the performance of other duties. A limited, but extremely useful, change in the military mandate would involve intelligence sharing with civilian law enforcement and a willingness to take action against drug warehouses and heroin laboratories. This would help correct the impression of most Afghans that the U.S. military purposefully ignores the participation of the warlords in the drug trade. In the absence of any enforcement actions against the narcotics trade, the perceived message of tolerance of this activity will continue to undermine the effort to develop a culture of rule of law.
- *Reform the judicial reform process.* In theory, the Judicial Reform Commission (JRC) was a sensible idea, given that no single Afghan institution has authority over all elements of the justice sector; in practice, it has not been able effectively to drive reform in the sector.

—One option is to wind down the JRC and shift donor resources to building capacity in the permanent institutions. The persistent lack of consensus regarding the proper role of the JRC, the JRC's having become another faction in an already factionalized sector, and the limited time remaining in its currently defined lifespan militate in favor of beginning now to wind down the JRC and spin off its activities. Donor resources now being devoted to or earmarked for building up the JRC could be redirected to building the capacity of the permanent institutions directly, including the Ministry of Justice, *Saranwali*, Judiciary, and Ministry of Interior. In order to provide a new umbrella body for driving reform and coordinating with donors, creation of a joint body composed of representatives of the permanent institutions would seem to have the benefit—in contrast to the JRC—of buy-in from the stakeholders. However, such a body probably would mirror the disputatious relations among the institutions rather than bridging their differences. Consequently, if the JRC is disbanded, a new expert advisory body attached to the President's office is recommended instead, in particular because the current posture of the Supreme Court is a primary obstacle to reform, and only the chief executive has the potential for influence over that institution. This body should be composed in a way that would give it greater political clout than the current JRC, in order to enable it to bridge differences among the permanent institutions and carry weight with foreign donors.

—A second option is to substantially enhance the JRC's political stature and capacity in order to improve its effectiveness. The continuing need for an umbrella over and facilitator among the coequal permanent institutions in the justice sector argues in favor of maintaining, but enhancing, the JRC. This would entail reorganizing the JRC to give it a more politically powerful membership; forging a close relationship between the Presidency and the JRC, so that the latter becomes the President's agent in dealing with the justice sector; and extending the life of the JRC beyond

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the coming elections, while clarifying and enhancing its somewhat ambiguous terms of reference in a new decree. At the same time, donors would need to speed the flow of resources to the JRC, supplement its currently limited technical capacity, and provide professional management capability. A revitalized JRC could play a leading role in facilitating regular dialogue and cooperation among the permanent institutions, thus helping to ensure an integrated approach to developing the rule of law.

In either scenario, it is imperative that organizational arrangements ensure that Afghans, with international assistance, decide how their judicial system should look and function, by addressing such issues as the role of *Sharia* and tribal tradition and the respective roles and authority of the various institutional actors in the justice sector. Until such issues are addressed, any new commission or advisory body—in all likelihood involving personnel from the various institutions—will continue to be fractious.

- *Establish a judicial monitoring program.* As part of a renewed engagement with justice sector rebuilding, UNAMA would be best-placed to establish an independently managed judicial monitoring arm. Without any systematic observation of how the system functions in reality, measuring progress, applying resources, and identifying specific issues to be addressed will continue to be exceedingly challenging. Monitoring personnel also could work to foster appropriate disciplinary systems in Afghan institutions.
- *Significantly increase funding for corrections programs.* Except for one \$2 million program and limited NGO activities, the dire need to improve prisons and detention centers in Afghanistan and ensure central government control over facilities is being ignored. Lack of overhaul of the corrections system has a direct negative impact on the functioning of the entire criminal justice system. One or more donors are needed to step forward and play a major role in this area. Even if resources for implementation of prison infrastructure projects are limited in the near term, it would be possible with more modest resources to build capacity in the Ministry of Justice for professional corrections planning and management, and to train corrections personnel. At the same time, the political and diplomatic work of disengaging warlords from control over prison and detention facilities in the provinces should proceed.

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For more information on this topic,
see our website (www.usip.org),
which has an online edition of this
report containing links to related
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