

Monitoring & Evaluation (M&E) in the Justice Sector

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Executive Summary:

Despite considerable national and international efforts in the reconstruction of Afghanistan’s justice sector, it remains difficult to measure what and where progress has been made. A comprehensive M&E system aims at creating a feedback loop on identifying persistent deficiencies, best practices, and recommending successful interventions for emulation.

Objectives:

1. *Operationalising Commitments*: living up to and fulfilling Compact benchmarks.
2. *Good Governance*: institutional self-evaluation to ensure command and control.
3. *Accountability*: office holders live up to standards of public and international law.
4. *Aid Effectiveness*: measuring results and establishing best practices.

Activities:

1. *Strengthen existing internal oversight units* in the three permanent justice institutions to enable them *to monitor themselves*. This should be an integral part of the ongoing public administration reform TA, especially pertinent to the upcoming EC justice PAR (6th Framework Agreement Support to Public Administration Reform).
2. *Monitor judicial performance and fairness by an external body*. The recently started UNAMA pilot Court Monitoring project and the ISISC Provincial Justice Initiative are useful starting points. In analogy to the East Timorese “Judicial Systems Monitoring Project” (JSMP) which started as an international effort and was gradually transferred to national ownership, external court monitoring in Afghanistan should be gradually handed over to a

national body/NGO. One of the currently active international implementers should be designated to continue material support and technical expertise.

3. *Monitor aid effectiveness.* ANDS Secretariat is given international and national TA to coordinate an integrated sectoral approach among the three permanent justice institutions and international agencies. The placement/secondment of one international expert and two national staff should be jointly financed, perceived as neutral and maintain a friendly distance to existing implementers and mediate the competition between national institutions. There are potential linkages to the approach proposed in the State Department/INL “Provincial Justice Coordination Mechanism” Document, an integration of the task proposed here with the mandate suggested in that document is desirable.

Expected Results:

1. Base-line of statistical data on de facto functioning of all three justice institutions throughout the country is established; managerial decisions at the centre are effectively communicated to the provinces and implementation reported back; reformed organisational structure corresponds to de facto reporting lines and effective communication channels are operative; organisational data is publicly available.
2. Function and fairness especially of provincial courts are continuously monitored and independently reported. Increased transparency and publicity of proceeding is having a beneficial effect on substantive and procedural justice.
3. International financial and technical assistance is spent effectively and efficiently; justice institutions are able to cooperate on a sector-wide integrated reconstruction strategy; training and refurbishment activities no longer supply-driven but corresponding to local needs and reinforcing each other; needs are prioritised and best practices identified and circulated.

Introduction:

Despite the dedicated work by both Afghan and international experts and agencies over the course of the past five years, the rehabilitation of the country's justice institutions continues to face significant challenges before it can live up to the goals outlined in the Afghanistan Compact.

Identified as one of five 'lead' sectors in the post-Bonn process, the justice field is deemed indispensable for the successful reconstruction of sustainable economic and political recovery. It has also posed a number of particularly daunting challenges to successful reform. Chief among these are the traditional division of the sector into three distinct institutions (Ministry of Justice, Attorney Generals Office, Supreme Court) whose distinct organisational traditions and the lack of effective communication between them have delayed the formulation of a comprehensive and integrated sectoral strategy. Given these difficulties in formulating organisational needs and harmonising them across the sector, much of international assistance has been supply-driven, with an often underwhelming impact in terms of effectiveness and efficiency. The emphasis has often been on high visibility, low impact projects offered to local counterparts *after* planning had been finalised at donor level, rather than the more difficult long-term work that focuses on improving administrative mechanisms and organisational cultures whose impact will be visible only after some time.

While the emphasis on political institutions and processes stressed in the Bonn Agreement is understandable in the given circumstances, it must be stressed that the indispensable foundation of state-building is the creation of administrative capability. In this respect the justice sector mirrors the overall difficulty of public administration reform in Afghanistan. Those training and capacity building measures that have been undertaken have often aimed at disseminating normative commitments enshrined in the constitution or in international conventions, but largely neglected the technical and managerial needs of a currently largely dysfunctional civil service.

Given the lacklustre performance record of reform and reconstruction in the justice sector during the past five years, it is questionable whether current approaches are sustainable in the face of clearly articulated political commitments towards achieving *tangible* results in the medium-term. The establishment of a comprehensive monitoring and evaluation (M&E) system will ultimately help justifying continued resource flows through the achievement of *measurable benchmarks*, and thereby serve the best interest of both Afghan justice institutions as well as international implementing organisations. In this respect the upcoming Rome Conference

expressly convened to counter 'donor fatigue' among Western publics must be seen as a major challenge but also opportunity for the joint assistance effort to the justice sector.

Existing Political Commitments:

Virtually all counterparts consulted in Kabul agreed on the necessity to establish some form of M&E system to ensure greater aid effectiveness and best practices; several actors have furthermore indicated that the present international environment augurs well for a concerted approach since donor capitals are increasingly demanding evidence that investments in institutional capacity are yielding concrete results. This reflects the considerable political agreement that exists in this respect between the Afghan government and the international community as expressed in Annex II of the Afghanistan Compact:

“These mutual commitments are intended to ensure that the donor assistance being provided to Afghanistan is *used efficiently and effectively*, that there is *increased transparency and accountability*, and that *both Afghans and the taxpayer in donor countries are receiving value for money*.” (emphasis added)

The recent high-level mission sent by the UN Security Council “*to give assurance to the Afghan society of the continued commitment by the international community to the Afghan process based on the Afghanistan Compact and Security Council resolution 1662 (2006) under Afghan leadership*” is equally adamant about the need to hold both international assistance and local institutions accountable for the progress, or lack thereof, towards the establishment of the rule of law:

“More effective mechanisms for strategic planning, funding and coordination of rule of law programmes among international donors and agencies at the national and provincial levels are required. There is also a need to address the problem of endemic corruption within the judiciary and for a *comprehensive review of judicial service*. The mission calls upon donors to *increase the coherence and scale of assistance* in the development of Afghanistan’s human capital, with special priority to be given to the reform of the country’s civil service. *An assessment of technical assistance efforts should be undertaken with a view to the realization of maximum use of such assistance*.” (para. 39, emphasis added)

These sentiments are shared by virtually all reports consulted for this study, invariably stressing the need for more accountability of both national institutions and

international actors through effective monitoring, coordination, benchmarking, and the establishment of best practices. There is, however, considerable ambiguity about the feasibility of comprehensive M&E in the face of strong countervailing organisational interests, structural constraints, and resource shortages.

Desirability of M&E:

There are four broad reasons for the desirability of a comprehensive M&E system:

1. *Operationalising Commitments*: living up to and fulfilling Compact benchmarks.
2. *Good Governance*: institutional self-evaluation as a precondition for autonomous decision-making, command and control.
3. *Accountability*: of office holders towards rights holders measured against normative commitments of the state in public and international law.
4. *Aid Effectiveness*: making sure international aid is most efficiently spent by measuring results and establishing best practices.

Operationalising Commitments:

The importance of the justice sector for the overall reconstruction of Afghanistan is universally acknowledged, and there is a palpable sense of frustration with the lack of visible progress after five years of considerable national and international efforts. Both the Afghanistan Compact and the Afghanistan National Development Strategy (ANDS) describe the reform of the justice sector as a priority objective, committing both the government and the international community toward the attainment of measurable benchmarks, stressing thereby the importance of a comprehensive monitoring and evaluation framework to periodically assess progress and challenges. The high-level Joint Coordination and Monitoring Board (JCMB) seeks to address repeated criticism about the lack of comprehensive strategic planning and insufficient oversight and performance indicators. It is, however, questionable whether the Board or its as yet non-existing Secretariat will be able to effectively oversee the justice sector without significantly improving data collection, data clearing and reporting capacities.

Good Governance:

Even disregarding the considerable problems of entrenched corruption, nepotism and irregularities of due process, the present administrative and professional capacity of all three permanent justice institutions is unable to deliver even rudimentary justice to the vast majority of citizens, leading to an estimated 90% of disputes being resolved by traditional non-state mechanisms. Effectively addressing this serious capacity shortage has been hampered by an international assistance effort that has often been haphazard, disjointed and ill-suited to the needs of the institutions. Equally important, however, it has been hampered by extremely factitious relations between the Afghan institutions whose claims of procedural independence have often been taken at face value with little regard for a comprehensive sectoral vision or the judicious use of limited financial and technical resources.

Despite nominal units in all three institutions charged with internal oversight, it is at present highly questionable whether reporting lines are operational and meaningful internal incentive and discipline structures exist. Without these, however, all present emphasis on administrative reform (especially pay and grading) is unlikely to yield significant performance improvements.

Accountability:

A large number of commissioned reports and significant anecdotal evidence support the contention that at present the justice system falls significantly short of the normative standards enshrined in the constitution, national legislation, and international conventions. But while there is agreement about both the applicable minimum legal standards and the problematic state of the present justice system, there is considerable debate about the best way of moving towards greater implementation of these normative standards.

Internal oversight mechanisms and formal appeal procedures remain nominal and cannot be relied upon to provide effective redress to charges of malpractice by outside justice-seekers. Institutional checks and balances exist only in their most rudimentary forms and no formal complaint/ombudsman system exists. The present system of nominally relying on organisational self-policing must be supplemented by some form of *external* oversight if accountability of justice institutions is to be improved, because all administrative theory and experience teaches us that virtually all organisations are highly ineffective self-evaluators.

Aid Effectiveness:

The same holds true for international assistance efforts which remain largely supply-driven and whose effectiveness is assessed, if at all, by the implementing organisation itself. Even if disregarding the inherent tendency of such an arrangement towards self-serving assessments, this procedure is unable to evaluate how any given project fits into the overall strategic vision for the sector. Many reports, including the I-ANDS especially lament this latter aspect and suggest a greater channelling of external assistance through the regular budget to ensure better coordination, quality control of technical assistance, and matching aid with actual local needs.

Desirable as this may be, it is unlikely that donors will forego domestic control over project implementation in the foreseeable future. A reasonable substitute could thus be to enable the government, for instance through its ANDS Secretariat, to oversee and evaluate international assistance with a view not only of individual project performance but especially with regard to its perceived contribution to the overall strategic vision for the sector.

Possible types of M&E:

Despite the general political agreement about the desirability of M&E, there is considerable ambiguity about the precise scope of the term and subsequently about the best ways of implementing it. A comprehensive M&E system requires broad political agreement about its basic characteristics and a uniform approach to its implementation. Depending on the type of oversight deemed necessary, very different institutional solutions need to be devised:

1. *Base-line studies and internal oversight:* deal with physical and institutional infrastructure and overall administrative performance; this concerns primarily *quantitative* (statistical) data collection about the quality of public administration in the justice field; it requires constructive cooperation by the national authorities for the necessary access to internal documentation.
2. *Monitoring of ongoing system performance* against an agreed normative standard, including ombudsman/complaints channels; this concerns primarily a *qualitative* assessment of outcomes, i.e. can be measured by an outside agency not necessarily dependent on administrative cooperation.
3. *Evaluation of effectiveness and impact* of capacity-building measures such as trainings, services and infrastructure provisions, especially by international

actors; providing a feedback-loop establishing best practices and allowing for prioritisation. This requires international consensus and willingness to cooperate and endure potentially intrusive oversight.

In addition to these 'horizontal' distinctions, one furthermore needs to define the 'vertical' level of monitoring, i.e. how broad one is to conceive of the justice sector. A useful first step would be to concentrate on *court proceedings*, but a possible second step would include *pre-trial police* and *prosecutorial action*, as well as post-trial *detention* and the enforcement of *civil verdicts*.

It is possible to define the justice sector yet more broadly by including *informal non-state dispute settlement mechanisms*. While certainly important by virtue of their de facto dominance, informal systems pose a number of distinct challenges to a comprehensive monitoring activity, both normatively and methodically. There is much disagreement about the desirability and feasibility of international interaction with the informal sector and the extent to which such efforts could further undermine an already weak state, thus posing the question whether scarce resources should not instead be concentrated on strengthening state institutions. There are also significant methodical concerns which underline that the very strength of the informal sector lies precisely in its independence from outside control, thus calling into question the feasibility of external efforts at influencing or even merely observing its operations. At any rate, most experts consulted seemed to agree that whatever the desirability of including the informal sector into a comprehensive assessment of justice in Afghanistan, modes of operation are so different as to make it questionable whether a common M&E system could cover both informal and state institutions. For these reasons *we recommend to concentrate, at least initially, on the formal permanent justice institutions*. It might be advisable to *begin with* the operations of *the courts*, in order to subsequently expand 'up- and downstream' to include pre-trial and post-trial police, prosecutorial and detention services.

Discussion among stakeholders yielded furthermore a consensus that all three 'horizontal' types of supervision are necessary in the Afghan context. Given their distinct organisational and methodological requirements, we need to accept that a comprehensive M&E system *cannot be entrusted to any one institution* whether already existing or not. The internal aspects of managerial oversight will have to be fulfilled by each existing justice institution as part of their ongoing efforts towards public administration reform. Such oversight systems are an integral part and precondition of any effective bureaucratic machinery, therefore it would be *inadvisable to devise oversight units in isolation from overall administrative capacity building*.

In contrast, normative monitoring of justice sector *outputs* cannot simply rely on factual assertions by the institutions charged with providing these services. Given inherent *organisational self-interests* of preserving autonomy and protecting established processes and members, it would be *unreasonable to expect rigorous introspection*, especially when dealing with external charges of wrong-doing. Some measure of institutional checks and balances, i.e. officially mandated oversight of one organisation by another is therefore indispensable to ensure effective service-delivery. In this respect much emphasis has been placed on the need for formal complaint mechanisms, for instance through an ombudsman scheme. The *Independent Afghan Human Rights Committee* has already been given a broad constitutional mandate which arguably encompasses such normative oversight over the judicial process. The consultations, however, uncovered reservations about burdening an already strained institution with yet another substantial task. Further reservations were expressed regarding the limited credibility enjoyed by the Commission with Afghan audiences and regarding its highly acrimonious relations with other branches of the government.

A possible alternative alley for institutional checks and balances could be in principle the *Judicial Committee of Parliament*, working both on its own initiative as well as receiving petitions. Given the classical origin of the ombudsman institution in parliamentary prerogatives, this approach appears institutionally sound as well as fulfilling the stated desire to avoid creating completely new institutional structures as well as working within and thereby strengthening the state. Unfortunately, Parliament (particularly in its legislative capacity) is still to become a mature democratic institution that could win the confidence of the public necessary to function as an Ombudsman. Thus even if this approach may appear institutionally sound there are considerable concerns in terms of its viability and ability to gain donors' support.

Current efforts to empower an independent NGO to fulfil such a normative oversight role are not necessarily incompatible with this approach and could in due course complement parliamentary control of the justice sector once the legislative has gained sufficient practical experience and established public confidence.

The third aspect concerning the evaluation of aid effectiveness poses a number of distinct challenges. Virtually unanimous professions to its necessity notwithstanding, historical experience from other international assistance efforts strongly cautions against overly optimistic expectations of an effective coordination and benchmarking system. Given strong inherent organisational and national interests running contrary to the stated goal of strategic complementarity, it is unreasonable to expect a dramatic departure from established patterns in justice sector assistance in

Afghanistan. Nevertheless, recent efforts at greater information sharing, and by implication coordination, through the published justice sector matrixes and formalised regular coordination meetings are boding well for an eventual qualitative feedback system establishing best practices and identifying unworkable/undesirable habits.

It has been suggested that many if not all international agencies involved in justice sector assistance are engaging in practices undermining the integrity and sustainability of public administration reform, not least through the disbursement of per diems, salary top ups, etc. The issue presents itself as a classic common action problem where certain expectations on behalf of the beneficiary institution have to be met by an individual international agency in order not to endanger ongoing projects in whose continuation and success it has a vested interest. Changes have to be agreed and supervised at a comprehensive sectoral level. Furthermore, persistent complaints by Afghan institutions that technical assistance and training measures are supply driven and fail to meet local needs are unlikely to lead to changes in international behaviour in the absence of a comprehensive sectoral strategy. In this respect it has to be stressed that in the past five years a comprehensive strategic vision and a prioritisation of needs has been lacking, and that current commitments in the Afghanistan Compact and I-ANDS remain at an unworkable level of generality.

Deducing from these highly general aims operational commitments and *measurable* benchmarks is the indispensable precondition for any effective M&E exercise. Agreeing on sector-wide stepping-stones is a political exercise between the Afghan government, i.e. the three justice institutions (plus the Ministry of Interior for the police) in conjunction with the international community, i.e. with the development agencies charged with providing technical and other assistance. The strategic frameworks being prepared by the institutions as part of the wider I-ANDS exercise are precisely the right format for the attainment of this goal. Unfortunately, at present these documents lack an *internal* strategic vision and focus disproportionately on requests for *external* material assistance. In the absence of such a strategic vision for future development, however, M&E makes little sense because progress cannot be measured as the partial attainment of a future mental picture.

But assuming that a meaningful strategic vision can be agreed upon, there is agreement that M&E cannot be entrusted to any one bilateral agency but would have to be assumed by either the government, perhaps through its ANDS Secretariat, and/or by UNAMA.

Recommendations:

Realistic expectations about the benefits from M&E must take into account the strong structural constraints stated above. Given the *distinct benefits of each type of M&E* it is *not possible to recommend any one approach* in preference to the others. Due to the distinct preconditions for each, however, a *sequential approach* might be the most practical.

The first type of *internal managerial oversight* is at once the least controversial and the most difficult. It appears politically unproblematic because internal supervision is an integral part of any bureaucratic organisation and an indispensable part of exercising political control. Not surprisingly all justice institutions already possess nominal internal units charged with supervision and disciplinary matters. Alas, it can not be assumed that these units are operational and their capacity cannot be looked at in isolation from the general professional capacity of the administration as a whole. Internal supervision and disciplinary mechanisms rely strongly on the existence and internalisation of comprehensive professional codes of conduct, and related incentive and sanction mechanisms. Given the almost total absence of meritocratic recruitment and promotion, the lack of functioning communication channels, the considerable ambiguity about professional roles and responsibilities, the absence of a normative commitment towards service delivery and accountability towards the public at large, it appears highly unrealistic to expect these internal supervisory units to single-handedly achieve administrative efficiency and responsiveness.

Capacity building in these units must be part and parcel of general public administration reform and can be meaningfully undertaken only once basic administrative procedures are effectively in place. We *recommend* that current efforts aiming at increasing administrative procedures and capacities *mainstream monitoring systems* into their overall approach. In this respect it has to be underlined that the absence of reliable base-line data for the justice sector makes both prioritisation and a strategic approach difficult, if not impossible. Furthermore, the absence of such data makes it very difficult to gauge progress over time and regions.

The second type of *normative monitoring* is much easier to achieve because the base-line against which to measure current performance already exists in the form of unambiguous national and international legal minimum standards. Nevertheless, considerable problems of implementation remain, especially with regard to the habitually isolationist and protectionist attitudes exhibited by the Afghan justice institutions. It is not clear whether external monitors will enjoy sufficient access to courts, prisons, police stations, and the like. *Transparency and the openness of*

administrative and judicial processes are not values historically associated with the Afghan civil service and it remains questionable whether an independent organisation, whether NGO or governmental agency, without strong political backing will be able to enjoy the necessary level of access. UNAMA's current provincial monitoring initiative is to be welcomed as its political mandate and strong institutional position appears to be a useful counterweight to these problems. Sufficient thought should, however, be given to the sustainability of the exercise by providing it with sufficient political and institutional backing, including the sustained provision of international technical and material assistance. Eventually some form of legislative recognition of such an organisation's mandate would be welcomed.

The third aspect of *evaluating international assistance* efforts is both politically controversial and operationally difficult. Such oversight requires not only a strong political mandate and perceived neutrality and expertise by the organisation tasked with it, but depends significantly on the existence of a commonly agreed strategic framework incorporating a meaningful division of labour and measurable benchmarks. *Current efforts under the Compact and ANDS processes are steps in the right direction but fall short of what is required.* But irrespective its inherent difficulty, there appears to be *no alternative to making the agreed upon Compact framework finally operational.*

Within the ANDS Secretariat a dedicated unit should be endowed to coordinate the production of a complimentary and concerted justice sector strategy by all justice institutions, and to supervise the attainment of its operational benchmarks. This would have to include detailed reporting to the JCMB about the relative merits of various assistance efforts. It is to be hoped that both the publicity of such reporting and the seniority of the JCMB will ensure a greater attention to producing tangible and needed results beyond the present emphasis on high visibility, low impact items.

Implementation of M&E:

As stated, *we do not counsel to tackle internal monitoring systems independently from general public administration reform.* Those agencies engaged with technical assistance in this field should pay close attention to *mainstream effective internal supervisory and monitoring systems into overall capacity building efforts,* keeping in mind the challenges of endemic corruption and the absence of strong professional ethics.

With respect to the second type of normative monitoring *we agree that the presence of neutral observers can have a beneficial impact on overall system performance*

even if we do not expect dramatically new analytical insights from such reporting. The current UNAMA pilot project could evolve into a permanent feature of external control along the positive experience in other post-conflict scenarios, perhaps modelled upon the successful East Timorese Judicial Systems Monitoring Project (JSMP). Given the weakness of civil society in Afghanistan, the dearth of skilled personnel and traditional hostility of justice operators to external scrutiny, *we recommend some form of official endorsement* of such work, even if undertaken by a nominally independent NGO. Such endorsement could be included in framework agreements between the government and the international community. In principle no implementing legislation is necessary as the public access to judicial proceedings is already guaranteed by the constitution, nevertheless, some form of official endorsement by the Afghan authorities might eventually be useful, either in legislative form or a 'letter of patent' by the Supreme Court and/or Attorney General. It would be desirable if persistent obstruction by justice institutions would meet some form of sanction.

Some thought needs to be given to the organisational, logistic and financial requirements of this normative monitoring system, especially about the role of international advisors. Their currently provided institutional attachment to and support by UNAMA could in due course be phased out to one of the currently active international agencies providing assistance to an independent NGO. The simultaneous ISISC effort at the provincial level could perhaps provide an obvious point of reference.

With respect to the third aspect of *evaluation of international aid effectiveness*, we suggest the placement/secondment of two or more experts to the ANDS Secretariat working in close conjunction with UNAMA and the Italian 'lead' to develop and supervise a comprehensive sectoral strategy. These experts must closely interact with embedded experts and task forces within the justice institutions to jointly agree on institutional strategies, define measurable benchmarks, and report on their implementation. Some points should be kept in mind:

1. Uniformity of methodology across all justice institutions is essential, in both quantitative and qualitative assessments. The aim must be to have comparable data permitting a comprehensive view of the entire justice sector.
2. Rather than placing embedded international experts/technical assistance in each of the justice institutions, their existing national and international manpower should be utilised by centrally coordinating their efforts into a comprehensive and complimentary strategic vision.

3. The aim should thus not be to supplement existing TA in the justice institutions, but to enable a neutral central body to coordinate and monitor the latter's efforts. For the sake of neutrality and acceptability the support given to such a central body, such as the ANDS, should not originate from any one national source but be multilaterally funded, perhaps in the form of a designated trust fund. For the same reasons it would be advisable if such support given to ANDS would be channelled through UNAMA, perhaps in the form of seconded personnel from a nation currently not heavily active in the justice sector.

The precise modalities of their placement with the ADNS Secretariat and their interaction with and integration into existing coordination structures for the justice sector need to be carefully negotiated between the stakeholders, both international and Afghan. Joint funding and *common* terms of reference and reporting lines would be strongly preferable. GTZ is able to support the effort by financing up to two national positions within ANDS for up to one year. One or two international experts should likewise be placed there, preferably through secondment to UNAMA with duty stations at the ANDS. These positions could be financed through secondment from interested small donor nations, and/or the establishment of a designated multilateral trust fund for the benefit of UNAMA/ANDS, internal procedural rules permitting. In order to speed up implementation GTZ would be able to provide for a transitory period funding for one of these posts until proper channels are established.

Given the Secretariat's function of bringing together the disparate reform and reconstruction efforts of the various branches of the government into a single *national* development strategy for the medium- to long-term, the present aim should be to enable it to discharge this function effectively for the justice sector. This requires ongoing and in-depth consultation with all four Afghan institutions dealing with justice to produce coordinated, complimentary, internally consistent, and realistically attainable visions for institutional change. Ensuring that the contribution of the international community in this endeavour is constructive and yielding measurable results should be an integral part of the creation and supervision of such a strategic vision.

Stakeholders Consulted:

Placed in alphabetical order; all academic, military and similar titles omitted. The usual caveats apply; the author is solely responsible for the content of this study and no endorsement, express or implied, can be assumed from those cited below.

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