

HUMAN RIGHTS AT A CROSSROADS:

The need for a rights-centred approach to peace
and reconciliation in Afghanistan

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,



Impunitas continuum affectum tribuit delinquent
Continuous impunity encourages the offender
However tall a mountain, there is a route to its peak

Afghan proverb

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Introduction

Stakeholders' focus on reconciliation at any cost prevails in Afghanistan. After more than 30 years of war, the Afghan people are extenuated and yearn for security, peace and a normal life. More than 70% of the population was born after the Russian invasion in 1979 and have spent their lives under war. Millions have lived part of their lives as refugees in Pakistan and Iran, and hundreds of thousands are still internally displaced. Many remain in exile as a result of the uncertainties that persist in Afghanistan. In the most recent years, thousands of young Afghans have chosen to migrate abroad because of the prevailing insecurity and the absence of livelihood.

Afghans have also grown disillusioned since the launch in October 2001 of the US-led intervention to remove the Taliban from power. The civil war that prevailed until 2001 was before long replaced by an internal conflict opposing the mainly Taliban insurgent groups to the internationally-backed government. From 2005 onwards, the level of violence has increased and the spectre of civil war reappeared. Although at first the Pakistani government adamantly refuted the presence of Taliban and their training camps on its soil, it became clear that the Taliban were able to muster their forces and grow strong enough using guerrilla tactics and disseminating fear among the population; in some regions they managed to get in a position to broker power-sharing. The US-led intervention's failure to secure stability for Afghanistan and donor-fatigue have shaped an exit-strategy based on a scenario which seemed shocking just a few years ago – negotiations with the Taliban for a political settlement. This agenda fails to take into account the cost for the forward-looking populations of Afghanistan, who have repeatedly expressed their support for democratic institutional changes. The deteriorating security situation and daily acts of terror and intimidation against civilians in different regions alarm the Afghan people, whose memories of systematic and generalised human rights violations, atrocities and oppression under Taliban rule remain vivid.

Furthermore, progress in economic development and social welfare in the country has been meagre and has not met the high expectations raised by the injection of billions of US dollars into the Afghan economy since 2001 by the international community. Major challenges have remained inadequately addressed, especially in building democracy and the rule of law.

Despite these hardships, Afghans have unswervingly expressed their faith in progressive change and democratisation; they have exhibited a strong desire for justice and for the end to all-pervasive impunity. This report aims to demonstrate that a hasty reconciliation with the Taliban without due regard to human rights, as currently pursued by the Government of Afghanistan and its international partners, will be unsustainable and ultimately self-defeating. Such an approach will obliterate truth-seeking efforts and obviate justice, promote continued impunity and lead to further human rights violations. As such, it *cannot* lay the foundations for sustained peace. Experience in post-conflict countries has proven that reconciliation before truth-seeking and justice only rehabilitates those responsible for grave human rights violations.

The first and second sections analyse the context in which the reconciliation process will unfold until the withdrawal of international troops by the end of 2014. The third section demonstrates that safeguarding and consolidating important institutional and democratic achievements since 2001 is crucial to ensuring that Afghanistan does not revert back to a situation of widespread

human rights violations, once again becoming a haven for acts of terror. The transition process to 2014 and beyond must embody a strong commitment from both the Government of Afghanistan and the international community to fully endorse justice and human rights as core, non-negotiable principles in all institutional and strategic arrangements. The fourth section profiles the Taliban and brings evidence that they are committing similar patterns of human rights violations to those they regularly committed when in power from 1996 to 2001. This section also outlines the various human rights mechanisms the international community can mobilise in order to prevent the rehabilitation and return of Taliban's violent ideological governance. It also identifies the key responsibilities and obligations of the international community and Afghanistan's partners in addressing the human rights situation prevailing in the country. The conclusion and recommendations summarize the various factors which the Government of Afghanistan and its international partners should mobilise to build democracy and the rule of law, and prevent further human rights violations in Afghanistan.

I. Afghanistan's challenges: war, ethnicity, poverty

1. A history of war, social tension and foreign influence

Afghanistan has seen decades of underdevelopment, war, foreign occupation and political instability occasioned by multiple regime changes. These factors render its future uncertain. Several wars have taken place since 1979: beginning with a near ten-year occupation by Soviet troops, a bloody decade of civil war culminated in Taliban rule. The year 2001 marked a new period of intervention by international troops after the ousting of the Taliban regime. The US-led intervention announced support for a new Afghan Government in seeking to wage war on the Taliban, whilst democratising and stabilising the country.

High numbers of civilian deaths, continued conflict, slow stabilisation and development, mismanaged planning and corruption have rendered the presence of over 100,000 foreign troops, mostly American, increasingly unpopular. Populations under fire and the families of suicide attack victims have been critical of what seems like contradictory policy approaches and the inability of the Government and its international partners to ensure the security of ordinary citizens. Afghans are caught between expressing anger and concern about the international coalition's shortcomings whilst in the same breath expressing fear about returning to a situation of Taliban-rule or civil war after the departure of international forces.

The Hamid Karzai government, established with the support of the United States of America, has recently opened the door to talks with Taliban belligerents and their allies, taking reconciliatory steps towards them through Afghan interlocutors. The Taliban's regaining of ground since 2005 has led the Western coalition to announce that it is impossible to defeat the Taliban solely by military means. Despite fluctuations, armed conflict and talks between the USA and the Taliban, who are now recognised as de facto legitimate interlocutors, have been ongoing, with Qatar hosting a Taliban representative bureau with the support of the USA and Germany.

Foreign interference in Afghanistan's internal affairs is not a new phenomenon, having begun long before 1979. This dynamic is crucial to understanding the multiple layers of conflict, including the absence of national unity, that prevail today.

Afghanistan is a relatively young country. It was formed in the early 18th century and obtained independence from the British in the 1920s. Its boundaries are the result of a 19th century 'Great Game' struggle for control over the region between the Russian and British Empires. The Persians conceded Herat to Britain through a peace accord in 1857 and only in 1895 was the Panj River defined as the northern frontier of Afghanistan.

Following the second Anglo-Afghan war (1878-1880), Amir Abdur Rahman came to the Afghan throne, giving Afghanistan a hereto unknown degree of unity. However, the third

Anglo-Afghan war in 1919 was followed by a further period of civil conflict as King Amanullah Khan attempted to end Afghanistan's traditional isolation. It is during his reign that the first school for girls was set up. His regime remained unstable for over ten years, and his reforms were opposed by the clergy, until Mohammed Zahir Shah took to the throne in 1933. His reign lasted until 1973 when a non-violent coup brought an end to the monarchy in Afghanistan. Foreign influences persisted as the country's new regime sought closer relations with the Soviet Union and a more distant relationship with Pakistan. In 1978, Mohammad Daoud's regime was overthrown in a bloody military coup, and the country was renamed the Democratic Republic of Afghanistan, under the leadership of the People's Democratic Party of Afghanistan (PDPA). The PDPA regime lasted, in one form or another, until 1992. The Soviet Union's occupation of Afghanistan between 1979 and 1989 saw between 600,000 and 2 million deaths, mostly civilian. Around six million Afghans fled to Pakistan and Iran as refugees in this Cold War period during which the United States began to covertly fund and train different groups (*tanzeem* or parties) and commanders of anti-government Islamic Mujahedeen forces through the Pakistani secret service, Inter Services Intelligence (ISI). Following the withdrawal of Soviet troops in 1989, political alliances forged to lead the country failed. A civil war began, mainly between different Mujahedeen commanders representing different ethnic groups in the country. This civil war phase lasted until 1996 when the Taliban took power, with the military support of Pakistan and financial backing from Saudi Arabia. Under the Taliban's ideological regime a climate of fear was instituted. This was accomplished through a combination of extremist readings of Sharia and Pashtun tribal customs, the severe repression of individual freedom, human rights violations on a massive scale, the exclusion of women from the public sphere and the violent targeting of populations belonging to other ethnic groups and faiths. Civil war continued, as the Northern Alliance led by Ahmad Shah Massoud and Abdul Rashid Dostum, resisted the Taliban's attempt to establish an 'Emirate of Afghanistan'.

With the rise of the Taliban in the 1990s, Afghanistan became the playground of a new 'Great Game' between international and regional powers. USA, Great Britain, Russia, Pakistan, Iran, Saudi Arabia, and some Central Asian states had competing interests in the outcome of Afghanistan's civil war. A strong pro-Taliban lobby was active and well received in Western capitals, despite the official Afghan representative to the United Nations still being nominated by the exiled Mujahedeen president Burhanuddin Rabbani. Until 2001, each country openly supported specific Afghan groups, who in turn sought external support to counterbalance their internal adversaries. While various groups in Afghanistan shared ethnic and religious bonds with other similar groups in neighbouring states, confrontation by proxy between regional states was the result of competing political, strategic and security agendas. The presence of millions of refugees from Afghanistan in Pakistan and Iran made these places fertile grounds for the mobilisation of the Afghan youth by all stakeholders.

Whilst claiming that Afghanistan is a 'natural zone of influence', Pakistan's role in the Afghan conflict and its support of the Taliban was more complex than that of any other state in the region. The post-revolutionary regime in Iran openly supported several Hazara, and to a lesser extent Tajik, parties to Afghanistan's conflict, notwithstanding its own engagement in an eight-year war with Iraq. Uzbekistan and Tajikistan also expressed concerns about the impact of Afghanistan's civil war on their own societies.

Since the end of the Cold War, Afghanistan has remained a centre of strategic attention for influential powers. Its destiny has been tied to the conflicting interests of the British, the US

and NATO, on the one hand, Russia, China and the Shanghai Cooperation Organisation, on the other, and Saudi Arabia and its allies in the greater region.

Given the absence of a strong central power in Afghanistan and the severe lack of national consensus and trust in the country, promoting an exclusively Afghan-led process that ignores the influence of external players is clearly an unrealistic approach to peace building in this context. It must be acknowledged that the very existence of these external influences makes it extremely difficult to build a nation-state and guarantee a lasting peace in Afghanistan.

2. The ethnic dimension of the conflict

Afghanistan's cultural heritage remains tremendous. During ancient times, the territory of modern-day Afghanistan was governed by Hindu and Zoroastrian rule. In 305 BC, Buddhism from India was brought to the Kingdoms of Bactria and Sogdiana, surviving the Islamic conquest, only to fade away progressively. Many archaeological sites, including those in the Bamiyan Valley and Kabul, have been excavated since 2001. The Afghan population, though predominantly Muslim (Sunni and Shiite), also has a number of minority non-Muslim groups,¹ testimony to the religious diversity of its recent past.

Afghanistan is ethnically diverse; there are over 40 major ethnicities with over 50 separate languages and dialects. Afghanistan's multi-ethnic character means that language variety, as well as bilingualism and multilingualism are a common phenomenon. It should be added that the Afghan notion of ethnicity, known as *qawm*, is not only defined by reference to a common cultural or genetic group, but also by tribes, families, geographic regions, and even occupations.

A quest for "proving" supremacy in numbers, and a linguistic struggle to determine Afghanistan's national language between Pashto and Dari (Persian) speaking populations has been a major underlying tension in Afghan politics.² Persian has been the lingua franca of the political elite (including the palace) and Kabul dwellers; it has been used for communication between Afghanistan's various ethnic and linguistic groups throughout the nineteenth and twentieth centuries. Lack of political will, war, population movement and the fluidity of the Afghanistan/Pakistan frontier mean that Afghanistan has never undergone a full population census.³ In the absence of a strong nation-state, identities are forged on the basis of regional and ethnic belonging.

From its conception to the civil war of the 1990s, Afghanistan was politically dominated by the Pashtuns; all kings came from this group. An ethnic balance was struck through a defined hierarchical system where some ethnic groups were more favoured, enjoying privileges denied to others. Both the monarchy and Mohammad Daoud's regime (1973-1978) were authoritarian, controlling all grievances, demands, and legitimate aspirations expressed by the various minority ethnic groups.

Ethnicity surfaced more forcefully as a political issue at the end of the 1970s and has now become a major factor in Afghan politics. Beyond ideological alliances forged in the name

¹ These comprise a few thousand Sikhs, Hindus and Christians, and an unknown number of Zoroastrians and Buddhists. Kabul's Jewish community has moved to Israel.

² The current constitution has adopted both languages as official state languages, as well as giving Uzbek the status of a national language

³ The four recent rounds of presidential and parliamentary elections took place in the absence of a population census. As such, only estimations were available to determine the number of potential voters and percentage of participation.

of communism and/or Islam, political entities have aligned in accordance with ethnicity or regional belonging. The creation of the Mujahedeen and the participation of all ethnic groups adhering to this movement in a variety of political and military groups empowered non-Pashtuns to become influential political actors. The civil war of the 1990s has been interpreted as a reaction to the Pashtuns' loss of exclusivity of leadership in the political arena. Thus, the civil war erupted between Pashtuns seeking to re-establish their dominance on the one hand, and Hazara, Tajik and Uzbek groups who sought adequate political representation, and the autonomy of their respective regions. The rise of the Taliban, a Pashtun religious movement lead by veteran Mujahedeen, added to the complexity of the Afghan war. Indeed, the Taliban's sectarianism, religious extremism and use of war as an instrument of national unification and political consolidation served to widen the gulf between various groups.

Today, Afghanistan's ethnic dimension remains as problematic as it was in 2001 and seems unacknowledged by international stakeholders. However, those grievances and rivalries prevailing during the pre-2001 civil war could easily re-emerge should the reconciliation process be perceived as unfair by one group or another.

3. The underlying causes of poverty in Afghanistan

Poverty, and associated signs of under-development such as poor health, illiteracy, unemployment and recurrent humanitarian crises, have been both a cause and result of Afghanistan's instability and the prevailing internal conflict.

Afghanistan's status as one of the least governed and most underdeveloped countries in recent decades is evidenced by a severe lack of comprehensive demographic data on the country, beyond that of most other developing states.⁴ Life expectancy in Afghanistan remains exceptionally low: estimates range from 45 to 49.7 years according to the World Health Organization in 2009.⁵ The mortality of children under five years old, estimated to be around 10%, is a major contributor to low life expectancy. Maternal mortality is also extremely high with one in every 50 Afghan women dying from natal causes.

Data gathered during a partial 2011 population census revealed Afghanistan to have the characteristics of a least developed country. With a population pyramid indicating that 42.3% of the population is under 14 years old and only 2.4% 65 years and over, Afghanistan remains the poorest country in Asia, ranking 172nd out of 187th on the 2011 UNDP Human Development Index. A recent World Bank report indicated that the country will remain highly dependent on foreign aid in the coming years. Foreign aid accounted for 92% of all public spending in 2011. Since 2001, relative progress has been made in delivering basic health services,⁶ access to education and development projects to rebuild the war-torn country. The Afghan Government's expenditure on its security forces has also been made possible by foreign aid. Afghanistan will need continued support for at least ten years following the withdrawal of international troops in 2014 to prevent it from falling back into chaos.

⁴ In July 2011, an initial census was carried out for the first time since an incomplete census in 1979. The population figure was revised to 29.8 million people. The previous estimate of 33.6 million had been extrapolated from the 1979 census. 2.7 million Afghans are still estimated to live as refugees in Pakistan and Iran.

⁵ See The World Factbook 2012 Washington, DC: Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> and World Health Organisation, World Health Statistics, 2009

⁶ Afghanistan nationals with serious health issues travel to Pakistan, India and Iran.

This dismal economic situation, coupled with the prevailing conflict, has opened the door to trafficking. Drug trafficking is by far the most prominent form of trafficking, and is intrinsically linked to instability in Afghanistan and the wider region. According to United Nations estimates, Afghanistan is the world's leading opium supplier, responsible for 90% of the global supply. In 2011, opium cultivation rose by 7% compared with 2010 and its production climbed 61%⁷.

Opium has often been identified as one of the key factors in Afghanistan's conflicts and one of the main obstacles to peace-building. Drug production and control over exports has become a determining factor in power politics. Despite initiatives undertaken by the Government and the UN involving the US military and the Indian government, production has not been curbed since 2007. In 2011, 78% of the country's opium cultivation came from five of its 34 regions. Kandahar and Helmand, two of the most insecure provinces with a significant American-British military presence, were among the biggest producers. Opium accounts for 9% of the country's GDP. Furthermore, the Taliban and other insurgent groups have been proven to rely on collecting taxes from opium farmers to finance their operations. Although not its main source of revenue, reports suggest that the opium trade, plays an important role in funding the insurgency: 10% of opium harvest proceeds may reach the Taliban, while another 70% is unaccounted for, likely absorbed by government bribes and corruption. Little revenue goes to local producers.

The combination of all these elements clearly indicates that efforts to build peace in Afghanistan will need to be sustained over the long-term, and must take into account the complexity of the political and socio-economic situation in the country.

⁷ UNODC

II. The Bonn Process and its aftermath not meeting human rights challenges

1. Quick-fixes and short-sightedness in the reconciliation process

The key objectives of the 2001 US-led military intervention in Afghanistan were to remove the Taliban from power and annihilate Al-Qaeda networks in the country. Removing the Taliban meant discarding their repressive mode of governance and establishing a new set of democratic principles and institutions in Afghanistan. The strategy adopted by the Afghan Government and Western states to achieve this was aligned for several years. It was believed that the insurgency could be defeated by military means and that institution-building and democratisation would put an end to the Taliban chapter. However, the Taliban were not wholly excluded from the political scene. Various statements by the US leadership progressively introduced the idea of a “good Taliban and bad Taliban”, leaving the door open to negotiations with those members of the Taliban accepting the authority of the new regime. By the end of 2009, the cost of military engagement in Afghanistan combined with the undeniable fact that the war had not been won, led US President Barack Obama to engage in a new discourse about American strategy in Afghanistan. Obama announced a temporary increase in the number of US troops in Afghanistan (coinciding with the withdrawal of troops from Iraq), to be followed by a progressive conditional transfer of security responsibility to the Government of Afghanistan. The date for a complete withdrawal of all international troops was set for 31 December 2014.

In spite of the strategy adopted by the US and its international partners, the insurgency’s strength steadily increased. Meanwhile, international troops committed a rising number of human rights violations in combating the insurgency and calls began for an all-inclusive, Afghan-led process involving negotiations with Taliban representatives. Following a Peace Jirga (assembly) held in Kabul in June 2010, a High Peace Council, composed of 68 members, was inaugurated on 7 October 2010. The Council, headed by Burhanuddin Rabbani, a former Afghan president, was aimed at facilitating peace talks with the Taliban and other insurgent groups. On 20 September 2011, Rabbani was assassinated by insurgents.⁸ This act of terror highlighted the uncertainties associated with the peace process, though it did not stop negotiations. The future of the peace talks was added to the agenda of the 16-19 November 2011 Jirga in Kabul as a result of Rabbani’s assassination. It became apparent at this time that Karzai’s administration was seeking forms of consent to this new strategy to negotiate peace at any cost with the Taliban. The Jirga, a gathering of so-called prominent Afghans, was attended by approximately 2,000 selected and appointed delegates from across the country. It was initially intended to be consultative but was ultimately used to legitimise a series of executive decisions, thus aiding the Government to bypass Parliament. Some vocal Afghan civil society representatives, including human rights and women’s rights groups, actively cast doubt on the soundness of this process, asserting that it endangered women’s rights and lacked guarantees for ending the impunity of those accused

⁸. Presumably the Taliban, the Haqqani Network or members of Al-Qaeda.

of human rights violations. The Afghan Government's initial engagement in establishing transitional justice processes (and that of its partners) was totally wiped off the agenda.

Negotiations with the Taliban took a decisive step after announcement of the imminent creation of a Taliban liaison office in Doha, Qatar. On 27 December 2011, the United States and Germany expressed support for the initiative and for the drive of President Karzai in seeking these negotiations. Despite various ups and downs, and mixed messages from all parties, negotiation of a peace settlement that includes the Taliban has remained at the core of diplomatic talks.

In this context, the series of peace and security conferences that took place in the end of 2011 have seemed merely cosmetic, and sharply contradict Afghanistan's unfolding reconciliation process. For example, on 2 November 2011, the Istanbul Conference brought Afghanistan together with neighbouring countries to define a roadmap to promote "regional security and cooperation". The final declaration,⁹ which expressed the resolve of signatory states in "combating and eliminating terrorism in all its forms and manifestations and violent extremism, and preventing safe havens for terrorists and terrorism in the region", contradicted Afghanistan's parallel efforts at reconciliation with the Taliban. Even less convincing was the declaration that followed the Bonn Conference on 5 December 2011, reaffirming Afghanistan's commitment to securing an Afghan-led peace and reconciliation process while respecting human rights and the country's democratic institutions.¹⁰ This scepticism was confirmed when, on 6 December 2011, two bomb attacks of an unprecedented sectarian nature killed 58 people in Mazar-e-Sharif and Kabul.

In short, the strategy recently adopted by the Afghan Government to promote peace in the country looks dubious at best. As Afghan expert, Ahmad Shuja, put it:

The Taliban have so far completely sidelined the Afghan Government and have indicated that they only want to talk with the United States. They are participating not as an insurgency, but as the Islamic Emirate of Afghanistan – the country's legitimate government – attempting to negotiate the withdrawal of the occupying foreign forces. And so Afghanistan's High Peace Council is sitting idle as the Taliban initiate talks with the USA. Also excluded are Afghanistan's civil society and political groups. Their exclusion means that effective interest articulation on behalf of women, minorities and the political opposition does not occur at the negotiations.¹¹

Such a strategy contradicts ten years' worth of work to build democratic institutions and rule of law aimed at closing the Taliban chapter and their return to power. The international community has made several strategic mistakes since 2001, jeopardising its own efforts to rebuild Afghanistan, and found a stable democracy. It leaves Afghanistan facing yet another period of uncertainty and instability.

⁹ Adopted on 2 November 2011 by the 'Heart of Asia' countries, which consist of the Islamic Republic of Afghanistan, the People's Republic of China, the Republic of India, the Islamic Republic of Iran, the Republic of Kazakhstan, the Kyrgyz Republic, the Islamic Republic of Pakistan, the Russian Federation, the Kingdom of Saudi Arabia, the Republic of Tajikistan, the Republic of Turkey, Turkmenistan, and the United Arab Emirates.

¹⁰ See the Bonn Conference Conclusions, 5 December 2011, available at: http://www.auswaertiges-amt.de/cae/servlet/contentblob/603684/publicationFile/162760/Conference_Conclusions_-_International_Afghanistan_Conference_Bonn_2011_engl.pdf;jsessionid=2C673C50B0C6D5C573726583564520F2.

¹¹ Ahmad Shuja, "What To Expect from Peace Talks with the Taliban", 5 January 2012, UN Dispatch, available at: <http://www.undispatch.com/what-to-expect-from-peace-talks-with-the-taliban>.

2. The predictable failure of the withdrawal strategy

Afghan forces are expected to take over full responsibility for national security by the end of 2014. Since this decision was taken in March 2011, security transfer has become the key strategic priority for the international community to make its hasty departure from Afghanistan viable and increase the chances of maintaining peace in the country beyond 2014.

At a February 2012 NATO ministerial meeting in Belgium, the US put forward a proposal to cut the size of the Afghan National Security Forces (ANSF – comprised of the Afghan army, air force, and police), which currently has around 300,000 troops. This force is still in the process of growing, with a view to reaching a targeted strength of 352,000 troops by September 2012. The new plan proposed by the US calls for reaching and maintaining troop levels at 352,000 only until the end of 2014, at which point the ANSF would be expected to start drawing down troop levels until they are reduced to 220,000.¹² Simultaneously, NATO is demanding that the ANSF take greater responsibility, proposing that they engage in front line combat with the Taliban.

The US and NATO pay the vast majority of ANSF expenses. The projected cost of maintaining the ANSF at a troop level of 352,000 is about US\$6 billion per year. Reports suggest that the US seeks to reduce this cost by about a third, to \$4.1 billion per year; hence the US and NATO call for reducing ANSF troop numbers from 352,000 to 220,000. How Afghanistan will deal with security beyond 2014 and its vulnerability at that stage is unclear. In the words of the Afghan Minister for Defence, General Abdul Rahim Wardak: “Going lower [in Afghan troop numbers] has to be based on realities on the ground. Otherwise it will be a disaster; it will be a catastrophe, putting at risk all that we have accomplished together with so much sacrifice in blood and treasure.”¹³ Indeed, another important concern is the effect that the demobilization of 132,000 Afghan soldiers will have on stability in the country.

The question today is whether it is even feasible to build an autonomous and effective Afghan army and police force in such a short time span. Indeed, the country has never had a long standing, stable security force, and many factors clearly demonstrate a high risk that the present force may be unable and/or unwilling to stop the insurgency, or refrain from engaging in human rights violations.¹⁴

Even though the training and mentoring of Afghan security forces has recently improved - including the duration of training sessions - major challenges concerning capacity and accountability remain to be addressed. The police force in particular is still perceived by a significant proportion of the population as being abusive, corrupt and incompetent (the newest young recruits are mostly illiterate or semi-literate). Recent reports implicate members of the police in serious human rights violations including torture, violence, sexual exploitation,

¹² For further see: CJ Radin, “Cutting the Afghan Security Forces: economics trumps military necessity”, 28 February 2012, Threat Matrix, available at: http://www.longwarjournal.org/threat-matrix/archives/2012/02/cutting_the_afghan_security_fo.php.

¹³ “Afghan General sounds alarm on US plan to cut security forces”, 18 February 2012, Wall Street Journal, available at: <http://www.foxnews.com/world/2012/02/18/afghan-general-sounds-alarm-on-us-plan-to-cut-local-security-forces/>.

¹⁴ Afghanistan’s GDP is roughly US\$15 billion per year. The government’s total income is \$3 billion per year. Only a portion of this income would be available for the ANSF. Realistically, the Afghan government’s contribution to funding the force could not exceed \$500 million per year, which would itself sustain only around 30,000 troops. The ANSF is currently funded almost entirely by US aid and small contributions from some other NATO nations, as well as a dedicated Law and Order trust fund provided by Japan. See CJ Radin, “Funding the Afghan security forces”, 16 September 2011, Threat Matrix, available at: http://www.longwarjournal.org/threatmatrix/archives/2011/09/funding_the_afghan_national_se.php#ixzz1tKnTs1by.

unauthorised raids, extrajudicial killings, enforced disappearances and mistreatment of prisoners. The Afghan Local Police remain controversial in light of issues surrounding vetting, command and control, and the risk of ethnically or politically biased militias is re-emerging”¹⁵.

The army is ill-equipped to act, and its operations in areas where it operates ‘independently’ have led to large numbers of civilian casualties. It also lacks the capacity to adequately investigate human rights violations, and victims are not appropriately redressed.

Taking into account the worrying levels of violence against women in Afghanistan - 90% of whom are estimated to have suffered psychological abuse and/or physical and sexual violence - the Afghan Government has not recruited a sufficient number of women into its security forces. Currently around 1,200 women serve, constituting less than 0.5% of total personnel. Moreover specific long-term programmes to educate the police on women’s rights are needed for a mind change.

The Afghan Peace and Reintegration Programme, launched by the Afghan Government in July 2010 and due to be completed in 2014, is the second component of the withdrawal strategy. It aims to weaken the insurgency and its leadership through the negotiation process. Whilst by late August 2011 the programme had already re-integrated 3,000 rank-and-file insurgents in their communities, having renounced violence, broken their ties with terrorists, and agreed to peacefully abide by the Afghan Constitution, it has so far failed to resolve their grievances or provide them with adequate livelihoods. Added to a lack of effective vetting mechanisms, this may lead to the increasing presence of former local militia members with links to so-called war lords and a history of perpetrating serious human rights violations, in the national security forces.

Since 2001, the international community’s half-hearted and inconsistent efforts at legal and judicial reform have led to the present disorganised, inefficient, corrupt, and at times counterproductive justice system. As a result, impunity has prevailed and alternative shadow justice mechanisms have grown (see section III).

3. Taliban Actions and Propaganda undermine Human Rights

The Taliban’s ideology remains as harmful as it was under its rule, and the Taliban has since evidenced its will and capacity to commit the same pattern of human rights violations that characterised that era, particularly in relation to women.

The subtle war of words which has accompanied the battle against the insurgency since 2001 has led the Government of Afghanistan and its international partners to differentiate so-called “moderate” Taliban from “hardliners”. The former have progressively come to be considered legitimate interlocutors in negotiations.¹⁶ This turn-around was made possible both by international willingness and an active Taliban propaganda machine geared towards improving the group’s image at the international level.¹⁷ The process leading to the Bonn Conference

¹⁵. Just don’t call it a militia : Impunity, Militias, and the ‘Afghan Local Police’, Human Rights Watch, September 2011

¹⁶. “Pakistan-Afghan-U.S. to work for Taliban names removal from UN list”, 27 April 2012, English Xinhua News, available at: http://news.xinhuanet.com/english/world/2012-04/27/c_131556890.htm

¹⁷. For a thorough description of the Taliban’s propaganda and access to their publications, see Taliban Propaganda Watch, available at: <http://milnewscs.wordpress.com/tag/voice-of-jihad/>, also their clearly anti-Afghan government website : <http://shahamat-farsi.com>

has highlighted the extent to which the Taliban have had the capacity to access national and international platforms, and have their voice heard as “the one voice of Afghanistan” throughout the peace and reconciliation process.

The Taliban first and foremost play on the dominant rhetoric surrounding “Afghanistan’s century-old resistance to external interference”, its supposed immutability and its visceral attachment to indigenous traditional tribal norms and power structures. Such cultural relativism denies the complexity of Afghan society, which is characterised by its ethnic and socio-political diversity, and pluralism. It seeks to impose the Taliban’s political and ideological agenda, whilst weakening the position of other progressive societal projects, and justifying certain ‘cultural’ practices that are in clear violation of the Constitution of Afghanistan and its international human rights obligations. In particular, the Taliban argue that public schools are not adapted to girls because of Afghan cultural customs: as a result, they recommend that all schools be located inside mosques and respect gender segregation. In April 2012 the Taliban closed or partially closed around 50 schools in south-eastern Afghanistan. The message quickly spread that the Taliban had warned educators and families to keep children at home. Afghan officials report that of 36,000 students who usually attend schools in southern Ghazni, about half have yielded to the Taliban’s threat. Over the past few years, the Taliban have closed or suspended dozens of schools in various parts of the country – particularly those attended by girls. The mass closure of Ghazni’s schools is one of the clearest signs to date of the insurgency’s ability not only to combat NATO and Afghan troops, but also to limit basic social rights that Western donors have spent a decade trying to bolster.¹⁸

As part of their propaganda, the Taliban have also played up their accusations against international troops. These troops are portrayed as the ‘enemy of the Afghan population’, the main cause of instability and the sole perpetrator of crimes against civilians in Afghanistan. This represents an attempt to accelerate the withdrawal of international troops from the country, whilst simultaneously presenting the Taliban as the protectors of the Afghan people. All crimes presumably committed by the Taliban are alleged to have been inflicted from the outside, and suicide attacks are portrayed as the product of Afghan hatred towards international troops.

The Taliban also attempt to monopolise the media and censor alternative sources of information. They consider independent journalists reporting on Afghan civilian casualties to negatively impact on the image the Afghan population has of them. By muzzling the media, the Taliban have attempted to lay favourable groundwork for their return to power. They possess highly efficient communications apparatus, enabling them to communicate quickly and broadly, nationally and internationally, using a full range of the latest technologies. These technologies can be adapted to the appropriate audience, whether overwhelmingly illiterate (requiring utilisation of radio, TV shows, online audio poetry, DVDs, audio cassettes, MP3s) or international (websites translated into five languages, magazines, newspapers and informational publications).

Most notably, the Taliban have clearly opposed Afghanistan’s democratic institutions. They have warned against voting, intimidated and punished populations during elections. It is not clear to what extent, during their recent talks with the various Government and international interlocutors, they have expressed readiness to accept all or “aspects” of the Afghan Constitution,

¹⁸ Kevin Sieff, “Taliban closes dozens of schools”, 26 April 2012, The Washington Post, available at: http://www.washingtonpost.com/world/taliban-closes-dozens-of-afghan-schools/2012/04/26/gIQA7IzUjT_story.html.

current laws and international obligations, particularly with regard to provisions on human rights, women's rights and freedom of the press. The Taliban have been vocal when it comes to denouncing government corruption and challenging the legitimacy of the Government and democratic institutions.

At the same time, Afghan Government leadership has been attempting to gain renewed legitimacy in the eyes of the Taliban by increasing and promoting parallel and politically cohesive ad hoc, unelected institutions (side-lining the Parliament composed of voices opposing the current policy), such as the High Peace Council and the Loya Jirgas.

The Afghanistan Independent Human Rights Commission (AIHRC), often condemned by the Taliban, has been in the last couple of years gradually marginalised and put under pressure (see below). Its recommendations and its role in the peace process have been reduced to a symbolic position. Contrary to the initial periods, the AIHRC has also been given a reduced margin of expression during the international donor conferences held in London, Kabul and Bonn. An important mapping report of the conflict produced by AIHRC originally planned for publication prior to the most recent election has yet to be issued.

Similarly, the leadership has condoned directives issued by the Ulema Council (a conservative religious advisory body), including a March 2012¹⁹ declaration on an array of subjects under five bullet points, the fifth and longest one relating to women and their rights and obligations, a reminder of the segregation they underwent during the reign of the Taliban. This declaration states in its provision F.1.d. that "men are fundamental and women are secondary"; it requires women to avoid mingling with unrelated men in various social settings, including in education, shopping, the office and other affairs of life (provision F.1.c.); it further orders women to "avoid traveling without a [Shariah-sanctioned] *mahram* (male companion)" (provision F.1.f.). President Karzai publicly declared his support of the Ulema Council directives.

In February, 2012, Minister of Culture Sayed Makhdoom Rahin requested that «all female news presenters must avoid heavy make-up and wear a headscarf,» adding this applied to state and private TV stations. The ministry's plea came as a surprise. All female anchors appear with their heads covered, sparking suggestions the directive was designed to impress the Taliban by pandering to their views. Media reaction was almost immediate as they have expressed concerns and fears, that this pressure is the beginning of media limitation and this is because of the Taliban. According to Nei a media watchdog, numerous examples of pressure on the press over the last year have included throwing acid on a veteran Afghan journalist and preventing a Turkish soap opera from being aired²⁰.

Moreover, recent allusions by authorities about whether to hold or not the next presidential election (and the announcement of a new transition government in alliance with the Taliban and Hekmatyar's Islamic party), about a possible date modification of the election and even a possible change of the constitution allowing for a third mandate for President Karzai, have fueled suspicion among the population that the democratic process will be encroached upon.

¹⁹ The full Dari version of the Ulema Shura Declaration is available on the President's site at: <http://president.gov.af/fa/news/7489>. An English translation is available at: <http://afghanistananalysis.wordpress.com/2012/03/04/english-translation-of-ulema-councils-declaration-about-women/>.

²⁰ <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9083480/Afghan-female-TV-presenters-asked-to-wear-headscarves-and-remove-make-up.html>

The future outcome of such trends could be far-reaching. Firstly, it could deprive Afghan citizens of their constitutionally guaranteed right to vote and be ruled by democratically elected representatives. Moreover, contesting the legitimacy of constitutionally-based institutions might readily lead to the dismantling of the human rights they are supposed to protect.

In sum, it seems that by manipulating nationalist feelings and appealing to ideological and regional solidarity, the Taliban have succeeded in securing support, notably in the conflict zones where civilians have suffered from the presence of international troops. They have also directly and indirectly enjoyed support among some high level government actors. Nevertheless, they have failed to garner support beyond their core supporters of the past, and are looked upon with hostility and fear by other populations and regions of the country. The weakness of Afghanistan's democratic institutions and the absence of rule of law in the country, enable the Taliban to present themselves as an alternative political/military force. The following section will demonstrate the shortcomings of the Afghan Government and the international community in laying the foundations for a strong and operational justice system based on the rule of law, and protecting the human rights of all Afghan people.

III. The Justice System & the Rule of Law under Attack

Near-sightedness and contradictory action is particularly manifest in the problems affecting the Afghan justice system, which is already burdened with several decades of war and legal factionalism. The recent decision by the international community to support and allegedly “reform” the informal justice system is at odds with its previous commitment to establish the rule of law in Afghanistan, and highlights the consequences of decision-making founded upon expediency.

In terms of legal reform, the primacy given to human rights in drafting the 2004 constitution and the ratification of several international human rights conventions are positive measures; however they fall short of what is necessary for the effective protection of the rights of the Afghan people in practice and are plagued by numerous institutional and legal challenges.

1. The primacy of human rights

The Afghan legal system is characterised by a multiplicity of legal sources and venues, which ultimately gives rise to the existence of contradictory sets of judicial norms. However, there is no ambiguity in either the Afghan Constitution or in international law as to the fact that human rights obligations prevail over any law to the contrary. The Afghan Constitution, adopted in 2004, explicitly affirms the State’s commitment to human rights. The majority of the rights in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have been incorporated therein. Some of these rights and freedoms are unequivocal and absolute. An important example is found in the principles of non-discrimination and equality for Afghan citizens. Indeed, Article 22 of the Constitution states: “[T]he citizens of Afghanistan – whether man or woman – have equal rights and duties before the law”. This is a rare stipulation among constitutions in Islamic countries. As scholar Mahmoudi notes, the mere fact “that the leader of the country, the President, can, according to Article 60, be a man or a woman is itself unusual” in the Islamic context.

Importantly, Article 6 makes “social justice, protection of human dignity, protection of human rights, [and] realization of democracy” essential State obligations.²¹ Freedom of religion is protected by Article 2. Although it states that Islam is the religion of Afghanistan, the Constitution makes clear that followers of other religions are free to exercise their faith and perform their religious observances. Article 6 provides for equality between all ethnic groups. Freedom of publication in all languages is established under Article 16, and similarly, freedom

²¹. “The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country”, Constitution of Afghanistan of 2004, Article 6.

of expression and association are provided for in Articles 34 and 35 respectively. Article 4 emphasises the democratic (as opposed to theocratic) character of the State, placing sovereignty in the people of Afghanistan rather than Allah, as found in other Islamic states, such as in Iran or Sudan.

The Constitution also includes concrete human rights provisions specific to criminal law and procedure. Collective punishment is prohibited by Article 26.²² This is an important provision considering that tribal customs often allow for collective punishment. Articles 26 to 40 guarantee due process of law, and include the crucial provision that “no person can be punished but in accordance with the decision of an authorised court and in conformity with the law adopted before the date of offence”.²³ Islamic corporal punishment allowed under Sharia law (e.g. stoning, mutilation) are banned by Article 29, which states, “[P]unishment contrary to human integrity is prohibited”. Additionally, free legal aid for the destitute is provided for in Article 31. Contrary to the traditional practices of tribal justice systems, Article 40 states that “nobody’s property shall be confiscated without the provisions of law and the order of an authorised court”.

This strong human rights body of law and subordination of tribal and religious law to statutory law is emphasised in Article 7: “[T]he State shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights”. Once again, this provision is said to be unique in constitutions of Islamic countries.²⁴ To ensure an effective supervision of human rights obligations, Article 58 of the Constitution establishes an Independent Human Rights Commission of Afghanistan, which functions like an ombudsman. This too is said to be unprecedented in the Islamic countries’ constitutions.²⁵

Overall, the 2004 Constitution is considered to be a progressive document in the Islamic context. There is a general consensus that its drafters genuinely intended to ensure respect for human rights, and “sought to create the most modern constitution in the Islamic world.”²⁶ Most observers agreed upon its adoption that it contained unprecedented built-in human rights guarantees. Whether these guarantees were to be respected was of course another matter, and would depend on enactments of the National Assembly and the practice of the Supreme Court. Unfortunately, the latter was swayed more by political cronyism and expediency than by legal competence or genuine will to address issues presented to it.

At its Universal Periodic Review in July 2009²⁷, the Government of Afghanistan accepted eight recommendations on ensuring that legislation, including local laws, is consistent with the Constitution and its obligations under international human rights law. It has also accepted recommendations on promoting and protecting women’s rights, including combating discrimination and violence against women. However, momentous challenges to a thorough implementation of these international human rights obligations and their constitutional counterparts, remain.

²². “The prosecution, arrest, and detention of an accused and the execution of penalty cannot affect another person”, Constitution of Afghanistan of 2004, Article 26.

²³. Constitution of Afghanistan of 2004, Article 27.

²⁴. Said Mahmoudi, “The Sharia in the New Afghan Constitution: Contradiction or Compliment?” Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2004, p. 873.

²⁵. *Idem*.

²⁶. *ibid*, p.879.

²⁷. Report of the Working Group on the Universal Periodic Review of Afghanistan, A/HRC/12/9.

2. Progress achieved in the field of human rights

a) Institutional changes supporting women's rights

Indicators on the ground continue to show significant discrimination against women and their acute vulnerability. Widespread insecurity and lack of resources has largely marred the success of the many programmes aiming at empowering Afghan women since 2001. Nevertheless, the post-Taliban period can be hailed as a breakthrough for Afghan women's rights.

Firstly, the concept of gender equality was re-introduced as early as December 2001 when women's participation in the interim government was guaranteed at the first Bonn conference. The immediate establishment of a Ministry of Women's Affairs (MOWA) was the most visible sign of change²⁸. As early as 2003, Afghanistan acceded to the Convention on the Elimination of Discrimination against Women (CEDAW), which was followed by a series of positive strides in terms of national laws and policies. In 2005, further advancement came as Afghan women achieved unprecedented levels of political representation through parliamentary elections, even more than intended under the existing quota.

Since then, a National Action Plan for Women in Afghanistan has been partly, though imperfectly, implemented. In particular, women's participation in all Afghanistan's governance institutions, including elected and appointed bodies and civil service, has been strengthened. Seventeen percent of civil servants across the country are women who actively contribute to national reconstruction and economic development. There are, however, currently only 50 female judges in Afghanistan, most of them are in Kabul, and not even 1% of the total police force - around 1,200 out of 136,000 police officers - are women. The government plans to recruit 5,000 more women police officers by 2014.

Following her visit to Afghanistan in July 2005, the UN Special Rapporteur on violence against women concluded that violence against women was "all-pervasive" and "tolerated", with perpetrators enjoying impunity because the law enforcement and justice systems are generally dysfunctional and moreover biased against women."²⁹ The Special Rapporteur made a number of recommendations to the international community and the Afghan government, including the reform of family and criminal law and the prioritization of women's human rights and the elimination of discrimination against women in public policy.

b) Access to education

According to Afghanistan's 2004 Constitution, education is a right for all citizens (both men and women) and, up to a certain level, it is free of charge. Article 26 states that:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

²⁸ Even if it was not bestowed with executive powers but only policy formulation.

²⁹ E/CN.4/2006/61/Add.5.

- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

During the Universal Periodic Review in 2009, Afghanistan accepted ten recommendations related to the promotion of access to education, especially for women and girls.

After the collapse of the education sector under the Taliban regime, the following achievements have been made since 2001³⁰:

- Between 2001 and 2010, primary school enrolment rose sevenfold from around one million to nearly seven million and the proportion of girls from virtually zero to 38%.³¹
- The number of teachers in general education has also risen sevenfold, but their qualifications are low and only 31% are women.³²
- Since 2003, over 5,000 school buildings have been rehabilitated or newly constructed, though only just over 50% of schools have buildings that are usable.

While many schools lack proper facilities, the number of qualified teachers is low. A major obstacle yet to be overcome is a cultural bias retained especially in conservative areas, towards the necessity of educating girls and women. However, significant progress has been made.

Although Afghanistan's adult literacy rate still ranks among the lowest in the world (an estimated 11 million Afghans remain illiterate),³³ there have been some encouraging improvements. School enrolment rates at primary, secondary and tertiary levels are presently 41.8% for females and 73.7% for males. Female literacy and access to education, in particular, have been rising. However, a new tendency towards school drop-out, mainly linked to coercion and insecurity in areas where the Taliban are present and poverty has been a source of worry.

Religious education plays a prominent role in the country and its influence on the formal education sector cannot be denied. It is very difficult however to give a credible estimate of the actual size of the *madrasah* (Islamic schools) sector. There is also a clear divide between public and private madrasah, and significant variation among the different schools in terms of size, funding sources, sectarian and ideological affiliations, and transnational connections.

Finally, the post-2001 period was marked by a rapid expansion of higher education institutions. The number of students across the country increased from 22,717 in 2002 to 56,451 in 2008,

³⁰ http://www.iiep.unesco.org/no-cache/news/single_

³¹ In 2001, there were 3,400 schools in Afghanistan, where around 1 million students studied and 20,000 teachers worked. The number of female students was practically nil. There are now about 14,000 schools in the entire country, where more than 8,100,000 students study, of which around 5,117,000 are boys and around 3,272,000 are girls.

³² The number of teachers is 190,000, of which 117,800 are men and 72,002 women. In 2001, very few teachers were professional; today 36% of the total are professionals. The same remarkable difference is noticeable in teacher training and adult education centres.

³³ See Afghanistan's Ministry of Education (MoE) website (<http://www.moe.gov.af>). According to the head of the MoE department dealing with illiteracy, the Ministry receives 13% of the total annual State budget but only 1% is allocated to combating illiteracy.

the last year for which figures are available. Around 131,000 people registered to take part in university entrance examinations in 2010, of whom 120,000 sat the examinations and 70,000 were admitted to higher education institutes. In 2002, only 15,000 students had taken part in the entrance exams. Some universities have been renovated or rebuilt, such as Kandahar University in the south, Nangarhar University in the east, Herat University in the west, and Balkh University in the north. Private universities or higher education institutes, run by a younger generation of well-educated professors have been flourishing in the country's major cities, proposing also M.A. programs (rare in state universities) and a more up to date curriculum notably in social sciences.

c) The political and cultural diversity of Afghanistan

Durable peace and sustainable justice in Afghanistan require the vigorous support of its democratic institutions, especially its elected bodies and the separation of powers. Though previous elections³⁴ were held in extremely challenging conditions with substantial portions of the territory beset by insurgency and high rates of illiteracy, the people of Afghanistan have shown their intent to vote and their thirst for participation in the country's decision-making processes. Participation rates were highly dependent on levels of Taliban presence and intimidation in specific regions. Until 2009, participation rates were very encouraging, with close to 70% of the population voting in the presidential election of 2004 (based on approximate population figures produced by authorities), and over 50% voting in the parliamentary and provincial elections in 2005. However, subsequent turnout fell to 30-35%, during the 2009 presidential elections and the 2010 Parliament elections. In many areas penetrated by insurgents turnout was far less at under 10%. Prior to the 2010 elections, the Ministry of the Interior announced that only 11 districts out of 360 were free of security problems.

A variety of programmes have made it possible to build the capacity of political stakeholders to articulate, organise, and compete in elections. They have also increased public awareness and oversight of the electoral process through activities such as the training of party activists, education of citizens through radio and TV shows, and building the capacity of Afghan organisations to monitor electoral and political processes and train electoral observers.

At a political level, Afghanistan has recently witnessed the creation and/or re-emergence of many different political parties. In 2003, a Political Parties Law was approved, and several new groups filed for registration. Former military groups with clearly identified leaders and who maintained strong local authority in the regions they formerly controlled rallied the support of ethnic groups on the basis of claims that they had fought to protect them during the wars of the previous decades. Several 'new' parties also registered, most of which had already formed in secret under the Taliban regime, or had previously existed as civil movements. In the lead up to the 2005 parliamentary and provincial council elections, 86 political parties were formally registered, including 28 leftist parties. Afghanistan's electoral system, which is a Single Non-Transferable Vote (SNTV) system, favours independent candidates backed by their political parties. A new party law introduced in late 2009 seems to have motivated the increased consolidation of parties. Several parties were able to mobilise candidates for the 2010 parliamentary polls and currently 21 parties have representatives in the new Wolesi Jirga, even

³⁴. Presidential elections took place in 2004, parliamentary and provincial elections in 2005, presidential and provincial elections in 2009, and parliamentary (Wolesi Jirga) elections in 2010.

if the SNTV does not allow the building of party-based coalitions or groups inside parliament. A noticeable breakthrough since 2001 has been the participation of women in election processes. During the first presidential elections in October 2004, there were 18 candidates including one woman. Out of 10,567,000 registered voters, 41.3% were women. Besides, the two election monitoring organisations, the Free and Fair Election Foundation of Afghanistan and AIHRC, deployed 50% and 30%, respectively, female observers. In the first parliamentary election in September 2005, six million of the approximately 12,600,000 electorate went to the polls. 44% of the voters were women. There were 6,103 candidates, a number of whom were disqualified, leaving a total of 5,800, including 582 women. The second presidential election and the provincial council elections were held in August 2009. In the presidential election, there were 41 candidates, including two women. In the provincial council elections, there were 3,180 candidates including 333 women. The Elections Commission reported that the participation rate in the presidential elections was around 38.8% and that 59.3% of the voters were men and 38.2% were women. The second general election was held in September 2010. As a result of deteriorated security conditions that included threats of armed opposition, riggings and irregularities in many parts of the country, female participation was low, particularly in the war-afflicted areas. However, the number of female candidates rose from 335 (2005) to 413, with increases in 18 provinces and decreases in three other provinces.

Afghanistan's diversity is also cultural and artistic. A young generation of independent artists, writers, poets, musicians and film makers has been extremely active in the last few years. Numerous clubs, groups and companies have been set up around the country and have been very vibrant. Several Afghan artists have been acclaimed through various international prizes such as the Golden Globes Award in 2004 Best Foreign Language Film for *Osama* by Siddiq Barmak and an April 2012 Pulitzer Prize for Massoud Hosseini, a young photographer. In addition to the many above-mentioned dynamics, it is important to stress that in late 2001, a Ministry of Information and Culture was established and given the mandate to manage not only arts, heritage, archives, libraries and media, but also youth affairs and sports, in sharp contrast with the policies adopted by the Taliban, who banned most of the above activities.

The stated vision of the Ministry was "to create an environment where: media [...] are independent, pluralistic and accessible to Afghan men and women throughout the country; the cultural heritage of Afghanistan is preserved, protected and handed on to young generations of Afghans as a record of the rich human experience and aspirations in their country, so as to foster cultural creativity in all its diversity; and sport serves as a unifying element in society and is accessible to all - in particular children, women and the disabled."

Since its establishment the Ministry of Information and Culture has been implementing cultural development projects in provinces across Afghanistan in partnership with UNESCO. It has also rolled out a broader programme for the implementation of conventions to safeguard and promote cultural heritage,³⁵ and the development of cultural policy, institutional partnerships, and international cooperation to strengthen the sector. Reintroducing arts and music, as well as diffusing knowledge of history and customs and safeguarding heritage are essential to successful reconstruction. They can foster the development of common identities in diversity and lay the foundations for inter-cultural dialogue and tolerance.

³⁵ Activities include conservation and development initiatives at Afghanistan's World Heritage sites in Jam and Bamiyan; at the Gawhar Shad Mausoleum in Herat; the Mausoleum of Abdul Razzaq in Ghazni; the rehabilitation of the National Museum and regional museums; and the training of cultural heritage specialists in various disciplines, amongst other projects and activities.

d) A thriving NGO and media community

Since 1979, NGOs have played a prominent humanitarian role in Afghanistan. In the post-Taliban era, there has been a proliferation of NGOs as the Taliban's restrictions were brought to an end, and massive development aid flowed into the country. By January 2012, the Afghan national bureau for NGOs registered a total of 1,473 local NGOs and 294 foreign NGOs. Although the majority of these organisations are Afghan, the largest programmes are implemented by international NGOs. There are several NGO coordinating bodies including the Afghan NGOs Coordination Bureau (ANCB), the Agency Coordinating Body for Afghan Relief (ACBAR), the Islamic Coordination Council and the South West Afghanistan and Baluchistan Association for Coordination (SWABAC). Of these, only ACBAR officially works in collaboration with UNAMA; the others have established links with Afghan authorities.

Hundreds of civil society, culture and human rights and media organisations have also grown rapidly. There are now several umbrella and coordinating bodies boasting hundreds of member organisations. The most prominent are the Civil Society Forum, Civil Society and Human rights Network, Foundation for Civil Society and Culture.

Besides, Afghanistan's legal system has undergone several dramatic changes since 2002, with profound consequences for civil society and not-for-profit organisations. In November 2002, the Transitional Government of Afghanistan adopted the Law on Social Organisations, enacted in light of Afghanistan's 1964 Constitution. In the new January 2004 Constitution, Article 35 grants Afghan citizens the "right to form social gatherings for the purpose of securing material or spiritual aims in accordance with the provisions of the law." The Constitution also recognises the freedoms of expression and assembly (or "demonstration").³⁶ In June 2005, President Karzai approved the Law on NGOs, which became effective immediately upon signature. This law created a new legal framework for NGOs in Afghanistan and replaced the Regulation for the Activities of Domestic and Foreign NGOs in Afghanistan (NGO Regulation), enacted in 2000 by the Taliban regime.

More than 200 print media (including newspapers, magazines, journals and other publications), 44 TV stations, 141 radio stations and 8 news agencies have also been established in Afghanistan since 2001³⁷. The proliferation of Internet-based media, including social networks and blogs, reflects the will of the population both to access more diverse sources of information and to express themselves freely, while the adoption in 2006 of a new media law was a positive development towards promoting press pluralism in Afghanistan, although Afghan legislation still prohibits material deemed to run counter to Islamic law.

However, the flow of international capital has been highly criticised for its fractured distribution throughout Afghanistan, being split into main tributaries (the military, governmental organisations and major relief organisations), minor tributaries and rivulets, including sub-sets dubbed BINGOs (business-related NGOs) and MANGOs (suspected mafia-related NGOs)³⁸. Media outlets have similarly been operating under a wide range of ownership. These recent developments have therefore represented positive factors of democratic change. They will also require renewed support for the above-mentioned challenges to be addressed.

³⁶. Constitution of Afghanistan 2004, Articles 34 and 36.

³⁷. Reporters Without Borders

³⁸. Walter Mayr, "Criticism grows of Afghanistan's bloated NGO industry", 22 September 2010, *Der Spiegel Online*, available at: <http://www.spiegel.de/international/world/0,1518,718656,00.html>.

3. Challenges and threats to the justice system

Several problems affect the administration of justice in Afghanistan. Complexities enclose sources of applicable law, including incoherence between legal norms and uncertainty over who possesses the right of constitutional interpretation. To these complexities are added issues surrounding the very existence of the rule of law, as well as concerns about the administration of justice. Indeed, executive interference in the justice system and that system's lack of means and resources are cause for concern. The informal justice system is arbitrary and skewed, and is predominantly in the hands of insurgents. Nevertheless, it has filled in a gap in the absence of formal justice in the country. The existence of multiple forms of legislation and legal system means citizens often go 'forum shopping', seeking the system that best suits their needs, the case in question, and/or their personal relationship to those adjudicating the case. Worse, the array of laws shielding top level and regionally-based criminals from scrutiny means that systematic impunity prevails in Afghanistan.

a) The incoherence of legal norms and ambiguous role of Sharia in the legal structure

The existence of competing models of legitimacy is one of the main challenges to establishing the rule of law in Afghanistan.³⁹ The conflict of norms afflicting Afghan law is not new. However, it has been compounded by a lack of clarification from constitutional, judicial and political entities following the 2001 Bonn Conference, and by the international community's recent U-turn in support of the informal justice system, the norms of which are not constitutionally compliant. 'Legal pluralism' in Afghanistan is closer to legal factionalism or separatism than to a harmonious coexistence of compatible norms. International Crisis Group (ICG) highlights that:

“[t]he fundamental dissonance between the three legal foundations – secular statutory law, Islamic Sharia law and customary tribal law – lies at the heart of this dysfunctional judicial system. Deep tensions between concepts of adjudication and reconciliation, retribution and restitution are embedded within these competing systems of jurisprudence, complicating the national discussion on the politics of justice.”⁴⁰

There are several sources of law in Afghanistan. They include the Constitution and statutory law in general, Sharia law (Sunni and Shia schools) and the tribal customs of the informal justice system. To this should be added enclaves of extraordinary justice, such as US-run detention centres. Many of the legal processes stemming from these different sources of law are not mutually compatible. This creates a situation of legal ambiguity, compounded by the lack of a forum for authoritative clarification. Although the Supreme Court may be partially charged with this function under the 2004 Constitution, the relevant provision is both vague and overly restrictive. To further complicate matters, other adjudicative bodies have also claimed this power (see below). Although some work to streamline and harmonise the multiplicity of laws has been done under the aegis of the Ministry of Justice, the pace of work has been slow and halting. One of the most enduring fiascos of the post-2001 arrangement has been the failure to establish a clear, apolitical protocol on the hierarchy of various applicable legal norms.

³⁹. William Maley, "The rule of law and the weight of politics", in *The Rule of Law in Afghanistan - Missing in Inaction*, edited by Whit Mason, Cambridge University Press, 2011, p.69

⁴⁰. International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, Asia Report N°195 – 17 November 2010, p.2

The human rights credentials of the Afghan Constitution, most notably its strong Article 7 on the supremacy of international human rights obligations, appears to be undermined by the ‘repugnance clause’ of that document, which states that “in Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam”.⁴¹ This raises the issue of which body of law should have legal precedence, namely whether Sharia law is permitted to whither the supremacy of international human rights obligations. Indeed, Said Mahmoudi states: “[T]he assumed precedence of the Sharia over any other applicable legal norm can curtail or impede the application of the rights declared in the Universal Declaration and render references in the Constitution to the Declaration meaningless or ineffective”.⁴²

The repugnance clause is a subtle, but significantly strengthened version of a similar provision in the 1964 Constitution. This earlier provision merely stated that no law could contradict the ‘principles’ of Islam,⁴³ but the non-repugnance principle is reinforced in other articles in the present constitution, notably Article 149: “the provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended”. Additionally, Article 130 provides “when there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner”. This stipulation is explicitly qualified only by an Article 131 exception for the Shia, who are to be judged in personal matters according to the Shia school of law.⁴⁴

Islamic law within the Afghan legal structure is also used (or abused) within the pseudo-legal structures set up by the Taliban, who often erect their own justice systems in the areas they control, and impose their own hard-line interpretations of the Sharia law.

b) The dismal record of the Supreme Court

The inherent conflict between the Constitution’s repugnance clause and its human rights guarantees, as well as a need to interpret the role of Islam in the implementation of law, has significantly increased pressure on the Supreme Court. The Supreme Court’s role is to clarify and disambiguate the legal tensions emanating from the potential contradiction between Articles 3 and 7 of the Constitution. Article 121 states: “The Supreme Court, at the request of the Government or the Courts, can review compliance with the Constitution of laws, legislative decrees, international treaties and international conventions, and interpret them in accordance with the law”.

However, under Karzai’s government the Supreme Court has repeatedly shown its subservience to political orders, a near complete neglect of human rights, and, most worrying, legal incompetence. The Court has also been dominated by Islamist hardliners since its inception in 2004, particularly under the leadership of Chief Justice Fazl Hadi Shinwari, the former head of a Peshawar madrasah. Shinwari has no formal legal training and was a close associate of the Abdul Rasul Sayyaf, a former Mujahedeen and now a Member of Parliament. Shinwari was appointed to head the Supreme Court in December 2001 (reconfirmed in June 2002) until 2006. In 2006, Alexander Thier noted that the practices of the then transitional Supreme Court

⁴¹. Constitution of Afghanistan of 2004, Article 3.

⁴². Mahmoudi, “The Sharia in the New Afghan Constitution: Contradiction or Compliment?” 2004, p. 874.

⁴³. See Andrew Finkelman, “The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan’s Constitutional Development Process, 2002-2004”, *The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization*, Spring 2005.

⁴⁴. “Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect”, Constitution of Afghanistan of 2004, Art. 131.

suggested that “a small, unelected group of fundamentalists [would] use the Court to short-circuit the political process through the use of an Islamic trump card.”⁴⁵

Indeed, Shinwari’s tenure did not bode well for Afghanistan’s fulfilment of its human rights obligations.⁴⁶ Thier notes that while “the reach of the Supreme Court is extremely circumscribed... it still manages to abuse even this limited authority”.⁴⁷ In fact, only ten days after the ratification of the new Constitution, the Supreme Court announced that a video of a female singer shown on Kabul TV was un-Islamic and therefore illegal. The double irony was not missed by observers: not only was the content of the pronouncement contrary to the provisions of the Constitution, but the unilateral pronouncement itself, in the absence of any case before the Court and any law on which to found the pronouncement, was blatantly unconstitutional. This irony was compounded by the fact that the Court’s decree was not enforced, exemplifying its ineffectiveness. Shinwari also “publicly upbraided” Dr Sima Samar, a former Women’s Affairs Minister and currently chairperson of Afghanistan Independent Human Rights Commission, when she criticised fundamentalist perspectives.⁴⁸ He also ordered the arrests of a newspaper editor and deputy editor after their paper contained criticisms of Karzai’s leadership.⁴⁹ Moreover, one of Shinwari’s appointees, Ansarullah Mawlavizada, rejected calls for the release of an Afghan convert to Christianity, Abdul Rahman, who had been condemned to death for apostasy by a lower court in March 2006.⁵⁰ As of 2004, among those members of the Supreme Court whose educational qualifications were publicly known, there was not a single individual with a secular law degree.⁵¹ Under Shinwari’s tenure, the Supreme Court sought to extend its influence throughout the judicial system by making appointments beyond its authority. It has appointed 137 judges, 128 more than it was sanctioned to appoint.

Abdul Salam Azimi, Shinwari’s successor, was appointed in 2006. While initially hailed as a moderate, Azimi has nevertheless backed the Islamist agenda. In particular, he supported harsh punishment for alleged cases of blasphemy, including in the prosecution of Parwez Kambakhsh, a student journalist, whose case received worldwide attention after he was arrested for downloading and distributing allegedly “un-Islamic” materials in 2008. On 22 January 2008, the Primary Court in the northern city of Mazar-e-Sharif sentenced Kambakhsh to death for “blasphemy and distribution of texts defamatory of Islam.” Kambakhsh denounced his confession of the offence as a product of torture and appealed the decision to an appeal court in Kabul. In October 2008, the Court of Appeals upheld the conviction but commuted Kambakhsh’s sentence to imprisonment for twenty years. In late August 2009, President Hamid Karzai granted Kambakhsh “amnesty”. He then left Afghanistan.

The Supreme Court has turned out to be a servile body, essentially acting as an extension of the executive branch of the government. This has also been manifest in the issue of constitutional interpretation. Indeed, an array of laws derived from different sources does not necessarily lead to a chaotic justice system, provided powers over interpretation, disambiguation and discernment of hierarchy are firmly embedded within one officially recognised institution. In Afghanistan, however, this is not the case.

⁴⁵ Alexander J. Thier “The Making of a Constitution in Afghanistan”, *New York Law School Law Review*, Vol. 51, 2006/07, p. 572.

⁴⁶ Finkelman, “The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan’s Constitutional Development Process, 2002-2004”, 2005, p.7.

⁴⁷ Thier, “The Making of a Constitution in Afghanistan”, 2006/07, p.573.

⁴⁸ HRW press release, “Afghanistan: Former Women’s Minister Intimidated” 26 June 2002.

⁴⁹ HRW press release, “Afghanistan: Karzai fails on press freedom: Editors of Kabul newspaper still detained”, June 24, 2003.

⁵⁰ International Crisis Group, *Reforming Afghanistan’s Broken Judiciary*.

⁵¹ Mark A. Drumbl, “Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan”, *Washington & Lee Public Law and Legal Theory Research Paper Series*, Working Paper No. 03-15 January 2004.

According to Article 121 of the Constitution, the Supreme Court has the power of judicial review. This is a novelty in Afghan legal history. However, the language of Article 121 fails to include broad powers of constitutional interpretation. Such powers were originally considered in the draft constitutional articles, which envisaged the establishment of a constitutional court in and of itself. Article 121 empowers the Supreme Court to verify the compatibility of all legislation with the Constitution, but shies away from the direct delegation of interpretative powers.⁵² Nevertheless, the Supreme Court has effectively acted as a constitutional court with the power to interpret the Constitution since its inception in 2004. This was particularly evident in the 2005 case concerning membership of the Senate or Upper House of Parliament (*Meshrano Jirga*). In this case, the Supreme Court gave an advisory opinion that seats left vacant could be filled by members chosen by Provincial Councils (instead of District Council members, as per Article 84 of the Constitution), until the District Councils were duly elected. The decision was accepted by the *Meshrano Jirga*. Similarly, when a dispute arose in 2006 between the executive and the legislative branches over the meaning of the word “majority” in a vote to approve government ministers and Supreme Court Justices, the Supreme Court’s ruling was considered binding. This gave the Supreme Court substantial authority in resolving conflicts of norms affecting bodies of law. In other words, while any Supreme Court endowed with powers of judicial review would have an enormous influence on the fulfilment of constitutional human rights provisions, this is even more so the case for the Afghan Supreme Court where the constitution is affected by internal tensions and inconsistencies.

However, in 2007 a dispute erupted between the Executive and Parliament over ministerial appointments and removals. In May 2007, the lower house voted to strip the then Foreign Minister Rangin Dadfar Spanta of his post. President Karzai appealed to the Supreme Court, which ultimately sided with Karzai, ruling the Parliament’s vote unconstitutional. Several members of Parliament, angered by the Supreme Court’s decision which was widely felt to be politicized, stated that the Supreme Court did not have jurisdiction to hear the case as it did not fall within its powers under Article 121, and therefore refused to recognise the decision.⁵³ This witnesses the fact that the Supreme Court has increasingly succumbed to the sway of the executive branch, particularly of Mr Karzai. International Crisis Group states that “[t]he President has often turned to the court to settle political disputes, substantially weakening perceptions of its [the Court’s] independence”.⁵⁴

Following this incident, a move was made to solve the matter of constitutional interpretation through the establishment of a commission as envisaged under Article 157, which provides for the establishment of an “Independent Commission for the Supervision of the Implementation of the Constitution” (ICSIC) whose members would be “appointed by the President.” However, the Constitution does not explain the specific mandate of such a Commission, nor its relationship to the Supreme Court. The law establishing the ICSIC was finally adopted in November 2008 after a series of tense reviews that bounced back and forth between the executive and legislature, presidential vetoes and parliamentary overrides.⁵⁵ Presidential Decree 11371 of November 2010 instructed that “drafts of laws after a decision of the cabinet and prior to sending to the

⁵² See John Dempsey and J. Alexander Thier, “Resolving the Crisis over Constitutional Interpretation in Afghanistan”, USIP Peace Briefing, March 2009.

⁵³ Sylvana Sinha and Scott Worden, “Constitutional Interpretation and the Continuing Crisis in Afghanistan”, USIP Peace Briefing, November 2011.

⁵⁴ International Crisis Group, *Reforming Afghanistan’s Broken Judiciary*, p.15.

⁵⁵ *ibid*, p. 16

National Assembly shall be sent to the [ICSIC].” The ICSIC has until now been engaged with the executive branch to review and vet proposed laws or policies for constitutional validity. The newly appointed members of the ICSIC (Gul Rahman Qazi, Sayed Omar Munib, Mohammad Amin Ahmadi, Abdul Qadir, Adalatkhwah and Mahbuba Huquqmal) have pledged to vigorously pursue their duty as constitutional arbiters. However, their ability to do so is another question.

c) Failing administration of justice, and constant executive interference

The problems plaguing the administration of formal justice in Afghanistan are huge. Insufficient resources have fuelled endemic corruption, which was already a problem in the formal justice system. Studies have shown the judiciary to be considered by respondents to rank among the most corrupt institutions in the country. Lack of resources also means that there are many vacant positions in the formal judicial system - only about 50% of all judicial positions are occupied, and two-thirds of those serving as judges do not have university-level training.⁵⁶

This problem is compounded by a lack of separation of powers. Afghanistan’s constitution attempts to create a meaningful separation and balance of powers between the three branches of State. In the area of law-making, both the legislature and executive can propose laws, which are passed by a majority of both Parliamentary houses, the *Wolesi Jirga* (the lower House) and the *Meshrano Jirga* (the upper House), which make up the National Assembly. The president can veto laws, though such a veto can be over-ridden by a two-thirds majority vote by the National Assembly.

There is also give-and-take with the presidential appointments process. Cabinet officials must be approved by the National Assembly, and the *Wolesi Jirga* can both interpellate and dismiss cabinet officials. One-third of *Meshrano Jirga* members are appointed by the President, and although all Supreme Court justices are also appointed by the President, they are subject to the approval of the *Wolesi Jirga*. The President is the Commander-in-Chief of the military, and has the right to declare war with the approval of the National Assembly.

As far as the independence of the judicial branch is concerned, Article 116 states that “the judicial branch is an independent organ of the State of the Islamic Republic of Afghanistan”.

However, a long tradition of political interference with both legislative and judicial powers, and the general thrust of Afghanistan’s constitutional and political development since 2001, has led away from the enforcement of checks and balances. “Central to this has been a presidential politics of personalised networking rather than institution-building”.⁵⁷

The constitution establishes a strong presidential system, and the government does not depend on a majority in the legislature for its survival. Constitutional commentators noted back in 2004 that “the general tendency in the new Constitution seems to be to rein in the judiciary’s top echelons politically”.⁵⁸ As the appointment of officials lies within the discretion of the President, local power-holders were appointed to State positions in 2002; the most notorious was perhaps Gul Agha Sherzai, former Governor of Kandahar then of Nangarhar provinces,

⁵⁶ Susanne Schmeidl, “Engaging traditional justice mechanisms”, in *The Rule of Law in Afghanistan*, 2011, p. 159.

⁵⁷ Maley, “The rule of law and the weight of politics”, p. 73.

⁵⁸ Christina Jones-Pauly and Neamat Nojumi, “Balancing Relations between Society and State: Legal Steps toward National Reconciliation and Reconstruction of Afghanistan”, *The American Journal of Comparative Law*, Vol. 52, No. 4 (Autumn, 2004), p.831.

well-known for committing widespread extortion, bribery and theft during his governorship in the 1990s prior to Taliban rule. After the Taliban was ousted in 2001, Sherzai returned to storm the local government offices by force.

In short, the trajectory since 2001 has been towards an increasing politicization and personalisation of the office of the President and his array of advisors, whose hold on power stands in inverse proportion to his respect for the rule of law. This was made abundantly clear in numerous instances, perhaps most notably at the time of his re-election in 2009. Although his term in office expired in May 2009, elections were postponed until August 2009 and then blatantly rigged.⁵⁹

Part of the problem faced by the justice system also stems from the 'lead nation' model; here, one nation is given responsibility for one specific aspect of Afghanistan's reconstruction. In this case, Italy was made responsible for legal and judicial reconstruction, while Germany took responsibility for the reform of policing. From the onset these efforts were plagued by insufficient resources and manpower, an under-estimation of the magnitude of problems, and disputed decisions on fund allocations. The lead nation model did not deliver as promised, partly because of financial restrictions, but also because it encouraged one-dimensional, tunnel-vision solutions to multi-faceted problems. This flaw is illustrated in Italy's attempts to reform the Criminal Procedure Code. Italy's failure to produce a document based on Afghan realities and backed by Afghan legal practitioners was instrumental in further alienating the legal community from what was increasingly perceived as a myopically "Western" process. "The Italian effort to support judicial reform was inconsistent and inept from the start", said ICG.⁶⁰ Its process included outsourcing large parts of the programme to the International Development Law Organisation, which, months after the start of the programme, still only had one full-time representative in Afghanistan.

There is a general consensus among observers that, in spite of various pledges concerning the rule of law (including the June 2007 Rome conference on the rule of law), judicial sector reform and rule of law programmes have remained very low in the ranking of priorities set by both the Afghan Government and the international community. For example, the amount of funding allocated by the United States Agency for International Development (USAID) for rule of law programmes amounted to a mere 1% of the total USAID budget for Afghanistan between 2002 and 2007.

d) The limitations – and instrumentalisation - of the informal justice system

Perhaps even more infamous than the rule of law situation in Afghanistan is the general discourse justifying its abandonment. This oft-repeated cliché argues that the rule of law in Afghanistan was always viewed as an external, "Western", "neo-imperialist" imposition on a society profoundly entrenched in its tribal traditions. This society was reputedly devoid of formal governmental institutions, and never ready to take up arms to resist foreign intervention. Francesc Vendrell, a former Special Representative of the European Union for Afghanistan, former Personal Representative of the Secretary-General and Head of the United Nations Special Mission for Afghanistan, notes that "this critique, however comforting to us, ignores Afghanistan's history".⁶¹ For example, between 1919 and the end of the 1970s, Afghanistan had functioning civilian institutions.

⁵⁹. International Crisis Group, Afghanistan: Elections and the Crisis of Governance, 25 nov. 2009.

⁶⁰. International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, p.10.

⁶¹. Francesc Vedrell, "The international community's failures in Afghanistan", in *The Rule of Law in Afghanistan*, 2011, p. 53.

As noted above, the tribal system⁶² has not only profoundly changed in nature following decades of conflict; its influence in many parts of the country has also eroded. The tribal system is considered to be an anachronism by many educated Afghans. The recent support to tribal law as the solution to the ills affecting the justice system illustrates that trend. It seems to be an attempt to divest the international community of its share of the responsibility for the failure of judicial reform. The Afghan Government and the international community have now endorsed the informal justice system as a valid source of law and a way of administering justice.⁶³ Indeed, the 2007 UNDP Human Development Report for Afghanistan advocated in favour of a “hybrid justice system”. It is notable that “the new Constitution for the first time in Afghan constitutional history refers explicitly to the “traditions” of Afghanistan”.⁶⁴

While the political decision to endorse such tribal law rests on dubious motivations, it offers no genuine solution to the issues plaguing the Afghan justice system. A draft law on the integration of the informal justice system is currently being circulated, but very few safeguards as to the role of women and the impact on their human rights seem to have been integrated into this draft. The US has jumped on the band wagon, and has embarked on “dubious experiments to legitimise politically tainted tribal shuras and jirgas”.⁶⁵ In particular, the US has hired an American contractor, Checchi and Company Consulting, Inc., to implement and monitor programmes of support to the traditional justice system. The ICG reports that some US \$10 million of the US \$25 million that USAID will spend on the informal justice sector (a whopping 40%) will be used by Checchi and Company to complete a “study” of the sector. As the ICG euphemistically notes, “it is unclear whether this will have any impact on the rule of law in the country. Nor is it evident that hiring private contractors to lead an evaluation of the role of traditional tribal law in the justice system will amount to anything more than an exercise in cultural relativity”.⁶⁶

The *jirga* and *shura* justice system is an informal mode of conflict resolution, based on a theological view of justice (restoring harmony and peace in the community). It is organised around exclusively male gatherings during which the dispute or conflict is discussed. The number of *jirga* men needed in any given proceeding varies, as does the length of the proceeding – some issues require days, some weeks, of deliberation. At the end of proceedings, the *jirga* will issue a decision, which will be conveyed orally to the parties. Punishments are then meted out, and can range from fines to exile, or even the burning down of an individual’s house. If a party is dissatisfied with the ruling, an appeal to a second *jirga* is often possible.

Quite aside from the fact that women are completely excluded from the *jirga* process, that its decisions are intrinsically arbitrary, and that there is little nation-wide consensus especially among educated and non-Pashtun societies, regarding its legitimacy, *jirgas* pose serious substantive challenges to the legal architecture of Afghanistan. The on-going custom of giving one or several “fair and virgin girls” to an enemy family (“*baad*”) as a means of settling a dispute contradicts not only human rights norms, but Afghanistan’s own constitution. The continued practice of *baad* and the continued exclusion of women from *jirgas* make conciliation between traditional justice systems and international law near impossible. Human Rights Watch states in its 2012 report that “human rights abuses are endemic within the traditional justice system, with many practices persisting

⁶² Referring to Pashtun tribal codes and practices.

⁶³ Islamic Republic of Afghanistan, *National Justice Sector Strategy*, 2008.

⁶⁴ Jones-Pauly & Nojumi, “Balancing Relations between Society and State”, p. 845

⁶⁵ ICG, *Reforming Afghanistan’s Broken Judiciary*, p. 31

⁶⁶ ICG, *Reforming Afghanistan’s Broken Judiciary*, p. 31

despite being outlawed, including *baad*, the practice of handing over a girl to another family to resolve a dispute”.⁶⁷

It should be emphasised that there is neither temporal nor spatial unity to the informal justice system. It would be highly misleading to imply that the informal justice system has remained unchanged for centuries. It is possible that the Afghan informal justice system has changed more than other traditional institutions because of the country’s legacy of war and succession of regimes, which each modified customary law to accommodate its political and administrative needs. All “traditions” change and evolve; this is no less true of *jirgas* and *shuras* than it is for any tradition anywhere. As a matter of fact, *shuras*, as more permanent consultative bodies within a community, were largely introduced during the Afghan wars by the *Mujahedeen* commanders as a way to influence community decisions. They are therefore very recent institutions, and lack the robe of tradition often attributed to them.⁶⁸ “The unwritten nature of Afghan customary law renders it open to arbitrary application and abuse. Indeed, the current domination of *shuras* in the north by commanders is ample proof of the susceptibility of customary legal institutions”, writes Senior.⁶⁹

There is little doubt that local *jirga* systems are manipulated by various successive local leaders. Norway’s Chr. Michelsen Institute reports that “[t]he power of the [jirgas and shuras] has been reduced over the years with the emergence of military organisations, commanders and warlords”.⁷⁰ In particular, the Taliban have skewed the *jirga* process towards a harsher interpretation of Islamic law, and the flow of arms and proceeds from corruption and the opium trade have reportedly allowed warlords to hijack proceedings and local political structures to benefit their own interests. In its August 2011 report, the United States Institute of Peace (USIP) stated:

“[T]hese community-based mechanisms have often been undermined by corrupt officials, local strongmen, and general instability. Arms and access to illicit funds from sources such as the opium trade allow strongmen to manipulate local political structures without being responsive to community needs as leaders have been in the past”.⁷¹

In 2004, the USIP had already noted that “provincial governors, militia commanders, police chiefs, and other power brokers now exercise control through fear and intimidation and through manipulation of the traditional *shuras*”.⁷² Contrary to what is often hailed as the great strength of the *jirga* system – its egalitarian nature – there is a growing body of evidence to indicate that decades of war, the influx of money and weapons (“Kalashnikov culture”), and sharp changes in the traditional balance of local power have greatly modified the equality and equity of the *jirgas*. *Jirgas* now often serve to sanction and legitimise local and national power holders, with decisions resulting in the weak being condemned and the strong rewarded, irrespective of the merits of their case. *Jirga* mediators often “no longer function independently but as puppets of strongmen, for either patronage or financial interests”.⁷³

⁶⁷. Human Rights Watch, *Afghanistan: Little Progress on Rights*, 24 Jan 2012.

⁶⁸. Schmeidl, “Engaging traditional justice mechanisms”, p. 156

⁶⁹. Amy Senior, “Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law”, *The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization*, Spring 2006, p.5.

⁷⁰. Astri Suhrke, Torunn Wimpelmann Chaudhary, Aziz Hakimi, Kristian Berg Harpviken, Akbar Sarwari, Arne Strand, “Conciliatory Approaches to the Insurgency in Afghanistan: An Overview”, Report prepared by CMI and PRIO for the Norwegian Ministry of Foreign Affairs, January 2009, p.7.

⁷¹. Noah Coburn, “The Politics of Dispute Resolution and Continued Instability in Afghanistan”, USIP, Special Report 285, August 2011, p.2.

⁷². “Establishing the rule of law in Afghanistan” USIP, Special Report 117, March 2004, p.3.

⁷³. Schmeidl, “Engaging traditional justice mechanisms”, p.161.

According to the Norwegian Refugee Council observers, the system is also weak in cases where strong communal interests are involved, as in most cases between Pashtun returnees and local residents in Northern Afghanistan. These cases tend to be resolved in favour of the latter, “because local power-holders and government officials support them instead of the returnees”.⁷⁴ It should also be noted that the *jirga* system rests on the premise that it is operating within a closed community that shares values and a way of life, and has no external elements or influences. However, this very premise is increasingly untenable in contemporary Afghanistan.

The imbalance in favour of strong parties may also explain how customary structures are being abused to grab government land. Some tribes lay claims to State land, and then force the *jirga* to render a decision in their favour. The government then registers the decision as a deed, thereby sanctioning the land grab.

In Taliban dominated districts, the co-option of local elders is common. Essentially, the Taliban modify the existing system of punishments by insisting that elders resolve cases using the Taliban’s interpretation of Sharia law. They also insist on the prosecution of certain crimes over others, typically “moral crimes” (*zina*) involving women. This has also been made possible by the influx of young, radical “clerics” who have been educated in Pakistani *madrasahs*, and then returned to Afghanistan to act as judges in local *jirgas* and *shuras*. Unsurprisingly, this replicates what frequently occurred under Taliban rule in the late 1990s, when the Taliban would appropriate local courts and *jirgas* for their own purposes.⁷⁵ In fact, membership of the local clergy in the village *jirga* was regularly made compulsory.

Not only do *jirgas* utilise “traditions” to suit current political needs, they do not apply the same judicial rules and criteria across Afghanistan, making them spatially variable as well as temporally changing. In fact, “elders have the right to break new ground by ignoring precedents, interpreting them to fit the case or modifying them, although such changes must meet with general agreement”.⁷⁶ In other words, neither precedents nor tradition is binding on a *jirga* – rendering arguments supporting *jirga* justice on the grounds of “tradition” even more difficult to sustain.

Additionally, there is evidence that the *jirga* system is increasingly being tainted by corruption; here, just like in the formal justice system, rich parties can simply buy favourable decisions. In the past elders viewed participation in the *jirga* as a community service. Now it appears that some elders render their services purely for financial benefit.⁷⁷

Finally, as the *jirga* system functions on the premise of a shared community, it will more often than not be unable to deal with inter-community disputes, as was the case between the nomadic Kuchi and sedentary populations.

Some argue that many Afghans trust the informal justice system more than they trust the formal justice system.⁷⁸ This does not, in and of itself, prove much: indeed, it can be understood as speaking more to the failures of the formal justice system, than extolling the successes of the tribal system. These ‘opinion statistics’ are “often interpreted as a preference for the informal over the formal system – yet often it may simply be that the informal system is the

⁷⁴ Schmeidl, Mundt and Miszak, 2009, quoted in Schmeidl, *ibid*.

⁷⁵ Jones-Pauly and Nojumi, “Balancing Relations between Society and State”, p.835.

⁷⁶ Schmeidl, “Engaging traditional justice mechanisms”, p. 153.

⁷⁷ Schmeidl, “Engaging traditional justice mechanisms”, p. 162.

⁷⁸ Asia Foundation 2009, p. 85-89, quoted in Maley, “The rule of law and the weight of politics”, p. 70.

only mechanism accessible to the rural majority”.⁷⁹ This assertion has been attested to by local mediator in stating that “if we had a proper court system and able law enforcement agencies, we would not have to use the *jirga*”.⁸⁰

It appears that the inchoate state of justice in Afghanistan, and the multitude of possible legal venues, appears to have promoted ‘forum shopping’. At worst, citizens choose any available venue in rural areas; at best, they choose the justice system that will suit their own personal needs, taking their cases to a given system on the basis of its benefits, including, for example, their personal influence or relationships with those sitting on the *jirga*. This “pick-and-choose” attitude, especially in urban centres, flagrantly contradicts the essence of the uniformity of, and equality under, the law. This is especially so as disputants can undermine each other by seeking a different legal venue. The USIP notes that:

“[I]n some cases, such an array of mechanisms may allow disputants to approach the body they feel most comfortable with, increasing access to justice for women, who might not be as likely to approach the formal system. At the same time, however, the personal connections of disputants to influential figures, such as commanders, and their ability to bring these figures into the process can decrease the likelihood that the dispute will be resolved justly”.⁸¹

The problem goes beyond citizens choosing the type of legal venue they prefer. There is some evidence that disputants are using the threat of going to the State system to pressure *jirgas*⁸² into deciding in their favour. There is also evidence of powerful individuals buying or coercing the decision they want from the justice system they feel they can influence most.⁸³

⁷⁹ Schmeidl, “Engaging traditional justice mechanisms”, p. 158.

⁸⁰ Quoted in Schmeidl, *ibid* p. 158.

⁸¹ Coburn, “The Politics of Dispute Resolution”, p. 4.

⁸² Jones-Pauly and Nojumi, “Balancing Relations between Society and State”, p. 840.

⁸³ Schmeidl, “Engaging traditional justice mechanisms”, p.156.

4. Widespread and systematic impunity

a) Introduction

The Afghan justice system is further undermined by endemic impunity. Perhaps few other factors have ruined its credibility and legitimacy as much as the systematic impunity enjoyed by high-level and regionally strong perpetrators of offences such as war crimes, human rights violations, narcotics trafficking, and corruption. The international community bears a portion of the responsibility for this impunity having refused to push the Afghan Government to address atrocities committed during earlier phases of the conflict.

The American decision to support Mujahedeen-era warlords and war criminals was certainly an important factor in the perpetuation of impunity. It has given a clear signal that reconciliation would happen at the expense of justice. In 2009 the US Senate Committee on Foreign Relations wrote: “Despite alliances with the opium trade, many of these [US-paid] warlords later traded on their stature as US allies to take senior positions in the new Afghan Government, laying the groundwork for the corrupt nexus between drugs and authority that pervades the power structure today”.⁸⁴ More generally, the “light footprint” approach and the limited assistance mandate given to UNAMA made it difficult to enforce a sustained transitional justice programme similar to that in Kosovo or Bosnia-Herzegovina. The co-option of warlords into the system dealt a serious blow to any efforts to end impunity and bring perpetrators of previous human rights violations to justice. Not only were these individuals not prosecuted, but empowered – they were actually adopted into the government regime, with many warlords accused of serious war crimes joining President Karzai’s presidential re-election campaign.

In short, the ‘putting peace before justice’ argument prevailed then as it does now. It constituted a gross miscalculation in rendering Afghan society awash in a culture of impunity. This only led to stronger disaffection for the justice system, and increased the fragility of the legitimacy and credibility of the newly established regime. The Afghanistan Research and Evaluation Unit (AREU) states that:

“Since the signing of the Bonn Agreement in 2001, no concerted efforts have been made by the Afghan Government to implement a process of transitional justice. There has been limited action to address the culture of impunity in Afghanistan and alleged perpetrators of some of the worst human rights abuses have retained positions of power. The [Government of Afghanistan] and some of the most influential international actors have instead argued that implementing justice could disrupt the uneasy peace”.⁸⁵

Where offenders have had sufficient leverage, there has not only been continued impunity for war crimes and other atrocities, but also for other crimes. In particular, impunity for corruption and electoral fraud has been massive and on-going. Although the High Office for Oversight and Anti-Corruption was created in 2008, not a single minister, deputy minister or provincial governor had been indicted for corruption as of early 2010, despite massive amounts of evidence of wrongdoings. It is clear that there is constant political interference with the Attorney General’s office, with high level officials blocking prosecution, arrest or investigation of any individual

⁸⁴ US Senate Committee on Foreign Relations, quoted in Michael Hartmann, “Casualties of Myopia”, in *The Rule of Law in Afghanistan*, p. 181.

⁸⁵ Emily Winterbotham, *The State of Transitional Justice in Afghanistan*, AREU, April 2010, p.4.

with connections to the government. The case of former Minister of Hajj, Sediq Chakari, whose staff were arrested at Kabul airport in 2009 carrying approximately US\$400,000 in cash, but who was never otherwise held to account, is a case in point.⁸⁶ Impunity is also the order of the day for the electoral fraud committed during the 2009 election, where over a million fraudulent ballots were cast. Although two officials of the Electoral Commission resigned, there were no other signs that steps would be taken to punish those responsible for the fraud. In fact, it appears that the international community “tiptoed around” the fraud in order to preserve the outcomes negotiated with Karzai prior to the election. Indeed, Karzai himself later went on to blame the fraud on the European Union and the UN.⁸⁷

b) The Amnesty Law

Impunity seems to have strengthened over the years. Between 2002 and 2005, Karzai’s government made public assurances voicing strong support for transitional justice, especially following the 2004 report (entitled, *A Call for Justice*) of the Afghan Independent Human Rights Commission (AIHRC). The AIHRC stated that Afghanistan’s legacy of human rights abuses had led to a “deeply eroded trust in public authorities due to the absence of justice”. It submitted a series of proposals to end impunity for war crimes and mass atrocities, including establishing an independent and permanent special prosecutor’s office, as well as setting up a special chamber to hear these cases. The data in that report indicated that 86.8% of Afghans demanded implementation of justice and 90% demanded the dismissal of human rights violators from their posts.

It should also be noted that the AIHRC and its legal advisor, Professor Mohammed Mohsin Farid, have drafted amendments to the penal code implementing some provisions of the Rome Statute of the International Criminal Court (ICC). However, the Commission has so far been unsuccessful in its discussions with the Ministry of Justice about integrating these provisions into the Afghan penal code. Similarly, President Karzai waltzed around this issue in the early years of his administration. In 2002, he pledged to set up a truth commission to uncover the massive crimes committed over the past decades, a pledge that was never fulfilled.

Efforts to hold accountable the authors of massive human rights violations and international crimes stemming from earlier periods were brought to a screeching halt with the adoption of the National Reconciliation, General Amnesty and National Stability Law in 2007. This law granted a blanket amnesty to all previous human rights offenders. Ironically, only months before the adoption of this law, Karzai had signed an action plan to prevent any such amnesty. The chairperson of the AIHRC, Dr. Sima Samar, stated that Karzai had twice promised her that he would not sign any such document.⁸⁸ The law seemed to have been forgotten in 2007 and 2008, but was then quietly and discreetly published in the Official Gazette in December 2009.

The 2007 law provides general amnesty, without reservation, to “all political factions and hostile parties” who were involved in hostilities before the post-2001 interim administration. It ensures that these persons “shall enjoy all their legal rights [...] and not be legally and judicially prosecuted”. The law also provides for amnesty for any current opposition individuals and

⁸⁶. See Hartmann, “Casualties of Myopia”, p. 190 and onwards.

⁸⁷. *ibid.*, p. 192.

⁸⁸. Quoted by Hartmann, *ibid.*, p. 185.

groups who “cease enmity after the enforcement of this resolution” if they “join the process of national reconciliation, and respect the constitution and other laws”.⁸⁹ No limitations as to the nature of the crimes amnestied or on the temporal scope of the amnesty, were provided for in the law. Theoretically, this could mean that the amnesty could be in place indefinitely. The only exception to this amnesty is that individual cases brought by victims of the crimes can proceed. However, no procedure of investigation was provided.⁹⁰ This means that it effectively places responsibility for ensuring accountability for past violations on the shoulders of individuals; in the absence of a complaint by the victim, the Afghan authorities are prohibited from prosecuting war criminals on their own. The AREU notes that “The Amnesty Law has already had enormous political significance, serving as a clear signal of the power alleged human rights violators continue to wield in government. Furthermore, the law complicates the implementation of transitional justice”.⁹¹

This Amnesty Law violates Article 7 of the Constitution of Afghanistan, which makes observance of international norms (including those under the ICC Rome Statute, the ICCPR and customary international law, requiring accountability for war crimes and crimes against humanity) obligatory. Blanket amnesty for grave violations of international human rights and humanitarian law are not permissible under international law.

c) Lack of support for the Afghan Independent Human Rights Commission

While the establishment of the AIHRC, enshrined in the Constitution, was originally hailed as one of the great achievements of the post-2001 government, and considered to be a landmark in creating conditions for accountability for past abuses, it soon dawned on observers that AIHRC’s progress was being surreptitiously hampered by the government itself. The AIHRC is being increasingly sidelined, and its activities are often thwarted by the very regime that is supposed to protect and strengthen it. The government has attempted to discourage the AIHRC from documenting and investigating past war crimes and atrocities on the preposterous grounds that “a violation of the [amnesty] law is a punishable crime”.⁹²

The surprise decision by President Karzai to remove three commissioners (Nader Nadery, Fahim Hakim and Maulawi Ghulam Muhammad Gharib), on 22 December 2011, was interpreted as a sign of his intent to rein in the AIHRC’s work; it was felt to be a “stealth attack on human rights”.⁹³ AIHRC chairperson, Dr. Sima Samar, was not informed of the removal decision, and the fate of the other commissioners is still uncertain. Their appointment has neither been renewed nor cancelled “in what can be seen as a step to weaken those commissioners’ position and to undermine their job security”.⁹⁴ Many observers note that the three commissioners removed were among the most critical of and vocal about Karzai’s regime. They link the President’s decision to remove them to the long anticipated (and delayed) publication of an AIHRC mapping report on human rights violations in Afghanistan during the conflict. This report is due to be a major landmark in the transitional justice debate. It is expected to name individuals close to Karzai, and/or serving in his administration, as being the authors of past

⁸⁹. Article 3 of the Amnesty Law, quoted in Hartmann, *ibid*, p.184.

⁹⁰. See Hartmann, *ibid*.

⁹¹. Winterbotham, *The State of Transitional Justice in Afghanistan*, p.10.

⁹². Statement by Yusouf Haleem, Director of the Taqin, quoted in Human Rights Watch “Measure brought into force by Karzai means atrocities will go unpunished”, 10 March 2010.

⁹³. Thomas Ruttig, “Another Blow to Justice: Three Commissioners Fired from the AIHRC”, AAN, 23 Dec 2011.

⁹⁴. *ibid*.

human rights violations. Thomas Ruttig of the Afghanistan Analysis Network (AAN) notes:

“The removal of the three critical voices can be seen as part of a long-term government strategy to replace the more active part of civil society – and of the AIHRC as one of the most respected independent institutions in the country in particular - with more conservative and docile Karzai loyalists”.⁹⁵

AIHRC has worked with ministries and civil society to develop a three-year action plan for the implementation of the National Priority Program on Human Rights and Civic Responsibilities. This program highlights the importance of human rights, legal awareness and civic education, targeting communities across Afghanistan to foster a more informed public and civil society and to increase Government accountability. As of today, it remains unclear whether there will be enough funding available to implement the program.

The final 2011/2012 budget submitted to the Afghan Parliament allocated only half the amount pledged to the AIHRC and failed to regularize its legal status within the overall budget framework. As international donor support is likely to dwindle, the AIHRC will increasingly have to rely on Government allocations, and so long as its budgetary status is not regularized or safeguarded, the Commission’s independence and long-term sustainability will be vulnerable.

d) Making a mockery of vetting and monitoring mechanisms

Continued impunity and lack of respect for human rights make a mockery of vetting mechanisms. Vetting processes were deemed to be so essential that other forms of accountability (prosecution and trial of major war criminals) have been sidestepped. It is generally acknowledged that while it may not be possible to prosecute all offenders, policies that support the removal or exclusion of certain individuals from power operate as confidence-building measures within State and society. Efficient vetting mechanisms are therefore important to building the credibility of democratic institutions after conflict, and to providing a minimal sense that justice is being pursued. Not even this minimal sense of justice has been observed in Afghanistan. Many warlords and other commanders accused of serious human rights violations have been included in the political elite and given official positions within the Karzai administration. This amnesty thus further undermines the legitimacy and credibility of the regime.

While Afghanistan’s Electoral Law bars those who have been “*convicted* of crimes against humanity, criminal activity or deprivation of civil rights by a court”, or those belonging to unofficial military forces or armed groups, from running as election candidates, it does not mention those only *suspected* of war crimes and human rights violations. Consequently, impunity acts in a vicious circle: since no one has ever been *convicted* of these crimes because of entrenched impunity, they cannot be subjected to measures that bar them from obtaining positions of influence.

No doubt the international community, including the UN, have lacked the political will to ensure fair vetting processes. Especially during elections, this has allowed many armed commanders, including Taliban listed on the UN Security Council sanctions list, to run for office.⁹⁶ During the 2005 elections, although the secretariat identified 1,100 candidates with links to illegal armed

⁹⁵. *ibid.*

⁹⁶. International Centre for Transitional Justice, *Vetting Lessons for the 2009-10 Elections in Afghanistan*, January 2009.

groups (including the Taliban), many people were not disqualified because of ‘insufficient evidence’ or fears that they would pose a security threat to the fledgling Government of Afghanistan if they were disbarred.

During the 2009 provincial elections, the Electoral Complaints Commission, entrusted with correcting and sanctioning electoral offences (including ensuring candidates who do not meet the Election Law requirements are removed from the ballot), kept almost twice as many people (57) off the ballots as compared to the preceding election. However, the 2009 presidential and provincial elections further entrenched the position of several alleged perpetrators of human rights abuses in spheres of influence.

A similar pattern emerged during the 2010 parliamentary elections. The vetting process led to the exclusion of 36 candidates for alleged links with armed groups. However, confusion and lack of transparency surrounding the whole process of how and where decisions were made did little to bolster its credibility. The AAN observed that:

“[T]he whole process was hurried and obscure. The excluded candidates complained of the short notice, which did not allow them to prepare a defence, and of contradictory directives from the IEC as to what the requirements were and where they were to present their dossier. They also wondered why the documents they secured from provincial branches of the relevant ministries were not deemed sufficient to acquit them from the charges. They – credibly – maintain to have been “sacrificed to a show of democracy” set up to appease the conscience of foreigners, and that they have been selected precisely for their inability to garner the support of strong state officials or stir up trouble if excluded.⁹⁷”

⁹⁷ Fabrizio Foschini and Gran Hewad, “The Alchemy of vetting”, AAN, 16 July 2010.

IV. The Return of Taliban Ideology and the Responsibility of the International Community

1. An overview of human rights violations under Taliban rule

During their reign (1996-2001), the Taliban systematically violated human rights and made no attempts to foster the rule of law or good governance. Rather, they imposed extremist religious dictates on the entire Afghan population, with no concern for the proper functioning of the country or the well-being of its people. In July 1998, the Taliban's supreme leader, Mullah Mohammad Omar, revised the Constitution to base it on Islamic law. In particular, justice was to be implemented according to extreme interpretations of Islamic and tribal law, in contradiction of international human rights standards. Regular public executions, lashing and stoning took place at stadiums or in public parks and the severed hands and feet of thieves were regularly hung from trees for several days.

Under Taliban rule, women lost most of their basic rights, including access to health care, the right to education and work, freedom to circulate unaccompanied, and the right to participate in political life. Across the country, girls' schools were closed and women, including widows with no family income, were banned from securing jobs. Women were particularly singled out for behaving or dressing "inappropriately", according to the Taliban's standards. The burqa was compulsory and wearing shoes with heels was prohibited. Women were forbidden to make noise when walking, and could not even laugh in public. The panes of their houses had to be painted in case they were seen from the outside. Women could not be treated by a male physician, so access to health care was hampered. Women were prohibited from being photographed. The officers of the Ministry for the Promotion of Virtue and Prevention of Vice, armed with wire whisks, arbitrarily beat women in the streets, to maintain a climate of fear.

Men were also subject to religious obligations: failing to attend five daily prayers in the mosque resulted in arrest and punishment. Shaving was prohibited and men had to grow beards beyond the length of a fist under the chin. Failure to do so could result in imprisonment until facial hair reached the required length. Other extreme restrictions on basic freedoms affecting the whole population included a Taliban order requiring all people with non-Islamic names to change them to Islamic names. Other activities considered to be "non-Islamic" were banned.

Anyone who converted from Islam to any other religion was executed. Non-Muslim minorities such as Hindus as well as the Shia had to wear a distinct badge or stitch a yellow cloth onto their dress to be differentiated from the majority Sunni population. Groups that were not Sunni Muslims had to pay an "infidel" tax.

As demonstrated by the destruction of the Buddha statues in Bamiyan in March 2001, the Taliban also denied the legitimacy of art, painting, music, poetry, and the heritage of generations. They burnt films and videotapes in public places, erased pictures of individuals, and burned photographed manuscripts. Music was banished and tapes were unwound and hung on trees; all musical instruments and TV sets were broken and buried. The Taliban banned television broadcasts, allowing only *Radio Sharia*.

Anyone who carried objectionable literature was executed. In 1997, during their purge against books, including those of the Kabul University library, the Taliban incinerated more than 55,000 archival volumes and manuscripts from the library of Hakim Nasser Khosrow in Pul-e Khumri in Baghlan province. The Kabul Museum was not spared either. Armed with stones and axes, the Minister of Information and Culture, Qudratullah Jamal, and the Finance Minister, Aghajan Motasem, systematically smashed some 2,750 pieces of art.

Last but not least, ethnic groups, in particular the Shia Hazara, the Tajiks and the Uzbeks, faced a variety of abuses and repression. The Taliban considered killing Hazaras, and driving them out of Afghanistan, to be part of waging jihad. The highest and most prolonged levels of Hazara migration to neighbouring countries took place during the Taliban era, reflecting the severity of the situation at this time. Several massacres were particularly well documented. In July 1998, the Taliban executed approximately 2,000 Hazara civilians in the city of Mazar-e-Sharif, going door to door for six days, looking for males and executing them. Thousands of prisoners were transported in metal container trucks, where many suffocated or died of heat stroke. In July and August 1999, the Taliban bombed Dara-e-Suf, a Hazara area controlled by the Northern Alliance. The attacks were accompanied by summary executions, the abduction of women, prisoners, forced labour, burning of houses and the destruction of agricultural resources. In May 2000, at Robatak pass, the Taliban summarily executed at least 31 Hazara civilians, northwest of Pul-e-Khumri. In January 2001, at Khwajaghar, Takhar province, the Taliban summarily executed at least 31 Uzbek civilians fleeing the city. In Yakaolang district, they carried out the massacre of 170 Shiite Hazaras. The victims were gathered into several assembly points, and then slaughtered.

More than ten years have passed since the fall of the Taliban regime. However, the human rights violations committed then are committed today by insurgents groups. In light of the recent moves towards reconciliation with the Taliban and the growing possibility of their return to power make, the following section outlines the human rights violations they have committed since 2001.

2. Human rights violations by Taliban since 2001

From 2001, the Government of Afghanistan and coalition forces conducted low intensity counter-insurgency operations against the Taliban and other groups hostile to the new government, initially facing little armed opposition. However, from 2005, the Taliban expanded their outreach into Pashtun-dominated areas of Southern Afghanistan and fresh alliances with other groups such as the Hezb-e Islami led by Gulbuddin Hekmatyar to gain influence over other parts of the country. The Taliban progressively increased the intensity of their attacks. They then inexorably gained ground. According to research conducted by the International Council on Security and

Development, by 2009 the Taliban had a permanent presence in over 80% of the country.⁹⁸ In June 2011, the ICG reported that the Taliban had expanded far beyond their strongholds in the South and South-East, stating that “insurgent leaders [had] achieved momentum in the Central-Eastern provinces by employing a strategy that combines the installation of shadow governments, intimidation, and the co-opting of government officials”.

As an armed group, the Taliban have first and foremost been responsible for crimes under international humanitarian law. According to the United Nations Assistance Mission in Afghanistan (UNAMA), over 10,000 civilians were killed in the conflict in Afghanistan from 2007 to 2011. These killings have increased in both frequency and intensity over the years, with the majority occurring in the Southern, South-Eastern and Eastern areas of Afghanistan and attributed to insurgents. Taliban attacks have killed numerous national and international soldiers, as well as Afghan police officers; however they have predominantly affected civilian populations. Data on civilian casualties caused by the Taliban and their affiliates first appeared after 2006. Insurgents were responsible for 46% of the total number of civilian casualties of the armed conflict in 2007 (700 deaths), 75% in 2010 (2,080 deaths) and 75% in 2011 (2,858 deaths). Over the same year, 58% of the women and children who were killed as a result of the conflict were the victims of insurgents. Suicide attacks (once very rare in Afghanistan), improvised explosive devices (IEDs), assassinations, abductions, intimidation and harassment have been the dominant tactics used by the Taliban to wage conflict. Many civilians have been specifically targeted by the different insurgent groups, including aid workers, doctors, day labourers, mechanics, students, clerics, and civilian government employees, such as teachers and engineers. Since May 2010, an updated Code of Conduct (*Laiha*) composed by the Taliban has not contributed to reducing civilian casualties nor led to actions against commanders or members who disobeyed the code. On the contrary, there has been an increase in the number of civilian deaths resulting from attacks by insurgents.

Since May 2003, insurgents have been held responsible for numerous attacks on protected objects, including mosques, hospitals, helicopters used for medical evacuation and other places protected under international humanitarian law. Each year since 2008, the Afghanistan NGO Security Office has recorded over 100 security incidents affecting NGOs in Afghanistan. UN staff and installations have also been targeted on several occasions, including two high profile attacks in Kabul in 2009 and in Mazar-e Sharif 2011.

The Taliban have also attempted to disrupt democratic processes in place since 2001. To that end, they have systematically attacked symbols of democracy. In particular, they have threatened candidates and ordinary citizens during each election. Numerous cases of torture, mutilation and killings have been reported. On 16 September 2010, the Afghan Free and Fair Election Foundation reported there had been 19 election-related deaths prior to the 18 September 2010 parliamentary vote. It reported that all the deaths, which included four parliamentary candidates, took place between 15 July 2010 and 25 August 2010. The Taliban had warned voters to boycott the poll and “stick to jihad”. More than a thousand polling centres had to close down due to security concerns. Politically active women have also been regularly targeted, threatened and intimidated.

⁹⁸. ICOS, Press release: “Ten years after 9/11 Taliban now have presence in 80% of Afghanistan”, 10 September 2010, available at: http://www.icosgroup.net/2009/media/media-press-releases/eight_years_after_911/.

Teachers and students have regularly been victim of Taliban threats. By early 2012, millions of children were unable to attend school. Between January and November 2009, there were 613 recorded school-related incidents, including the burning of school buildings, kidnappings, threats, forced school closures and the killing or injuring of students and teachers. This was a marked increase on the 348 incidents recorded in 2008. UNICEF noted that the southern regions had been particularly hard hit, as more than 70% of schools were closed in Helmand Province and over 80% were closed in Zabul Province. Between March and June 2011, at least 20 school-related attacks were recorded. Girls' schools are particularly vulnerable to attack, as exemplified by an incident in November 2008 when assailants squirted acid on 15 schoolgirls in Kandahar, disfiguring some of them. A further incident in April 2010 saw about 50 schoolgirls from Kunduz province hospitalized after losing consciousness or vomiting in a suspected poison gas attack. In April 2012, 150 schoolgirls were poisoned by contaminated drinking water in Takhar province. Many cases of acid throwing in the faces of women and girls walking to school have been reported in the last few years.

Journalists have also seen serious deterioration in their working conditions in Afghanistan, particularly since 2008. Several groups, including judges, prosecutors and political chiefs are responsible for this trend, and again, the Taliban have been the main perpetrators. According to Reporters Without Borders, there were no fewer than 24 physical assaults, 35 death threats, 14 arrests and seven abductions perpetrated against journalists between June 2007 and January 2009. In April 2007 Ajmal Naqshbandi was brutally murdered by the Taliban. Several Taliban spokesmen told media organizations in Kabul that the group had beheaded Naqshbandi in the Garmsir district of Helmand province after the Afghan Government refused to release senior Taliban leaders in captivity.⁹⁹

One of the key factors for this level of persecution is that, in spite of the prevailing pluralism in the country, journalists are required to observe certain red lines and practice self-censorship. For instance, in September 2008 the Ulema Council of Ghazni Province asked all independent media, in particular radio stations, not to broadcast the voices of women. It was declared that conversation and contact with women (outside the family circle) and broadcasting their voices on the radio is forbidden by Islam and offenders would be dealt with accordingly. Farid Ahmad Rustai, Director of Radio Dehkada in Shahr-i Naw of Ghazni, told the Afghan Independent Journalists Association that he had received a written death threat from the Taliban. Subsequently, female employees of the independent media in Ghazni were forced to reduce their physical presence at the workplace and record their programmes at home.¹⁰⁰ On 18 May 2005, Shaima Rezayee, 24, was shot dead at her home in Char Qala, a neighbourhood of Kabul. She was the first journalist to be killed in Afghanistan since the end of the Afghan civil war in 2001. Reporters Without Borders and local authorities believe her killing was linked to her work as a presenter on Tolo TV. In 2007, Zakia Zaki, 35, was shot seven times as she slept in her bed with her young son. A respected journalist and human-rights activist in the province of Parwan just north of the capital, she headed the US-funded Peace Radio. She was also the principal of a local school and ran for parliament in 2005. Her killing came just days after the slaying in Kabul of Sanga Amach, 21, a news presenter for a Shamshad private television station. Both women had reportedly received threats, warning them to stop reporting.

⁹⁹ Committee to Protect Journalists, "Afghan journalist Ajmal Nakshbandi killed by captor" 9 April 2007, available at: <http://cpj.org/2007/04/afghan-journalist-ajmal-nakshbandi-killed-by-captor.php>.

¹⁰⁰ For a full report on the violence and aggression suffered by Afghan journalists Cf. Annex III.

Importantly, there is growing evidence that most human rights violations and restrictions on fundamental freedoms imposed under the Taliban regime between 1996 and 2001 are being revived in regions where the Taliban are present. In April 2009, the Taliban publicly executed, in Nemroz province, a couple accused of adultery. Both were shot dead in front of the mosque. On 16 August 2010, the Taliban restored death by stoning, and a young couple who had eloped to escape family pressures were killed in Dasht-e-Archi district, Kunduz province. Video footage shows that the crowd was mainly composed of Taliban members. There have been numerous similar cases of brutality and summary execution. On 11 November 2011, a group of armed men stoned and shot dead a woman and her daughter in Ghazni province, just 300 meters from the governor's office in Ghazni city, a territory prioritised for transfer to Afghan security control. The mother was accused of "moral deviation and adultery".

People working for government institutions have been targeted, killed and imprisoned by the Taliban, who deny the government's legitimacy. Some district officials have even been beheaded. As highlighted above, in the regions under their control the Taliban have also infiltrated *shuras* and are pushing for strict Sharia law enforcement. For that purpose, they threaten, intimidate and even kill local elders, indicating that where the State is weak, the legal vacuum left will be filled by the Taliban's law.

3. Human rights violations committed by international forces

As mentioned in section II, the Taliban have constantly invoked alleged crimes committed by international troops to call for their immediate withdrawal and present themselves as "freedom fighters". The involvement of international forces in a number of human rights violations during counter-insurgency operations cannot be denied and is paradoxically serving the insurgent cause.

Initially, in October 2001, the Afghan people were relieved to be rid of the Taliban and showed no particular hostility toward foreign troops on their soil. NATO soldiers stationed in Kabul in 2002 even spoke of the Afghans as "a friendly and quiet people". However, bombings, missiles and the coalition's unmanned aerial vehicles (UAVs) soon led to the killing of scores of civilians and thus fostered hostility.

Continued aerial bombing by NATO forces has caused an increasing number of civilian casualties. It has forced the Afghan Government to express criticism, at first shyly, but recently more openly, of the coalition's military operations. The President's position has been fuelled both by popular resentment within the Afghan population and pressure from the Taliban, notably since a rapprochement between the two has emerged. Several incidents were particularly traumatic for the Afghan population and gave the impression that NATO forces had a complete disregard for human life. On 6 July 2008, an air raid in Nangarhar province, a remote mountainous area in the Deh Bala district, resulted in the killing of 35 children, nine women and three men, who were headed to a wedding. At the time of the strike, the group was resting in Kamala village, on their way from the bride's village to the groom's. They were not associated with any insurgent group.

Lack of accountability following similar incidents by international troops including Afghan and international forces that remain outside the regular chain of command, in particular private security groups, severely undermine the credibility of the foreign forces and of their efforts

in Afghanistan, as it has nurtured resentment. It has further increased the perception among Afghans that international forces are above the law and unaccountable for their actions. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions declared that “the response of the international forces to incidents of alleged civilian casualties [was combining] great seriousness of intent and adherence to the applicable law with a surprisingly opaque and unsatisfactory outcome.” He further observed that “often those whose relatives had been killed were unable to ascertain any information as to those responsible”.¹⁰¹ The set-up of the Civilian Casualties Tracking Cell (CCTC) and the publication of non-binding guidelines on civilian compensation for troop-contributing countries in 2011 seemed to be positive steps. However, the CCTC has lacked both sufficient resources and adequate investigative powers to carry out its mandate effectively. Moreover, the implementation of the guidelines remains hindered by the absence of clear and practical procedures for recording civilian casualties, receiving claims, conducting investigations and offering remedies.

By July 2011, international forces working in cooperation with Afghan national forces were still responsible for a high number of civilian deaths. The number of civilians killed by NATO air strikes in the first half of 2011 was up 14%. Night raids – around 300 per month – conducted by national and international security forces have continued to generate fear, insecurity, distrust and anger amongst Afghan civilians, in spite of causing only 1% of civilian casualties throughout 2011.

In April 2012, under an agreement signed between the Afghan Defence Minister and the top US and NATO General in Afghanistan, the US relinquished control over controversial night-time raids in Afghanistan. This gave Kabul an effective veto on operations to capture and kill insurgent leaders, which US generals have long said are critical to the success of the decade-old war. Afghan forces will approve and lead all raids, and hold and interrogate all Afghan prisoners. However, a shortage of trained Afghan Special Forces means US forces are likely to remain substantially involved in carrying out night raids. Washington D.C. said that 97% of night raids are now joint operations involving Afghan forces, and the Associated Press stated that only about 40% were Afghan-led.¹⁰²

To add to the already tense situation on the ground, US forces, which form the bulk of the international presence in Afghanistan, have systemically been accused of various systemic human rights violations since 2001. In particular, they have allegedly committed human rights violations, such as arbitrary detentions, torture and humiliation, to fight the insurgency.

In 2001, dozens of Afghans suspected of having links to al-Qaeda were arbitrarily arrested, without any real evidence of such connections. They were then transferred either to Bagram US air base in Afghanistan or directly to the US military detention camp in Guantanamo Bay.¹⁰³ This detention camp facility was given the extraterritorial status in a bid to counter disquiet about practices that flagrantly disregard rules of international law. It has since been well documented that prisoners alleged to belong to the Taliban or, be pro-Al Qaeda, have been detained in both of these locations for years, and subjected to a wide-range of practices constituting humiliation

¹⁰¹. UNAMA report, 2008

¹⁰². Emman Graham-Harrison, Afghanistan takes control of night raids from US, 7 April 2012, The Guardian, available at: <http://www.guardian.co.uk/world/2012/apr/08/afghanistan-us-night-raids>.

¹⁰³. Located in Guantanamo Bay, south-east of Cuba. Guantanamo Detention Centre is built on a 116 square kilometre naval base that the United States hired in Cuba under the Cuban-American Treaty of 1903.

and torture. Furthermore, many detainees have not been given any form of fair trial or access to legal representation. In 2002, persons being held in the CIA interrogation centre at Bagram who refused to cooperate were allegedly kept standing or kneeling for hours while wearing black hoods or spray-painted goggles. At times they were subject to what are known as “stress and duress” techniques, such as being held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights.

In 2004, public outrage in Afghanistan spiked following the publication of reports of torture and humiliation in the Iraqi prison of Abu Ghraib. These reports acted as a detonator for the Taliban and other groups of insurgents to denounce similar cases of mistreatment in Afghanistan and Guantanamo Bay. In January 2012, the Afghan Government eventually demanded that the United States hand over their detention facilities to Afghan control, along with all Afghan citizens held by coalition troops across the country. In 2008, US President Obama promised to close Guantanamo by January 2010. However, a law passed by US Congress in late December 2009 made this promise impossible by prohibiting the use of public funds to transfer detainees to the United States or other countries, and requiring terrorist suspects to be brought before military courts. Guantanamo Bay remains in operation at the time of writing this report.

In February 2010, a group of UN human rights experts published a “joint study on global practices in relation to secret detention in the context of countering terrorism”. The damning report documented cases of arbitrary and secret detention of individuals in Afghanistan without trial or charges, as well as the extraordinary rendition of detainees from, to and via Afghanistan outside the ambit of international or national legal procedures. The study’s legal assessment concluded in unequivocal terms that “secret detention is irreconcilably in violation of international human rights law, including during states of emergency and armed conflict. Likewise, it is in violation of international humanitarian law during any form of armed conflict.”¹⁰⁴

In short, human rights violations by international forces have caused serious damage to the credibility and legitimacy of their presence in Afghanistan, and led to further instability and human rights violations in the country.

4. The risk of adopting a soft approach to accountability for crimes under international law

The United Nations and the International Criminal Court are the only two international bodies that have the mandate to protect the Afghan population against crimes under international law. This section analyses the role played by both the UN and the ICC in Afghanistan since 2001. It concludes that neither body has sought to address crimes under international law committed in the country, nor been able to successfully fight impunity.

a) The UN approach to the situation in Afghanistan

The United Nations Assistance Mission in Afghanistan (UNAMA) was established by the Security Council in 2002 at the request of the Afghan Government. However, UNAMA has had

¹⁰⁴. Joint study on global practices in relation to secret detention in the context of countering terrorism by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention (represented by its Vice Chair), and the Working Group on Enforced and Involuntary Disappearances (represented by its Chair), A/HRC/13/42.

dedicated human rights staff only since 2007. Currently, it has 66 human rights staff, deployed throughout the country. UNAMA human rights mandate, under United Nations Security Council Resolution 1974 (2011), is by now to :

- “monitor the situation of civilians, to coordinate efforts to ensure their protection”;
- “to promote accountability”;
- “to assist in full implementation of the fundamental freedoms and human rights provisions of the Afghan Constitution and international treaties to which Afghanistan is State party, in particular those regarding the full enjoyment by women of their human rights.”

On 22 March 2012, the UN Security Council unanimously adopted Resolution 2041 (2012) renewing UNAMA’s mandate until March 2013. In the mandate renewal, the Security Council put greater emphasis than ever before on monitoring abuses of international human rights law in Afghanistan, particularly against women and children. The Security Council also noted continued restrictions on freedom of media and attacks against journalists in the country. The new mandate also stresses the importance of a comprehensive and inclusive, Afghan-led and Afghan-owned political process to support reconciliation. The United Nations encourages dialogue with those who “renounce violence, have no links to international terrorist organizations”, including Al-Qaida, “respect the constitution,” including its human rights provisions, notably the rights of women, “and are willing to join in building a peaceful Afghanistan”. On the ground, however, the reconciliation process does not reflect these stipulations and certain groups, such as the Taliban, who actively reject the human rights enshrined in the Afghan constitution, are being invited to participate in political negotiations. The use of so-called “transitional dialogue mechanisms” such as Loya Jirgas, are being promoted and praised by the international community. However, these mechanisms are often not inclusive of women and thus do not respect the conditions outlined in UNAMA mandate.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) works in close cooperation with the Human Rights component of UNAMA, and issues regular reports on the human rights situation in Afghanistan to the Human Rights Council (HRC), pursuant to the HRC decision 2/113 of 27 November 2006. This practice was put into place after the former UN Independent Expert on Afghanistan, whose mandate expired in 2005, issued a critical report on the impact of the international forces in Afghanistan. OHCHR’s last report was presented on 18 January 2012, stating ongoing human rights problems, including harmful traditional practices such as child marriage, impunity for human rights violations, and discrimination and violence against women.

Beyond the OHCHR, the HRC also monitored the evolution of the situation through its thematic procedures, providing useful complementary information on the evolution of the human rights situation in the country. In particular, the Special Rapporteur on violence against women visited the country in 2005, the Special Rapporteur on extrajudicial, summary or arbitrary executions in 2008 and the UN Working Group on the use of mercenaries in 2009¹⁰⁵. Each mandate

¹⁰⁵. Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Mission to Afghanistan (E/CN.4/2006/61/Add.5) ; report of the Special Rapporteur on extrajudicial summary or arbitrary executions - Preliminary note on mission to Afghanistan I (A/HRC/8/3/Add.6) ; report of the Special Rapporteur on extrajudicial, summary or arbitrary executions - Mission to Afghanistan (A/HRC/11/2/Add.4) ; report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination - Mission to Afghanistan (A/HRC/15/25/Add.2) .

issued thorough recommendations, which unfortunately remain far from being implemented. In 2011, the Special Rapporteur on extrajudicial, summary or arbitrary executions issued a follow-up report in which it regretted that extrajudicial killings remain widespread, and that “no concrete action has been taken on many recommendations regarding threats to life and on extrajudicial killings.”¹⁰⁶ He moreover regretted the absence of cooperation received from the Afghan Government in preparing his report. In fact, since 2009, no Special Procedures were able to visit the country, in spite of repeated requests.

Despite the UN’s concerted efforts to monitor and support human rights, some of the UN’s other activities in Afghanistan, have had worrisome human rights records. In particular, relevant UN Security Council Committees, including the Committee established pursuant to UN Security Council Resolution 1267 (1999), the Counter Terrorism Committee, the United Nations Office of Drugs and Crime, and the Counter-Terrorism Executive Directorate have failed to, in collaboration with international organisations and expert groups, set up appropriate institutions and transparently implement efficient mechanisms to guarantee full respect for human rights in fostering regional security and coordinating the fight against international terrorism.

The Security Council sanctions regime against the Taliban and Al-Qaida, originally established under Resolution 1267, lacks transparency and standardized criteria for listing and delisting, and was designed with serious human rights shortcomings, which have been denounced by certain judicial bodies, the UN Human Rights Committee and the UN Special Rapporteur on human rights and counter terrorism.

Resolution 1267 was limited in time and space, intervening under Chapter VII of the UN Charter and targeting the then Taliban regime of Afghanistan to pressure it to hand over terrorist leader Osama bin Laden. After the fall of the Taliban regime, the Resolution was converted (Resolution 1390 (2002)) into a consolidated list of Taliban and Al Qaida terrorists (Resolution 1390 (2002)), without temporal or geographic limitations. It imposed the freezing of assets and a travel ban of individuals and entities without ensuring respect of fair trial and due process, and the necessary guarantees around the right to privacy, freedom of movement and right to property.

To respond to criticism, the Security Council established the office of a Delisting Ombudsperson through Resolution 1904 (2009), responding partially - though not fully -, to concerns of due process. Despite the reforms, the Special Rapporteur on human rights and counter terrorism maintains the position that the procedures for terrorist listing and delisting do not meet international human rights standards.

In June 2011, the Security Council further modified its sanctions regime by separating the Taliban and Al Qaida lists. The Taliban are thus covered by the new Resolution 1988 (2011), which is based on the territorial limitation of Afghanistan. Yet, as mentioned by the Special Rapporteur on human rights and counter terrorism, it took “retrogressive steps” in relation to the human rights concerns.¹⁰⁷ In particular:

¹⁰⁶. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions - follow-up to country recommendations: Afghanistan (A/HRC/17/28/Add.6), p. 21.

¹⁰⁷. See «The new UN listing regimes for the Taliban and Al-Qaida » - Statement by the Special Rapporteur on human rights and counter terrorism, Martin Scheinin, June 29, 2011.

- It established grounds for delisting that are openly political, covering “individuals that meet the reconciliation conditions agreed to by the Government of Afghanistan and the international community”, which include the “respect for the Afghan Constitution”, without regarding their accountability for past crimes; and
- It withdrew the role of the Delisting Ombudsperson to independently review the list, thus moving backwards in terms of human rights protection, instead of improving due process and fair trial shortcomings.

In practice, as the reconciliation process started to unfold in 2010, the Afghan President solicited the Security Council to delist the names of Taliban who had renounced violence and joined pro-government forces. The Security Council eventually acceded to this request and started de-listing some names. In January 2010, it removed the name of the former Deputy Minister of Frontier Affairs, Abdul Hakim, who had left the Taliban movement and had been named as Governor of Uruzgan province in May 2007. In July 2010, the names of five other Taliban members were removed, including that of Abdul Hakim Mujahid Muhammad Awrang, the Taliban’s former Afghan representative to the UN, and Abdul Salam Zaeef, who served as the Taliban’s Afghan ambassador to Pakistan.

On 12 July 2010, the UN special envoy in Afghanistan, Steffan de Mistura, stated that the UN were studying the possibility of withdrawing the first ten names on a list of 70 individuals submitted to President Karzai following the June 2010 Peace Jirga in Kabul. On 18 July 2011, the Security Council, through its sanctions committee, removed another 15 former Taliban officials from its list. Ten of these individuals had not played any significant role during the Taliban regime; however, four had held high-level positions. These individuals included Maulvi Arsala Rahmani, who served as Deputy Minister of higher education; Said Rahman Haqqani, the former Deputy Mines Minister; another Deputy minister Faqir Mohammad; and Habibullah Fouzi, former Taliban ambassador to Saudi Arabia. All four are members of the High Peace Council.¹⁰⁸ The Taliban’s reaction to the removal of these names was that the persons concerned were no longer part of their movement and would not be authorised to represent them at any forum.

The sanctions imposed on the 123 Taliban figures that remain on the list seem to have little impact on the movement. Sanctions include a ban on air travel, the freezing of bank accounts and an arms embargo, none of which are relevant to the Taliban as far as their operations are concerned. However, repeated delisting requests from President Karzai, which include some top Taliban leaders such as Mullah Mohammad Omar and former Mujahedeen leader Gulbaddin Hekmatyar (Hezb-e Islami leader), display the government’s intention to reconcile with all Taliban elements, including those individuals who still play an active role in the insurgency.

In sum, attempts by the international community to support the reconciliation process have included highly dubious components, including the removal of Taliban leaders from the UN Security Council sanctions list at a time when the Taliban-led insurgency remains violent and harmful to Afghan and regional stability.

¹⁰⁸. Maulvi Arsala Rahmani was assassinated in Kabul on 13 May 2012.

b) The role of the International Criminal Court

The ICC can prosecute individuals for crimes of genocide, crimes against humanity, and war crimes that have occurred since Afghanistan's ratification of the Rome Statute on 1 May 2003. The Office of the Prosecutor (OTP) of the ICC has actually received dozens of communications under Article 15 of the Rome Statute and has therefore opened a preliminary examination of the situation in Afghanistan, which became public in 2007. Since then, it has sought and analysed information from multiple sources (experts, civil society organisations, Afghan Government officials, UN officials, and contributing states to ISAF in Afghanistan) on alleged crimes committed in Afghanistan. The OTP report on its preliminary examination, published on 13 December 2011,¹⁰⁹ listed the following crimes as alleged to have been perpetrated in Afghanistan:

- **Killings:** According to UNAMA, over 10,000 civilians have been killed in the conflict in Afghanistan between 2007 and 2011. These killings have increased in both frequency and intensity over the years with the majority attributed to insurgents and occurring in the southern, south-eastern and eastern areas of Afghanistan. Over the last five years, most civilian fatalities attributed to insurgent groups have reportedly resulted from suicide and improvised explosive device (IED) attacks. The Taliban and other insurgent groups are allegedly also responsible for deliberately killing selected Afghan and foreign civilians perceived to support the Government of Afghanistan and/or foreign interests. Politically active women are often targeted. There is also information about civilian deaths occurring in the course military operations (including aerial bombardments and search and seizure operations) conducted by "pro-governmental forces". Their number has gradually decreased over time reaching an all time low in 2011.
- **Torture:** There have been allegations of acts of torture or other cruel, inhuman or degrading treatment against detainees by various parties to the conflict. The OTP has received and will continue seeking further information on steps taken by the Afghan Government and pro-government forces to thoroughly examine such allegations and ensure accountability for those possibly involved in the mistreatment of prisoners.
- **Attacks on humanitarian targets and the UN:** Each year since 2008, the Afghanistan NGO Security Office has recorded over 100 security incidents affecting NGOs in Afghanistan. A number of these incidents may have been the result of deliberate attacks. UN staff and installations have also been targeted on several occasions, including two high profile attacks in 2009 and 2011.
- **Attacks on protected objects:** Since May 2003, insurgents have been held responsible for numerous attacks on protected objects, including mosques, hospitals and MEDEVAC helicopters. There have also been persistent attacks on girls' schools by means of arson, armed attacks and bombs.
- **Recruitment of child soldiers:** Both insurgent groups and Afghan forces have been accused of recruiting and using children. Insurgents have reportedly used children to carry out suicide attacks, plant explosives and transport munitions. The Taliban have denied this claim, referring to their policy prohibiting the use of children. The OTP has been informed of steps taken by the Afghan Government to protect children's rights, including the conclusion of an action plan for the prevention of under-age recruitment with the UN Special Representative for children and armed conflict in January 2011.

¹⁰⁹. Office of the Prosecutor, *Report on Preliminary Examination activities*, 13 December 2011.

However, while a large number of crimes have been, and continue to be, reported, verifying the seriousness of all allegations and obtaining the detailed information required to conduct a proper legal assessment of each reported incident and alleged individual responsibility has proven to be very challenging and time-consuming according to the OTP.

It must be reaffirmed that ICC jurisdiction is not weakened by the bilateral agreement signed between the Government of Afghanistan and the United States in the context of the so-called ‘impunity agreements’ of the George W. Bush Administration. The agreement was signed on 20 September 2002 to promote amnesty and specifically protects both US citizens in Afghanistan and Afghan citizens in the US from ICC jurisdiction. However, this agreement remains without effect before the ICC whose Statute excludes any type of amnesty. The ICC has jurisdiction in the absence of implementation of the principle of complementarity, namely, when national jurisdictions are unwilling or unable to prosecute alleged perpetrators of crimes within their jurisdiction.

In its report, the OTP also explains that “as part of the positive complementarity policy, the OTP has taken steps to encourage key actors to consider and promote accountability mechanisms within areas of their own purview”. Unfortunately, the OTP report lacks any further detailed information.

It is crucial that the role of the ICC in Afghanistan be strengthened in order to contribute to deterring any further crimes from being perpetrated and going unpunished. Affirmation of the OTP’s mission and a public declaration on national proceedings are needed in order to reassert the Court’s jurisdiction and take action in Afghanistan. Therefore, the assertion of ICC jurisdiction over the most serious crimes committed since 1 May 2003 would be both timely and useful. The ICC Prosecutor would thereby respond to victims’ desperate need for justice and thus contribute to breaking the vicious circle of impunity.

V. Conclusion and recommendations

Following 30 years of war, serious human rights violations and repeated political upheaval, efforts have been made for more than a decade to foster democracy, the rule of law and respect for human rights in Afghanistan. Achievements include the adoption of a Constitution with strong references to human rights, an improved legal framework, the establishment of the Afghanistan Independent Human Rights Commission and some progress in the field of access to education and women's rights. In the post-2001 era, Afghan society has been characterised by the expression of its diversity more than ever before. Its political, social and cultural as well as ethno-linguistic diversity shows that Afghanistan cannot be reduced to stereotypes. Factors of change do exist in Afghanistan, as illustrated by the mushrooming of NGOs, the development of education institutions, and the emergence of media outlets in the country, both quantitatively and qualitatively.

But the past ten years have also been marked by a number of important failures. The Afghan government and the international community were not able to effectively strengthen the justice system, to the point that tribal justice is now presented as part of the solution, in spite of the risks it entails for universal human rights. Important provisions of the Constitution have not been adequately implemented, in particular mechanisms for checks and balances, judicial capacity to determine constitutionality, or the precedence of human rights over other norms. Last but not least, impunity remains widespread, for past crimes but also for current serious human rights violations. Democratic achievements in Afghanistan are extremely fragile. Government institutions remain weak; they are plagued with corruption and have not yet been able to establish the rule of law or effective governance throughout the country.

The numerous human rights violations and active anti-democratic forces at play in Afghanistan present clear threats to the transition process towards peace and reconciliation. They could seriously undermine the hard-won democratic processes, and create conditions conducive to civil strife, if adequate measures are not being put in place. The prospect of the forthcoming NATO military disengagement from Afghanistan, combined with Taliban's increasing presence in important positions and institutions, make the adoption of such measures even more urgent.

1. Recommendations to the Government of Afghanistan

On the administration of justice and the fight against impunity, the Government of Afghanistan should:

- Investigate human rights violations taking place in Afghanistan, bring those responsible to justice and ensure that remedies are effective. These include violations against human rights defenders, journalists and political opponents, such as assassinations, torture, threats and attacks. Acid-throwing against women and girls and other gender-based violence should not remain unpunished.

- Propose and implement a solid framework for the establishment of transitional justice mechanisms, in collaboration with the AIHRC, Afghan civil society, human rights organisations and victims' groups. Such mechanisms might include truth commissions, redress for victims and memorial centres, to complement criminal justice mechanisms. As part of that commitment, the Government should revive and implement the victim-oriented Action Plan for Peace and Reconciliation, as originally drafted in 2005.
- Abolish, through the Parliament, the Public Amnesty and National Stability Law as it clearly violates Afghanistan's Constitution and the country's international treaty obligations, and is an obstacle to a just and lasting peace.
- Strengthen the Afghanistan Independent Human Rights Commission and guarantee its independence. It should ensure that the AIHRC is fully involved in all processes related to peace and reconciliation, and immediately release the AIHRC mapping report on human rights violations in Afghanistan during the conflict.
- Invite the United Nations to investigate and document crimes under international law committed by the Taliban and other armed groups in Afghanistan.

On women's rights, the Government of Afghanistan should:

- Ensure equal representation of women at all stages of any peace negotiation, at key government posts, in the judiciary and on decision-making bodies. Women should also be represented in the implementation of negotiated agreements in line with UN Security Council Resolution 1325 on women and armed conflicts.
- Repeal all discriminatory laws against women, notably the Shiite Personal Law, the law on marriage, discriminatory provisions in the Criminal Code and property law, and discriminatory customary laws. Steps should be taken, with the support of the international community, to end recourse to informal parallel customary courts and to ensure that women have full and effective access to the formal justice system.
- Strengthen, in coordination with the Supreme Court and the Office of the Attorney General, the implementation of the Elimination of Violence against Women (EVAW) Act.
- Keep improving women's access to social rights, such as healthcare and education, throughout the country.
- Continuously and broadly consult with civil society organizations and the AIHRC in the preparation of State reports to CEDAW and implementation of CEDAW's concluding observations and recommendations made by the Special Rapporteur on violence against women, its causes and consequences.

On capacity-building of State institutions, the Government of Afghanistan should:

- Refrain from interfering with the Judiciary, and make sure that the control of constitutionality can be exercised fully and independently by relevant bodies composed of competent legal experts.

- Grant full powers to the Elections Commission and ensure, through the Commission for electoral complaints, healthy vetting processes in collaboration with AIHRC. Independent monitors should be mandated by the international community to reinforce vetting processes and prevent election fraud in the future.
- Fight, in cooperation with the international community, the endemic corruption that prevents democratic institutions from functioning adequately.
- Make sure that a new process of disarmament of the population is implemented throughout the entire territory, and that borders are sufficiently manned in order to prevent arms trafficking.

On cooperation with UN human rights mechanisms, the Government of Afghanistan should:

- Consult and work with human rights NGOs, civil society organizations and the AIHRC in implementing the recommendations issued by the UN OHCHR, Special Procedures, treaty bodies and the Universal Periodic Review.
- Extend a standing invitation to the Special Procedures of the UN Human Rights Council, respond promptly to their requests for visit, such as the one made by the Special Rapporteur on torture, and respond to any request for information on individual cases or general trends, such as those of the Special Rapporteur on extrajudicial executions.

2. Recommendations to the United Nations

- The United Nations Human Rights Council should appoint a Special Rapporteur on the human rights situation in Afghanistan with a mandate to examine, monitor, advise and publicly report on the human rights situation in Afghanistan, to respond to individual victims' complaints, and to streamline, in cooperation with the Afghan authorities, a roadmap for the implementation of UN human rights recommendations.
- The UN Security Council should review Resolution 1988 on the Taliban so as to:
 - Modify the delisting criteria to ensure that all individuals suspected of being responsible for, or complicit to, international crimes as defined by the Rome Statute, be investigated and, where applicable, stand before an independent tribunal for their alleged crimes before being delisted.
 - Re-extend the mandate of the Delisting Ombudsperson, introduced through Resolution 1904 (2009), to receive individuals' or entities' requests for delisting.
 - Provide the Delisting Ombudsperson access to all information used for listing.
 - Ensure delisting recommendations by the Ombudsperson are in practice respected, so that they are not overturned through consensus decision by the 1267 Committee or referred to the Security Council.
 - Provide to all individuals and entities listed with the full set of information that is used as the substantive basis for the listing proposal, and with the rights and practical means to effectively challenge the proposal.

- The United Nations must ensure that respect for human rights is at the core of any cooperation agreement between the Government of Afghanistan, neighbouring countries and the international community to promote regional security and fight international terrorism.

3. Recommendations to NATO Member States and donor countries

- As recommended in the 2011 annual report of the United Nations High Commissioner for Human Rights, NATO and other international military forces as well as Afghan National Security Forces must ensure that systems are in place so that incidents causing civilian harm and the misconduct of international troops are properly documented and followed up with credible and transparent investigations. All those affected must be offered appropriate redress, including guarantees of non-repetition, compensation, apologies, investigations, and other tangible gestures of recognition. Compensation should be provided promptly, uniformly and systematically to all civilian victims of conflict-related casualties and of human rights violations.
- NATO member States and donor countries must ensure that the progressive withdrawal of international troops is accompanied by a serious commitment to support the strengthening of democratic institutions countrywide (including the formal justice system) and capacity-building within the Afghan National Security Forces. The recommendations made by the United Nations High Commissioner for Human Rights in her 2011 annual report to support and strengthen institutional capacity through the United Nations Assistance Mission in Afghanistan, must be implemented. The Afghan Independent Human Rights Commission must receive appropriate support, and their independence must be guaranteed.
- Donor countries should support the still fragile civil society and NGOs community in Afghanistan, including human rights organisations, and it should ensure that development assistance fully addresses needs defined in consultation with Afghan civil society, including women, and contributes to the strengthening of democratic institutions and the rule of law.

4. Recommendations to the International Criminal Court

- The Office of the Prosecutor of the ICC should issue regular and detailed reports on the status of its preliminary analysis of the Afghan situation.
- The Office of the Prosecutor of the ICC should publicly communicate its activities that aim to implement positive complementarity.
- Because national justice mechanisms have demonstrated their inability or unwillingness to genuinely investigate and prosecute the main perpetrators of international crimes, the Office of the Prosecutor should open an investigation into crimes under ICC jurisdiction committed in Afghanistan since 2003, and respond to victims' needs for redress.

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Armanshahr Foundation/OPEN ASIA is a non-governmental, not-for-profit and independent organisation of active citizens committed to bringing together progressive minds and action benefiting a culture of human rights and ensuring citizen social demands for democracy, women's equality, justice and rule of law in Middle Asia– Afghanistan, Tajikistan, Iran.

The Foundation's mission is to create environments proper for democratic debate and exchange in the public arena and notably through forums and cultural manifestations pursue activities in favour of enlightenment. Armanshahr also actively promotes dialogue both inside Afghanistan, trans-regionally and internationally with the goal of ensuring solidarity, progress and safeguarding peace. In 2010, Armanshahr launched the Simorgh Peace Prize.

Armanshahr is also an active Publishing House producing Politis-asia – a journal on contemporary issues, and Armanshahr – a periodical on Human rights and civil society. Armanshahr publishing has printed more than 100,000 books in the last years for a variety of publics in order to contribute to the creation of a broad constituency of well-informed citizens.

OPEN ASIA was founded in Tajikistan in 1995 and registered activities in France and Denmark in year 2000. Armanshahr Foundation has been active inside Afghanistan since 2006. Armanshahr is a member of the International Federation for Human Rights.

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of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest,

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