

An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan¹

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا (4:58)

Behold, God bids you to deliver all that you have been entrusted to those entitled, and whenever you judge between people, judge with justice. The best is what God exhorts you to do. God is all-hearing, all-seeing! (4:58)

Executive Summary

I. Introduction – Where are we now after five years of rule of law reform?

Afghanistan is a land rich in history and tradition. The last three decades have been a time of great turmoil and struggle for the Afghan people who have consistently displayed great strength and perseverance in the face of extraordinary challenges. Afghans engaged in a heroic and successful resistance to Soviet domination, only to find the country torn apart by internal conflict. With the fall of the Taliban regime, Afghans created a new nation, the Islamic Republic of Afghanistan, with the goal of rebuilding the country and establishing peace, security, good governance and prosperity.

Justice sector and rule of law reform represents one of the key elements of the new nation. Over the past five years, Afghan stakeholders, the international community and the United Nations, led by United Nations Assistance Mission in Afghanistan (UNAMA), have engaged in various efforts to improve the justice system and strengthen rule of law. The Italian government has taken the lead in international support for this sector. There has been substantial progress in this area driven by a common effort to promote improved respect for international standards and human rights. However, Afghan institutions still require substantial assistance to meet justice sector reform goals and donor efforts continue to suffer from inadequate coordination and coherence.

This paper presents an assessment of justice sector and rule of law reform in Afghanistan with a special consideration of the Afghanistan

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National Development Strategy (ANDS) documents prepared by the Supreme Court (SC), the Ministry of Justice (MOJ) and the Attorney General's Office (AGO). The ANDS strategies are linked to a larger a broad process of international support for nationwide reform outlined in the Afghanistan Compact and other key documents. Above all, the paper encourages donors and the Islamic Republic of Afghanistan to use the Rome Conference as an opportunity to build on previous experiences and agreements by making a series of commitments backed by immediate and long-term financial pledges. Each element of the executive summary is discussed in greater detail in the body of the report.

For the Rome Conference to be genuinely successful, it should be structured with great sensitivity to the needs of the Islamic Republic of Afghanistan and the Afghan people and should be based on lessons learned from the experiences of the past five years.

General social context of Afghanistan

- Seriously acknowledging the actual social and development context of contemporary Afghanistan
- Seriously engaging the limited capacity and reach of the State in much of the country, especially rural areas
- Engaging the diverse nature of Afghan society and the importance of local structures

General understanding of rule of law in Afghanistan

- Seriously acknowledging the nature of security and authority in contemporary Afghanistan and its impact on rule of law
- Seriously addressing the lack of adequate capacity and skills among justice sector professionals
- Openly engaging the Islamic foundation of Afghanistan's legal system
- Adequately engaging Afghanistan's system of informal justice
- Acknowledging the severity of corruption in general and within the justice sector

Overview of international rule of law projects in Afghanistan

- Keeping in mind substantial Afghan frustration with limited accomplishments in rule of law reform
- Addressing inadequate donor coordination
- Addressing inadequate donor support
- Planning for long-term sustainability

Recent advances

- Recognizing that meaningful advances have been achieved over the past year
- Acknowledging the growing interest and commitment on the part of donors and Afghan stakeholders for comprehensive rule of law reform

- Learning from past experiences

The Islamic Republic of Afghanistan and the Afghan people require a comprehensive strategic plan for justice that enables improved cooperation, efficiency and cost-effective policies. This vision, to be defined and expressed by Afghans, supports a more grounded and realistic engagement with the field and is served by the acceptance of several principles.

- Rule of law achievements require a long-term commitment.
- Genuine rule of law is expensive.
- Rule of law reform should be based on reasonable expectations.
- Rule of law programming should be structured in relation to the actual situation of the country.
- Rule of law success requires building national capacity and ensuring sustainability.
- Rule of law success requires an acceptance and engagement with the Islamic nature of Afghanistan and its legal system.
- Rule of law policy making requires consistent monitoring and evaluation and clearly defined systems of accountability.

II. The ANDS strategies – Identifying key justice institution needs as well as gaps

The ANDS process was developed to ensure broad and systematic institutional reform within the institutions of the Islamic Republic of Afghanistan. Each of the three major justice sector elements – SC, MOJ and AGO – have presented advanced drafts of their respective ANDS strategies that provide a clear picture of their needs.

Key Sector Goals –All three strategies are driven by a common commitment to the overarching goal of improving the credibility, integrity and professionalism of the three institutions. To achieve this basic goal, the institutions have identified a number of overlapping goals, including: salaries; infrastructure; transportation; provincial initiatives; capacity building and training; information management; codes of ethics and oversight; and, public awareness

Priorities – The SC defines its first priority as substantially increasing salaries, an issue raised in the AGO strategy and also referenced by the MOJ, which reports that it is advancing through the Priority Reform and Reconstruction (PRR) process. The MOJ and SC share a clear interest in focusing resources on infrastructure, an issue also echoed in the AGO strategy. The SC's additional priorities include: infrastructure investment, a translation and publication unit, a code of conduct and a judicial services commission and other projects. The MOJ's additional priorities include support for the legislative drafting and review department (Taqnin) and

related training. The AGO resisted prioritization that would negatively impact a more integrated approach to reform, but presented a general view of priorities focusing on the importance of salaries, vehicles, communication and infrastructure.

Developing a consolidated plan based on the ANDS documents – The current situation presents something of an impasse. Afghan institutions cannot make progress on a developing a specific vision of justice sector reforms that can be truly realized without having a reasonable sense of the availability of resources. Similarly, donors may be unwilling to commit substantial resources in the absence of a clear understanding of exactly what they are supporting and how this support will enable genuine rule of law reform that can be effectively monitored to ensure actual impact.

To address this situation, there is a need for clear and open communication between donor nations, Afghan justice institutions and the general Afghan government as well as improved coordination among the donors themselves. The Rome Conference can enable this process which will likely require a series of consultations that should begin with a pledge of increased financial support on the part of the international community for rule of law reform. Following an initial commitment of funds, it will be possible to discuss the nature, structure and vision of a consolidated plan. This process may reasonably include conditions for continued funding that must be met by Afghan partners. Ideally, initial pledges will be increased and adjusted based on monitoring and successful performance.

The ANDS strategies represent an Afghan-driven plan for progress within the SC, MOJ and AGO, yet they do not cover the nation's entire rule of law needs which are detailed in the body of the text and include:

- *Overarching challenges, gaps and issues to be resolved* – Islamic foundation of rule of law in Afghanistan; informal justice; corruption; legal aid and access to justice; legal education; National Directorate of Security (NDS); women's rights and gender equity; land issues; administrative justice; transitional justice; public awareness and legal representation.
- *Institutional Coordination* – cooperation between AGO and MOI/Afghan National Police; legislative process; coordination among other justice institutions; general lack of focus on civil law issues; and, international cooperation capabilities.
- *Capacity building and training* – general training principles; professional staff quality; and, administrative and support staff quality.
- *Data collection, analysis and information management* – data collection, monitoring and information management; establishment of compatible computerized and database systems; storage and

retrieval of court records; and, computerization of laws and jurisprudence.

- *Monitoring, evaluation and mechanisms of accountability*
- *Technical needs and interventions* – legal translation and library and research capabilities.

Addressing all these gaps at one time will not be possible. Even where full implementation of all the desired programs is not feasible it is useful and, in fact, necessary to adopt a comprehensive vision of justice.

III. How to move forward on justice sector and rule of law reform

The Rome Conference offers a valuable opportunity for the international community and the Islamic Republic of Afghanistan to commit to a comprehensive vision of rule of law reform that addresses Afghan needs while meeting donors concerns regarding monitoring, quality and long-term impact.

Developing a comprehensive strategic plan for justice sector and rule of law reform requires a number of advances. Some are detailed in this paper and can and should be accomplished at the Rome Conference. Other key elements require additional Afghan-led consultations.

The Rome Conference should be driven by the following key goals:

For the Islamic Republic of Afghanistan

1. *Commitment to institutional cooperation and comprehensive justice sector and rule of law reform.*
2. *Engagement with a strategic process involving the preparation of an action plan to enable comprehensive justice sector and rule of law reform.*

For donors and the international community

1. *Commitment to a comprehensive vision of rule of law reform in Afghanistan.*
2. *Pledges of significantly increased and dependable long-term funding for rule of law reform in Afghanistan.*

To ensure that a commitment to a comprehensive vision backed by genuine pledges of funding yields meaningful change, the Rome Conference should include advances in the following areas:

1. *Endorse a Donor Implementation Plan* – Donors attending the Rome Conference should endorse a Donor Implementation Plan involving clear pledges of specific immediate and long-term funding.
 - a. *Pledging of immediate support* – The Donor Implementation Plan should include a pledge of immediate funding by specific donors in a bilateral fashion to be allocated at the Rome Conference. These pledges should be directed towards a limited series of particular projects defined in a short planning document provided in advance by the

SC, MOJ and AGO. The projects should be ready for immediate implementation, should involve short duration for completion and a total cost per project of \$1 million or less.

- b. *Pledging of long-term support* – Donors should also make specific tangible pledges of funding for medium and long-term support. These pledges may be linked to particular actions or planned as general support for categories of activities. The pledges should be linked to needs identified by the Afghan stakeholders and should involve explicit demands for clear programmatic documents outlining specific goals, mechanisms of meeting those goals, timelines, benchmarks and systems of monitoring and evaluation.
 - c. *Commitment to long-term funding* – This pledging should be part of a broad vision of financial support for rule of law reform that is fundamentally long-term (i.e. 7-10 years) with specific plans for 1-year, 3-year and 5-year pledges.
2. *Endorse and pledge to a Provincial Justice Coordination Mechanism* – Because of the pressing need for justice sector and rule of law reform in the provinces, donors at the Rome Conference should approve a Provincial Justice Coordination Mechanism (PJCM) plan alongside financial commitment to support its implementation. In the event this is not yet possible, donors should support the PJCM and make specific plans for full endorsement and pledging.
 3. *Make plans to establish a mechanism for coordinated donor funding and management* – Rule of law reform will benefit from a unitary, coordinated funding mechanism which should be combined with bilateral assistance and discussed at the Rome Conference.
 4. *Ensure that there is an Afghan-led mechanism to supervise comprehensive justice sector and rule of law reform* – Implementing comprehensive rule of law reform will require Afghan political will and an efficient and effective monitoring process involving a specialized team within the ANDS Secretariat and the JCMB.
 5. *Make preparations for a continued process of justice sector and rule of law reform* – The Rome Conference should be envisioned as a key moment in redefining the international commitment to justice sector and rule of law reform which should include the following actions:

- a. *At Rome (July 2007)* – Presentation of a brief strategic document and list of key projects for the SC, MOJ and AGO to be funded through immediate support.
- b. *Immediately after Rome (July – August 2007)* – Elaboration of policy document that links the SC, MOJ and AGO ANDS documents with a clear action plan that enables the implementation of a comprehensive reform plan.
- c. *Kabul meeting on the development of a comprehensive strategy for justice sector and rule of law reform (September – October 2007)* – The first major meeting in this evolving process would take place in Kabul and link the presentation of a comprehensive policy coupled with a clear action plan outlining a five-year strategy that maps onto the ANDS documents but also addresses key gaps and inter-institutional planning.
- d. *Subsequent meetings (November 2007 and on)* – The Rome Conference should create momentum through commitments and pledging that support a steady process of specific policy elaboration that is Afghan-led and builds on the ANDS documents. This should yield a comprehensive strategy grounded in Afghan reality and expressive of Afghan needs.

It is still quite early to assess the full impact of the past five years of rule of law reform within the Islamic Republic of Afghanistan. Given the social, economic and political context of the country, many of the early promises were unlikely to be realized quickly. While Afghanistan presents many serious challenges, the Rome Conference offers a unique opportunity to develop a comprehensive approach to justice sector and rule of law reform that expresses local stakeholder priorities and builds the foundations for long-term sustainable improvements in the lives of the Afghan people.

An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan

M. Cherif Bassiouni and Daniel Rothenberg

1. Introduction

This paper presents an assessment of justice programs and rule of law reform in Afghanistan. It has been commissioned by the government of Italy as a reference document for participants of the Rome Conference which is jointly sponsored by Italy, the United Nations Assistance Mission in Afghanistan (UNAMA) and the Islamic Republic of Afghanistan.

The paper has several objectives, including: providing a brief overview of the past five years of justice sector reform; presenting a general case for a comprehensive approach to rule of law reform in Afghanistan; outlining a consolidation and overview of the Afghanistan National Development Strategy (ANDS) documents prepared by the Supreme Court (SC), the Ministry of Justice (MOJ) and the Attorney General's Office (AGO); identifying a series of challenges, gaps and issues to be solved; considering the development of a consolidated plan related to the ANDS documents linked to a comprehensive national strategy for justice sector and rule of law reform; and, providing an action plan for the Rome Conference and post-conference activities.

Above all the paper encourages donors and the Islamic Republic of Afghanistan to use the Rome Conference as an opportunity to make a series of commitments backed by immediate and long term financial pledges that will stimulate a process that will yield a comprehensive strategic plan for justice sector and rule of law reform in Afghanistan.

The paper builds on the links between justice sector reform and the larger ANDS process, including the justice benchmarks of the Afghanistan Compact, the work of the Joint Coordination and Monitoring Board (JCMB), and the general rule of law coordination framework including the Rule of Law Working Group, its sub-groups and the International Coordination Group for Justice Reform (ICGJR).

This paper is not intended to duplicate, revise or replace the extensive and detailed work of the SC, MOJ or AGO, whose strategies are attached as appendices. Similarly, the paper is not a complete summary of all prior efforts or a text designed to provide all the answers to the problems of justice sector and rule of law reform in Afghanistan. Instead, the paper seeks to support a careful and sustained engagement by the

Islamic Republic of Afghanistan with comprehensive rule of law reform which will require and support from the international community. The document serves this process by linking a consolidation of the substantial strategic efforts of the SC, MOJ and AGO with an identification of key gaps and a series of specific suggestions regarding the Rome Conference.

Ideally, the paper will help ensure that the Rome Conference is a productive meeting that allows the Afghan government to work with donors, UNAMA and others on developing a comprehensive vision of rule of law reform supported by substantial international assistance. A successful Rome Conference can contribute to improving access to quality justice services and support democracy, rule of law and justice for the Afghan people.

2. Overview – Assessing five years of rule of law reform and preparing for the Rome Conference

Afghanistan is a land rich in history and tradition. The last three decades have been a time of great turmoil and struggle for the Afghan people who have consistently displayed great strength and perseverance in the face of extraordinary challenges. Afghans engaged in a heroic and successful resistance to Soviet domination, only to find the country torn apart by internal conflict. With the fall of the Taliban regime, Afghans began a process of reconstructing their nation with the goal of establishing a system that provides peace, security, good governance and prosperity.

Afghanistan remains one of the poorest countries in the world. The conflict produced profound suffering: hundreds of thousands of people were killed, most of whom were civilians; entire villages were destroyed as a third of the population was forced to abandon their homes; the professional and managerial class fled the country; the national educational system was destroyed; and, the government ceased to adequately provide even modest services to the Afghan people. While these issues are well known among those working in the country, all development programs, including those involving rule of law reform, should be designed with an understanding the enormous poverty and marginalization of the Afghan people and the legacy of destruction and suffering brought on by the conflict.

In December 2001, the Interim Administration of Afghanistan was established as a means of helping to rebuild a devastated society with extremely limited elements of formal governance. Since then, Afghanistan has made many impressive gains including: hosting two Loya Jirgas; adopting a new constitution establishing an Islamic democratic state; holding presidential and parliamentary elections; demobilizing tens of thousands of combatants; enrolling more than four million children in school; and, assisting in the return of four million refugees. Throughout

this process, the Afghan people have consistently displayed extraordinary courage, strength, and perseverance.

Over the last five years, the Islamic Republic of Afghanistan, other Afghan stakeholders, the international community and the United Nations, led by UNAMA, have engaged in various efforts to improve the justice system and strengthen rule of law. The government of Italy has taken the lead in international support for this sector. In general, the international community has supported numerous important interventions including: support for legislative reform (the Juvenile Code, the Interim Criminal Procedure Code and the Law of Prisons, etc.); construction and rehabilitation of infrastructure (courts, offices, detention centers, etc.); training courses for judges, prosecutors and managerial staff; assistance to the faculties of law and shari'a; the construction of a National Legal Training Center; and, various activities to enhance rule of law, respect for human rights and the efficient functioning of the legal system. Despite these valuable efforts, Afghan institutions still require substantial assistance to meet justice sector reform goals and donor efforts continue to suffer from inadequate coordination and a lack of coherent and consistent implementation.

Afghan rule of law institutions currently lack efficiency, capacity and nationwide coverage. They are often viewed as susceptible to corruption and have perceived limited legitimacy within much of the country. While genuine rule of law reform within Afghanistan will require decades of investment, the current tension between expectations of rapid advancement and the delay on the ground has contributed to a sense of frustration among domestic stakeholders. Failing to improve rule of law reform could threaten the nation's reconstruction effort and the possibility of genuine peace and long-term stability in Afghanistan.

Over the past year, there has been a growing awareness among Afghan stakeholders as well as the international community that there is a need for a more comprehensive and coordinated approach to justice sector and rule of law reform. The Islamic Republic of Afghanistan and the Afghan people require a comprehensive strategic plan for justice that enables improved cooperation, efficiency and cost-effective policies. To the degree that such a plan cannot be fully implemented as a result of logistical and financial limitations, the country will benefit from a comprehensive approach to justice grounded in local reality that informs the development and implementation of policies.

In general, the donors and the international community should be more sensitive to how Afghans perceive and understand reconstruction efforts. Long-term, sustainable reform, in the justice sector and elsewhere, require local ownership to be truly effective. This means that these programs and policies need to be presented in a manner that is clearly

linked to Afghan needs and relevant to Afghan social and political reality. To the degree that reform efforts appear as the imposition of foreign ideas, they will likely appear reminiscent of the Soviet era, despite good intentions. For these reasons, it is essential that Afghans manage and guide national policies and that the presentation of justice sector and rule of law reform be intimately linked with Islamic principles and Afghan values, as well as expressive of international standards and fundamental human rights.

It is essential that the current international interest in supporting the Afghan justice sector be rapidly translated into meaningful action through a combination of substantial increases in coordinated donor support coupled with an integrated plan for action based on existing consultations, institutions and working groups. This process should build on prior justice sector efforts, enable commitments defined in the Afghanistan Compact and be directly linked to ANDS mechanisms. It should also express a coherent vision and strategy for the country and involve a renewed commitment to clear communication between the international community and Afghan stakeholders. These efforts represent a fundamental means of supporting the nation's evolving democracy and improving overall security and good governance.

General overview of Rule of Law reform activities

Afghanistan has never benefited from modern justice institutions with a high level of functioning, capacity and coverage throughout the nation. The Soviet domination of the 1980s and the ensuing multi-year conflict led to a profound delegitimization of the State and a loss of any possible earlier gains. Following the fall of the Taliban regime, the Afghan State and the country's rule of law institutions were in an especially poor situation.

The Bonn Agreements of December 2001 authorized the creation of the Afghan Interim Administration that highlighted, among other key objectives, the importance of reforming the justice system. The stated goal of these efforts was to rebuild justice sector institutions in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions. Italy took on primary responsibility for funding rule of law efforts and assisting justice sector reform. Since that time, the government of Italy has been at the forefront of these issues and has been responsible for many of the most productive gains.

Early rule of law reform efforts coincided with a time of enormous political reconfiguration including the preparation of a new constitution, elections and a substantial multi-sectoral reconstruction process. Afghanistan's vision of law is grounded in a commitment to the nation as an Islamic democracy. The Constitution defines Afghanistan as "an Islamic Republic" (Article 1) in which Islam is the national religion (Article 2) and

in which, “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” (Article 3). While the exact meaning of these commitments is part of the evolving process of governance, it is essential that serious rule of law reform in the country takes into account Afghan’s vision of their society and needs and the central role of Islam in virtually every aspect of daily life.

The Constitution also outlines the basic structure of the government as involving three branches: an executive, composed of the Presidency and key ministries and bodies including the MOJ and AGO; a legislature composed of the Wolesi Jirga (House of People) and the Meshrano Jirga (House of Elders); and, a judiciary defined by the SC. In this way, the Constitution establishes a system of checks and balances between distinct rule of law institutions, whose complex interaction and should be supported by a comprehensive strategic plan for justice sector reform.

The SC is defined as an “independent organ of the state” empowered to review laws and other agreements for compliance with the Constitution, hold open trials except “when it considers necessary”, govern the judiciary and provide other key internationally accepted due process protections (Articles 121-135). It is charged with using Hanafi jurisprudence when there is no clear legislative or constitutional provision regarding an issue and to “apply the Shia jurisprudence in cases involving personal matters” for Shia (Articles 130 and 131). The Constitution does not clarify most of the particular elements of the MOJ’s operations, but explains the key role of the AGO as, “investigation and filing the case against the accused in the court” (Article 134) an issue that is of great significance in clarifying the operation of criminal investigations and the relative roles of the police under the Ministry of Interior (MOI) and the AGO.

In an effort to support justice sector reform, the Bonn Agreement called for the creation of a Judicial Commission, which was later renamed the Judicial Reform Commission (JRC). The JRC reviewed existing rule of law institutions, proposed various reforms and facilitated international support. It had only limited success and was dissolved in mid-2005. Many believe that its problems resulted from a lack of authority, clarity in vision and direct engagement with the daily operations of rule of law issues.

In early 2003, the Justice Sector Consultative Group (JSCG) was established as a means of integrating the efforts of the Islamic Republic of Afghanistan, donor nations, UN agencies and the international community more generally. The JSCG is chaired by the Ministry of Justice and, while it facilitated communication among its members, it was unable to create and implement a broad strategy for rule of law reform.

In response to the slow progress of justice sector reform, the “Justice for All” plan was created and approved by the Islamic Republic of Afghanistan in October 2005. The objective of “Justice for All” was to prepare a broad program with detailed institutional needs, benchmarks, costing and short, medium, and long-term timelines. The “Justice for All” plan set as its goal an “affordable and sustainable justice system that...is accessible to all Afghans...[and] conforms with minimally accepted quality standards” which included improved links with systems of informal justice as well as a commitment to improved public awareness of legal rights.

This process was adjusted in accordance with the Interim Afghanistan National Development Strategy (I-ANDS) presented later that year. The I-ANDS involves three “critical and interdependent areas” or pillars, “Security,” “Governance, Rule of Law and Human Rights” and “Economic and Social Development,” which include various sub-pillars and sub-sections (so, for example the AGO ANDS strategy is positioned within the “Governance, Rule of Law and Human Rights” pillar, the “Rule of Law” sub-pillar and the “Justice” sector). The three pillars respond to a number of key cross-cutting themes including: “gender equity”; “counter-narcotics”; “regional cooperation”; and, “anti-corruption.” Through both “Justice for All” and the ANDS process, rule of law issues have been envisioned as a fundamental component of overall Afghan reconstruction.

This process was further refined at the January 2006 London Conference on Afghanistan that led to “the Afghanistan Compact.” This established a basic agreement between the Afghan government and the international community involving specific goals, concrete benchmarks and timelines for achievement based on the I-ANDS.

The event also created the Joint Coordination and Monitoring Board (JCMB) designed to monitor progress towards the achievement of key benchmarks within the compact by 2010. In the justice sector, these benchmarks include: completing the development and implementation of the legal framework envisioned in the constitution; reforming all key justice sector institutions to ensure “professionalism, credibility and integrity”; rehabilitating all prisons; ensuring that all justice sector institutions are fully operational in every province; and, implementation of all mechanisms of oversight to combat corruption and protect against due process violations.

ANDS justice sector reform builds on the vision elaborated in the Justice for All program. The framework includes an advisory Rule of Law Working Group, as well as six thematic sub-groups on: Law Reform; Justice Institutions and Judicial Reform; Justice Physical Infrastructure; Legal Education and Training; Access to Justice and Legal Aid; Corrections; as well as an Advisory Group on Women and Children in Justice. The goal of these working groups is to help address the technical challenges of each of

these elements of justice sector reform and to integrate work in these areas within the larger vision and structure of the ANDS.

In October 2006, the International Coordination Group for Justice Reform (ICGJR) was established in order to improve donor communication regarding justice sector policies. Then, in December 2006, the Afghanistan Rule of Law Coordination Meeting was held in Dubai to provide a review of past activities and to motivate a concerted international effort for a new commitment to reforming the Afghan justice sector. This event presented a critical review of donor activities while also raising useful questions about obstacles to more effective reform. The event prepared the groundwork for the Rome Conference.

Context of the Rome Conference

The Rome Conference is taking place after more than five years of rule of law discussions, planning, funding and implementation. For the Rome Conference to be genuinely successful, it should be structured with great sensitivity to the needs of the Islamic Republic of Afghanistan, the Afghan people and the experiences of the past five years, particularly the following key factors.

General social context of Afghanistan

- *Seriously acknowledging the actual social and development context of contemporary Afghanistan* – Afghanistan has nearly the lowest world ranking on the Human Development Index, the primary international measure of basic human welfare. Life expectancy is under 45 years and over a fifth of all Afghan children die before the age of five. About 70% of the rural population and 40% of the urban population have no access to clean water. Over 40% of the rural population has no access to proper sanitation and only 6% of the entire population has regular access to electricity. The vast majority of Afghans have limited formal education and the nation has a high rate of overall illiteracy. Less than one in six women can read and write, defining Afghanistan as the nation with the lowest female literacy rate in the world. Despite efforts by the Islamic Republic of Afghanistan, much of the population remains disconnected from State agencies, activities and services.
- *Seriously engaging the limited capacity and reach of the State in much of the country, especially rural areas* – Afghanistan is a large country in which a substantial portion of the population lives in rural areas that have limited engagement with the governance

mechanisms of a modern state. The majority of reconstruction efforts, particularly in the area of rule of law reform, occur in Kabul, the region surrounding Kabul and in other urban centers. For a large number of Afghans, the central authority influencing their lives is not the Afghan government, but an array of local forces including tribal leaders, warlords, traditional councils (*shuras* and *jirgas*), and religious authorities including *ulama* (Islamic scholars), *imams* (prayer leaders) and *pirs* (spiritual leaders).

- *Engaging the diverse nature of Afghan society and the importance of local concerns and structures* – Afghan society is diverse and the order and logic of daily life is often based on local structures and local power relations. Afghanistan is composed of various ethnic groups with a history of tension and conflict, as well as shifting alliances. In addition, authority has often not been based on centralized rule, with social and legal issues resolved on the basis of local and regional leaders and power brokers. While the unified state envisioned by the Islamic Republic of Afghanistan requires centralized management, serious rule of law efforts should be designed with an awareness of the gap between decisions made in Kabul and reality on the ground, especially in the provinces. The history of the Afghan people is filled with examples of local resistance to centralized authority as well as substantial rejection of foreign influence as evidenced in the extraordinary resistance to Soviet domination.

General understanding of rule of law in Afghanistan

- *Seriously acknowledging the nature of security and authority in contemporary Afghanistan and its impact on rule of law* – For decades, Afghans have had ready access to arms supplied by foreign forces and the nation has a large number of potential recruits for various armed groups. Alongside the growing threat posed by an organized insurgency, Afghans face a general and profound absence of the rule of law. In many places, security and basic order are controlled by unregulated armed local power holders, many of whom are linked to criminal enterprises. These practices are supported and enabled by the opium industry. Currently, Afghanistan's economy is more dependent on the production, refining, and export of narcotics than any other nation in the world, a situation that severely

impacts the capacity of the State to ensure rule of law and provide security in many regions.

- *Seriously addressing the lack of adequate capacity and skills among justice sector professionals* – Following decades of conflict, Afghanistan suffers from a lack of qualified justice sector professionals. According to official figures, many current judges, prosecutors and others have limited formal educational backgrounds, especially in the provinces. Many have only graduated from high school. Others have minimal training in advanced legal issues, including current laws and regulations. There is a pressing need for ongoing training programs for judges, prosecutors, lawyers, administrative staff and others. It is crucial that these programs build local training capacity so that Afghans themselves can continue and expand trainings on their own. These efforts should be linked to support for university curricula and the creation of professional associations and other mechanisms of capacity-building.
- *Openly engaging the Islamic foundation of Afghanistan's legal system* – Afghanistan's formal legal system is composed of Islamic beliefs and provisions, international standards, Afghan legal traditions and domestic legislation. Initially, the international community focused attention and resources on the need to apply international standards, especially crucial human rights principles. However, very little attention has been paid to the necessity of harmonizing and integrating these legal concepts as defined in the constitution. There is a need for a more serious international engagement with Islamic law, the role of Islamic legal authorities and general issues regarding the Afghan public's vision of law and the country's legal traditions. The relevance of these issues is seen in the fact that the nation's university system of legal education is divided between a program in law and a separate program in *shari'a* and that many legal professionals primary training is in Islamic law.
- *Adequately engaging Afghanistan's system of informal justice* – In most of the country, particularly rural areas, the vast majority of conflict resolution (some estimate 80% to 90% of all cases) is achieved through local systems of non-State adjudication known as *shuras* and *jirgas*. These mechanisms have a high degree of local legitimacy and are not generally connected with formal rule of law mechanisms. It is important to recognize that

some traditional practices may lead to serious human rights violations. For this reason, it is essential that urgent efforts are made to better understand the informal justice system. Then, various efforts can be made to reduce or prevent possible violations in the informal sector while also improving the legitimacy of the formal sector and generally serving the justice needs of the Afghan people.

- *Acknowledging the severity of corruption in general and within the justice sector* – Afghans consistently express enormous concern regarding the extent and impact of corruption within most state institutions. Surveys suggest that corruption is one of the primary Afghan complaints regarding the government and that the justice sector as widely viewed as among the most corrupt elements of the State. Addressing corruption is not simple and requires years of careful monitoring, evaluation and punishment. However, some issues require immediate attention such as the fact that key justice sector professionals (for example, judges and prosecutors earn as little as \$50 per month, less than what is required to meet their basic needs). Combating corruption within the justice sector requires substantial investments of resources to enable improved professionalism, ethics, monitoring and integrity.

Overview of international rule of law projects in Afghanistan

- *Keeping in mind substantial Afghan frustration with limited accomplishments in rule of law reform* – In general, Afghan justice institutions and the Afghan people are frustrated with limited overall progress in national reconstruction as well as slow gains in justice sector and rule of law reform. Afghans are eager to see measurable progress as soon as possible, particularly after over five years of poorly coordinated funding and a number of attempts at defining national strategic plans. The Rome Conference provides an opportunity for reinvigorating rule of law reform in Afghanistan, but only if concrete achievements are made.
- *Addressing inadequate donor coordination* – Over the past five years, investments in rule of law programs have been characterized by the multiple activities of different donors through programs lacking adequate coordination and an integrated vision. Addressing this situation requires a commitment to cooperation

among donors as well as their effective participation with coordination, monitoring and control mechanisms already in place. There is a need for improved information sharing among different actors as a means of avoiding duplication of efforts and inefficient implementation.

- *Addressing inadequate donor support* – Over the past five years, there has been minimal overall support for most justice sector institutions and a general failure to address key issues, such as justice needs in the provinces and the informal justice system. In addition, Afghan stakeholders are extremely concerned with significantly different levels of funding for some rule of law institutions at the expense of others (for example, substantial funding for MOI in comparison to SC, MOJ and AGO). Addressing these issues requires reallocating already committed funds as well as substantially increased new funding coupled with a system of communication that links financial support with a vision for comprehensive rule of law reform.
- *Planning for long-term sustainability* – As with many development investments in Afghanistan, international support for rule of law reform has generally failed to create mechanisms of long-term sustainability so that achievements can continue into the future. Addressing this issue requires increased attention on building the capacity of national institutions and personnel and a policy of gradually phasing out the use of international experts to allow Afghan stakeholders to control and manage programs and policies.

Recent advances

- *Recognizing that meaningful advances have been achieved over the past year* – The Rome Conference is premised on a growing acknowledgment of the need for improved donor coordination coupled with evidence of meaningful advances including: the establishment of the ANDS system; improved activities of the Rule of Law Working Groups; UNAMA's leadership in documenting and analyzing existing programs; and, new projects including monitoring efforts and increased attention to rule of law issues in the provinces.
- *Acknowledging the growing interest and commitment on the part of donors and Afghan stakeholders for comprehensive rule of law reform* – There is

an increasing recognition of the need for a comprehensive vision of rule of law reform coupled with a growing willingness to support these efforts. This is the driving force behind the Rome Conference and the high level representation at the event by the Islamic Republic of Afghanistan, the government of Italy, other donor nations and international entities, the United Nations and NATO.

- *Learning from past experiences* – Despite the problems, obstacles and challenges of rule of law reform over the past five years, Afghanistan has seen many advances in line with established benchmarks regarding anti-corruption, codes of ethics, legislative reform, justice sector trainings and other activities. In each case, it is essential to develop lessons learned to ensure rapid and substantial improvements in rule of law reform.

The context of the Rome Conference is a combination of: an exceedingly challenging development environment; a pressing need for a more realistic and appropriate engagement with rule of law issues in Afghanistan; a recognition of prior lack of coordination and investment in the justice sector; and, an awareness of the possibility of change and genuine improvements in rule of law reform. Alongside current frustration with missed opportunities and a mood of uncertainty regarding the future, the Rome Conference offers a valuable opportunity for linking the international community with Afghan stakeholders through a newly energized process of defining comprehensive justice sector and rule of law reform.

3. Addressing the need for a comprehensive strategic plan for justice sector and rule of law reform in Afghanistan

Rule of law reform in Afghanistan requires a comprehensive approach because of the fundamentally integrated operation of the justice sector as well as the very nature of genuine rule of law achievements.

The justice sector involves various activities including: the creation of laws; the enforcement and administration of laws; and, processes of adjudication. Key justice sector institutions within the Islamic Republic of Afghanistan include: the SC as an independent branch supervising judges, courts and adjudication; the MOJ for corrections, resolving civil and commercial disputes, legislative drafting (through the Taqnin), registering political parties, supervising juvenile justice, and managing the general administration of justice; the AGO for prosecutions; the Ministry of Interior (MOI) for the Afghan National Police (ANP) and related law enforcement activities; the National Assembly composed of the Wolesi

Jirga and the Meshrano Jirga; the National Directorate of Security (NDS) for domestic security issues; the Ministry of Counter-Narcotics; and, key independent commissions and bodies such as the Afghan Independent Human Rights Commission (AIHRC) and the General Independent Anti-corruption Commission (GIACC). While particular justice sector institutions must operate independently of each other, in the final analysis, these entities are profoundly interrelated.

In addition, a more complete vision of rule of law reform requires an engagement with a variety of other governmental bodies including; the Ministry of Foreign Affairs (for international law and related agreements); the Ministry for Women's Affairs; the Ministry of Finance (for improved budgetary monitoring); the Ministry of Higher Education (for work with university law and *shari'u* faculties, the National Legal Training Center and general training); The Ministry of Haj and Islamic Affairs (for greater coordination with religious authorities); the Ministry of Border Affairs; the Ministry of Refugees; and the Ministry of Martyrs and Disabled (for integrating transitional justice programs).

The very concept of rule of law extends beyond institution-specific achievements. Genuine advances in the rule of law are always integrated within and expressive of overall societal development and intimately bound to the degree to which the State is understood to be the primary guarantor of stability, security and social order. Rule of law is a complex concept that links the State and those living under its control. While the existence of functional justice institutions (including well-prepared professional staff and appropriate infrastructure) are a clear prerequisite for rule of law, the value of their activities and operation depends on their integration within people's lives. In addition, professional justice institutions require local capacity and the potential for long-term and sustainable systems of ensuring quality services. These issues are of great relevance within Afghanistan because the country is struggling to establish itself as a place where a modern state provides quality governmental services, including those related to all aspects of justice.

Failing to embrace a comprehensive vision of rule of law reform makes it difficult to establish priorities, adequately measure progress and engage in serious monitoring and follow-up. This decreases the opportunities for institutional cooperation, greater efficiency and cost-effective programming.

While there are many benefits of fully adopting a comprehensive strategic approach to rule of law reform, this might prove difficult in light of the present situation in Afghanistan. With this in mind, it is important to engage a comprehensive vision of justice even where full implementation is not feasible. Accepting the fundamentally integrated nature of justice sector success and rule of law will inform policy planning, even where it is limited

in scope and approach. In addition, this approach is useful for combating the tendency for different agencies and bodies in the justice sector to focus only on their work and thereby encourage compartmentalization. If nothing else, there is a need for monitoring the progress of these different institutions to assist in the overall progress of the justice sector and better serve the Afghan people.

In light of the goals of the Rome Conference, it is especially valuable for donors to support a comprehensive approach towards rule of law in Afghanistan. This vision, to be defined and expressed by Afghans, supports a more grounded and realistic engagement with the field and is served by the acceptance of several key principles.

- *Rule of law achievements require a long-term commitment* – While it is possible to make meaningful progress in rule of law reform in a short period of time (especially where the needs are great), the most substantive achievements in this area require long-term investment and commitment on the part of international donors and Afghan stakeholders.
- *Genuine rule of law is expensive* – The search for justice is an ongoing process and genuine rule of law is a costly enterprise that requires constant review and reform. It is for this reason that even the wealthiest, most-educated nations struggle to provide adequate due process protections and the appropriately defend fundamental rights. Where there is limited investment in rule of law reform, there is likely to be limited benefit.
- *Rule of law reform should be based on reasonable expectations* – Rule of law reform policies in Afghanistan should avoid making excessive promises and should instead be based on reasonable expectations of progress. These efforts should be developed with an explicit recognition of the impact of decades of conflict, a profound lack of state legitimacy, devastated infrastructure, limitations in local capacity and other serious challenges. Various international agreements, conferences and papers have presented unrealistic claims for justice sector reform and accomplishments, including reforms that cannot be reasonably achieved and deadlines that are impossible to meet. The excessive nature of these claims highlights the extraordinary challenges faced by the actual system which has a limited presence in much of the country and is characterized by urgent needs regarding salaries, infrastructure, capacity building, anti-corruption efforts, staff quality and related issues.

- *Rule of law programming should be structured in relation to the actual situation of the country* – Substantial and sustained investment in rule of law institutions is essential to support the nation’s fledgling democracy. However, justice sector entities face a serious crisis of perceived legitimacy as a result of allegations of corruption as well as their limited presence and capacity in much of the country. By all accounts, the majority of dispute resolution activity takes place apart from the formal justice sector, often through mechanisms of informal justice strongly grounded in Afghan tradition. Rule of law programming should engage in a more comprehensive manner this reality by gathering information on current practices and further developing locally relevant mechanisms of integration and quality service provision. This should be done in coordination with projects already implemented by some of the international organizations engaged in the field, such as UNDP, USAID, USIP, AREU, NRC and others.
- *Rule of law success requires building national capacity and ensuring sustainability* – The most valuable element of any service based system are the professionals and support staff that manage and implement programming. It is essential that investment in rule of law reform in Afghanistan focuses on building national capacity. Justice sector investment will only serve the needs of the Afghan people over the long term if it is managed by local stakeholders and structured in a manner that is sustainable. Current funding strategies should be designed with these issues in mind.
- *Rule of law success requires an acceptance and engagement with the Islamic nature of Afghan society and its legal system* – International investment in rule of law reform in Afghanistan will only yield local ownership of processes and institutions if the programs supported express Afghan values and commitments. The country is an Islamic democracy and its legal system prioritizes Islamic law and principles. Justice sector reform should embrace these issues and seek models for appropriate programs among other Islamic and civil law legal systems while making a concerted effort to provide international advisors with expertise in these areas. It is essential that experts avoid confusions between common law and civil law systems.

- *Rule of law policy making requires consistent monitoring and evaluation and clearly defined systems of accountability* – Successful rule of law reform requires the development and steady implementation of monitoring and evaluation processes in cooperation with Afghan stakeholders that engage actual measures of progress. It is essential that international investment be coupled with specific Afghan-led processes for ensuring accountability, ideally in a manner where measured improvements and progress is rewarded with significant increases in funding.

4. Review and Consolidation of key ANDS Strategies

The ANDS process was developed to ensure broad and systematic institutional reform within the Islamic Republic of Afghanistan. Each of the three major justice sector institutions – SC, MOJ and AGO – have presented advanced drafts of their ANDS strategies that provide a clear picture of their needs. In order to support a comprehensive approach to rule of law reform, this section of the paper presents a consolidated review of the three justice institutions’ ANDS strategies. This review identifies commonalities as well as some differences in the three strategies’ focus, approach, and vision.

Afghan stakeholders and members of the international community have invested substantial time and resources on the elaboration of the ANDS strategies and this section is designed to support these efforts. The review presented here does not reference every element of the ANDS strategies, but provides an overview that links general themes with specific proposed actions. The goal of this section is to improve donor coordination, stimulate increased donor pledges and enable genuine advances in rule of law reform.

Key Sector Goals – The ANDS strategies of the SC, MOJ and AGO present a number of common goals that, despite differences in the respective documents, present a fairly unified vision of rule of law reform in Afghanistan. All three strategies are driven by common commitments previously expressed in the “Justice for All” plans and formalized in the Afghanistan Compact. These include an overarching goal of improving the credibility, integrity and professionalism of the three institutions.

To achieve this basic goal, the institutions have identified a number of overlapping goals.

- *Salaries* – Ensuring professionalism and combating corruption by providing adequate salaries for staff.

- *Infrastructure* – Supporting basic institutional operation through substantial improvements in infrastructure, including improvements in offices, courts and prisons as well as staff housing facilities and office materials, such as computers and communication equipment.
- *Transportation* – Enabling work in provinces and on-site activities through significantly improved transportation resources for staff.
- *Provincial initiatives* – Ensuring that justice services are available to all Afghans by expanding presence and operations in the provinces.
- *Capacity building and training* – Improving professionalism through increased capacity building and training for professionals as well as support staff.
- *Information management* – Enabling professional information management through improvements in data collection, case management and databases that allow information to be shared among justice sector institutions.
- *Codes of ethics and oversight* – Supporting improved professionalism by implementing codes of ethics as well as oversight mechanisms to combat corruption and uphold professional standards.
- *Public awareness* – Improving the linkages between justice sector reform and the general public by increasing public awareness of basic rights and services.

Some of the three strategies also identified a number of goals not referenced by all strategies but of clear importance for a comprehensive vision of rule of law reform including: improvements in legal education; greater compatibility and interactions between formal and informal justice systems; improvements in drafting legislation; advances in legal aid; and greater coordination with other justice sector institutions (especially harmonizing the criminal justice procedures between the AGO and the MOI/police).

Contextual analysis – The three ANDS strategies approached the issue of contextual analysis in distinct ways. All acknowledged the complex

challenges of rule of law reform following decades of war, devastated infrastructure, general institutional weakness and related issues while also referencing a number of common themes such as: low levels of formal educational training among professional staff; substantial variation in educational and other qualifications; low salaries, especially in comparison with other justice sector institutions, such as MOI/police; substantial infrastructure needs; and, numerous capacity building and training needs.

The ANDS strategies often present specific data on the current context as a means of demonstrating existing needs and supporting specific actions. Key information for each institution is not presented in a unified manner that would assist in a more comprehensive approach to reform. Nevertheless, the available data provides a useful and concrete point of reference for assessing the current situation and establishing preliminary baselines for measuring progress. The following is a review of some key findings regarding the current context presented by the SC, MOJ and AGO, including some additional information from these institutions but not found in the ANDS strategies.

- *Salaries* – The SC and AGO report that staff salaries were below a professional living wage. SC salaries range from \$50/month to \$142/month and the AGO reports that prosecutors are paid an average salary of \$60/month. While the ANDS document for the MOJ reports that the Priority Reform and Reconstruction (PRR) process is advancing, the process has stagnated and salaries remain low.
- *Professional qualifications and staffing* – The SC reports that 44% of existing judges have graduated from a university program in *shari'a*; 12% from a university law program; 8% from other university departments; 16% from various non-university programs and 21% have only a high school education or less. The MOJ reports serious capacity needs as well as the fact that of 1919 prison administration positions only 1325 are staffed (69%) with 80% of those personnel possessing baccalaureate or post-baccalaureate diplomas. The MOJ finds needs in other areas as well, reporting that only 10 of 47 professional staff (21%) in the Taqin are “highly experienced”; The AGO reports that many prosecutors do not have university degrees, particularly in the provinces. For example at AGO headquarters, over half of the 238 prosecutors have law faculty (several with LL.M and Ph.D. qualifications) or *shari'a* degrees. In the Kabul provincial office, 37% of the 282 prosecutors have university law backgrounds. In the AGO provincial offices less

than 20% have law faculty or *shari'a* degrees. In general, the SC, MOJ and AGO have substantial needs for qualified support and administrative staff.

- *Training* – The SC reports that 60% of judges have completed the Judicial Stage training and many others have received Foundation training. The SC sees a pressing need for more comprehensive and expanded training programs. The MOJ reports that over the past 5 years there have been many trainings but they have generally been short, ad-hoc initiatives “resulting in gaps and redundancies...particularly at the provincial levels.” The MOJ states that serious training needs remain in all departments with some departments, such as the Taqin, requiring immediate specialized training. The AGO reports that “the technical competence of AGO prosecutors, managers and staff requires updating and improvement” presenting a need for additional training.
- *Infrastructure* – The SC reports that there are 34 provincial courts and 408 primary courts, for a total of 442 courts, of which 356 are functioning (81%). The SC also reports that 40 court buildings have been constructed by the international community. The MOJ reports that prisons are “grossly inadequate” and there is a “tremendous need for additional prison and detention buildings.” Of 34 prisons, 14 (42%) are located in rented homes. Within the next 5 years, 22 prisons must be built and 10 rehabilitated. The MOJ reports, “the absolute lack of adequate infrastructure in most provinces prevents the Ministry from expanding its delivery of service. Very few offices have the equipment and supplies necessary to function, and lack vehicles and communication equipment.” While the MOJ ANDS strategy makes limited mention of the issue of juvenile justice, efforts are underway with UNODC and UNICEF, supported by Italy to construct a juvenile rehabilitation center and to assess juvenile facilities nationwide. Nevertheless, the MOJ reports that currently 70% of its ordinary budget goes to prisons. The AGO reports a pressing need for vehicles to visit crime sites, as well as serious infrastructure needs particularly in the provinces where offices are “nonexistent or placed in inadequate structures.”
- *Case tracking and data collection and information management* – The SC reports that pilot projects on case information management

including a database are effective but require additional support. The MOJ reports that it lacks tools and resources to gather, store and analyze basic information and that “The Prison department...cannot track information pertaining to prisoners.” The AGO reports that while a joint information management assessment has been conducted, there is a pressing need for implementing a system that links quality data collection with record keeping, sharing and analysis.

- *Increased demands on justice system* – The SC reports that in the past four years pending cases have grown from under 200 to over 1,100 while for at least two years the number of disposed cases has remained relatively constant. The MOJ reports that the prison population has increased from around 600 in 2002 to over 10,000 (with over 500 juveniles) and continues to grow (an increase of over 1600% in five years). The MOJ also reports that the Taqin faces a heavy workload with over 700 legislative documents in need of review with an average drafting, reviewing and amending of over 40 documents per year. The AGO reports a new “proactive” approach to its role that has substantially increased its workload, especially in key areas such as anti-corruption.
- *Institutional and regulatory obstacles* – The SC reports some challenges to its independence as outlined in the constitution and is considering legal amendments to fully define its role in relation to other governmental institutions. The MOJ has outlined a number of laws and regulations that apply directly to its operations and draws attention to the need for improved enforcement to ensure more efficient and professional operation. In general, the potential value of the Taqin’s efforts are seriously impacted by exceedingly slow and confusing legislative processes by the National Assembly. This leads to a situation in which many very important pieces of legislation are prevented from becoming law in an efficient and timely manner. The AGO, which will also be defined by a new law, reports that despite the apparent clarity of Article 134 of the Constitution, there is a need to clarify its role in relation to other agencies especially the ANP, the General Independent Anti-corruption Commission (GIACC) and the Afghan National Army legal corps. In addition the AGO has documented situations of legal uncertainty defined by “confusing codes and laws” that encourage arbitrary and

inappropriate application while also raising questions about the current Interim Criminal Procedure Code.

- *Women and gender parity* – While the government is committed to promoting the access of women to all positions, the ANDS strategies do not focus extensively on this issue. The SC reports progress through the hiring of 42 women judges and 182 women court administrators as well as substantial participation of women in judicial trainings. The MOJ reports increased hiring of women. The AGO reports that 5% of prosecutors are women and 18% of prosecutors working in the civil unit at headquarters are women. The AGO also reports that 4 of 31 Directors are women, no Deputy Attorney Generals are women and only one of 34 provincial prosecutors are women.
- *Security* – The SC, MOJ and AGO all report serious security concerns ranging from the difficulty of operating in zones of conflict to a general inadequate capacity to protect justice sector staff. The increasing level of insecurity presents a special obstacle to the expansion of rule of law reform in many provinces.

Strategy and Programming – The ANDS strategies present a series of recommended programs designed to help the SC, MOJ and AGO achieve their goals. While the many tasks suggested are diverse, they can be understood to involve four different types of key activities: i) salary increases; ii) infrastructure; iii) training and capacity building; and iv) institutional reform.

The strategies and programming goals are not presented in an identical manner in each of the ANDS strategies. In addition, these issues are not generally detailed in an operational manner involving timelines, reporting mechanisms, monitoring systems and sequencing. Nevertheless, the documents present a useful understanding of key strategic and programming needs of the SC, MOJ and AGO.

- *Salary increases*

The SC suggests increasing pay for judges and judicial personnel to a maximum of eight times current wages.

The MOJ presents no specific salary requests, but discusses the current status of the PRR process, which presents a number of problems in need of immediate attention. While the ANDS strategy does not specifically detail these needs, MOJ staff salaries are a serious issue in need of attention.

The AGO identifies low wages and presents a general claim for increased salaries.

- *Infrastructure*

The SC suggests: construction or renovation of court buildings throughout Afghanistan with at least 20 courthouses built and 40 renovated each year; construction of judges' residences in provinces, with each of the 34 provincial appeals courts requiring five residences; provision to each Afghan court of one vehicle for use by judges; construction of Supreme Court building, with courtroom; and, modernization of Commercial Court system including construction, furnishings, equipment, operation, staffing, and judicial training.

The MOJ suggests: substantial and carefully detailed prison construction and rehabilitation throughout the country; construction of 20 buildings for the Department of Government Cases over the next five years, with four buildings constructed each year; and, construction and rehabilitation of juvenile rehabilitation centers throughout the county.

AGO suggests: newly designed AGO headquarters (now nearly complete); 500 new vehicles for use by prosecutors; and, equipment and furniture for the new headquarters and provincial and integrated justice facilities, communications equipment, and supplies.

- *Training and capacity building*

The SC suggests: increasing the length of the Stage training from one year to two years and restructuring its curriculum (supported through 2008 by Italy, Germany, France, and the United States); expanding Foundation training for sitting judges (supported through 2008 by the United States); creating a Judicial Training Institute including a building and accompanying residences; providing scholarships and study tours; creating Continuing Judicial Education Program (some support from the United States, Italy, Germany and Canada).

MOJ suggests: assistance to the Taqin through training, professional legal translators, access to legal materials, and support for coordination with other relevant entities; capacity building for office management, information technology, human resources, operations and English language skills; specific training in negotiation and mediation for the Huquq Department.

AGO suggests: redesigning Stage training for incoming prosecutors; continuing legal education for existing prosecutors; and, capacity building for various AGO reforms including case development, information management and ethics.

- *Institutional Reform.*

SC suggests: creating a Judicial Service Commission; developing a Code of Judicial Conduct with enforcement mechanisms (there exists support from the United States for drafting process with some support from the United States and Italy for training); reviewing and revising SC regulations; creating a Management Support Unit in the SC; developing a National Court Administration System; and, creating a Translation and Publication unit.

MOJ suggests: instituting a Law Reform Program that strengthens the capacity of the Taqin and its relationship with the relevant committees in the two houses of the National Assembly; establishing an Independent Bar Association; improving the overall capacity of Department of Huquq to engage in dispute resolution outside of courts; expanding public legal awareness of rights and legal protections; and, establishing a legal aid department in Kabul with legal aid clinics in the provinces, including close coordination with NGOs and others.

AGO suggests: creating an Organizational Restructuring Program to redesign AGO operations, involving the establishment of a Professional Standards and Education/Training Division, a Special Prosecutions Department, an Anti-Corruption and Financial Crimes Department, and a Department of Cassation; creating a Leadership, Management and Resource Strategy Implementation Program to develop management, planning, analysis and monitoring skills; developing a Law Reform, Policy Analysis and Planning Program to help direct criminal justice policy; setting up a Management Information Systems Program involving all elements of information systems (partly supported by Italy in partnership with United States and other donors) with links to law enforcement and justice sector collaboration and including Litigation Support and Case Management systems to improve case management; creating a Law Enforcement Justice Sector Cooperation Program whose principle project is police-prosecutor collaboration, as already authorized through a MOI/AGO Memorandum of Understanding signed with the facilitation of interested international donors; instituting a

Communications and Public Awareness Program to improve public perception of AGO; Provincial and sub-provincial Development Program; creating a NAPWA and EAWW Implementation Program; and, setting up an Afghanistan Prosecutors Association.

Prioritization of Projects – The ANDS strategy template requests that all institutions prioritize the projects they have identified as a means of meeting their goals. Clearly the purpose of prioritizing projects is to allow the strategies to reflect a broad-based vision of reform while also providing guidance on how to implement change given limited resources. The MOJ and SC strategies presented clear priorities and the AGO strategy raised an important objection to the request.

The AGO's objection to prioritizing arises from its conception of its reforms as fundamentally integrated and diverse. The AGO claims it is impractical to present some elements of a coordinated plan as having greater importance or urgency than others. While this position side-steps the demands of the ANDS process, it also points to a serious question on the part of Afghan stakeholders. They are concerned that donors may provide either all or no funding for specific components of a strategy rather than adopting a more nuanced approach to linking available funds with an integrated and systemic approach to much-needed reforms. When pressed, the AGO presented a basic prioritization involving: improved salaries to reduce corruption and provide a living wage; mobile phones, telephone cards and communication technology for prosecutors; vehicles for transporting prosecutors, visiting crime scenes and carrying victims and witnesses; and, office building and renovation as well as equipment and generators.

First priorities – The SC defines its first priority as substantially increasing salaries, an issue raised in AGO strategy and also referenced by the MOJ, which reports that it is advancing through the PRR process. The MOJ and SC share a clear interest in focusing resources on infrastructure, an issue also echoed in the AGO strategy. For example, the actions of greatest concern for the SC (aside from raising salaries) are in order of priority: building and renovating of courthouses; purchasing vehicles for use by judges; and, building residences for judges. For the MOJ, top priorities are: building and rehabilitating prisons; constructing juvenile rehabilitation centers; building Ministry headquarters, building MOJ offices in the provinces; and providing office equipment, furniture, vehicles and communication tools to all departments, especially in the provinces.

Additional priorities – The SC's secondary priorities begin with another infrastructure investment, building an SC central office with a courtroom, and then include; creating a Translation and Publication Unit,

establishing a code of conduct and a Judicial Services Commission, followed in the third and fourth priorities including improvements for a commercial court system; review of SC regulations; establishing a Management Support Unit; setting up a national court administration system; creating continuing legal education programming; setting up study abroad programs; improving Foundation training and basic skills; and, extending the Stage training to two years.

The MOJ's secondary priorities include providing additional support for the Taqniin; creating a Legal Resources Center for the Taqniin; developing legal terminology; and setting up a publishing unit. These are followed by additional priorities including: training for all staff in information technology, English and management skills; creating a Policy and Planning Unit; setting up a Reform and Implementation Management Unit; engaging in reform and rehabilitation for prisoners; creating study tours; developing a legal awareness programming; and creating Legal Resources Centers in the provinces.

Consolidating the three ANDS strategies – There are many ways to encourage and enable the creation of a consolidation of the SC, MOJ and AGO ANDS strategies. However, whatever approach is chosen to enable consolidation and coordination, it is clear that actual policy decisions must be led by Afghan institutions and must express Afghan stakeholder needs and concerns.

A significant amount of work has already been directed towards the elaboration of the ANDS strategies. These documents present a clear vision of the overall goals of the SC, MOJ and AGO, a solid review of the current context, as well as an extensive set of specific actions designed to address these problems, coupled with vision for prioritizing programs. Whatever subsequent plans are made regarding consolidation should be based on these efforts. For this reason, it is unlikely that a large investment in additional strategic documents is necessary to move the rule of law process forward.

However, there are a number of key issues worth addressing in order to use the SC, MOJ and AGO ANDS strategies as a guideline for a coordinated approach to rule of law reform.

Strategies must be designed according to available resources as a prerequisite for any serious implementation – One of the major flaws of the ANDS strategies is that they have been prepared without a clear sense of available resources. For this reason, the possibility of implementing any of the extensive plans detailed with various levels of specificity remains unclear. Because of this, the impressive and often confident assertions of achievement are, in fact, jeopardized by uncertainty regarding funding. Many of the programs

described in the ANDS strategies can be realized in a realistic manner if designed with donor coordination and in relation to available funds.

Costing – Of the three ANDS strategies only the SC strategy presents clear costing. However, it is unclear whether this costing has been developed in relationship to the availability of funds, donor guidance on possible financing or, for that matter, effective policy-making. The total budget of the SC costing over a 5-year period is over \$237 million. The cost of the SC's number one priority – increasing judicial salaries – alone accounts for over \$130 million. Assuming that the MOJ and AGO ANDS strategic plans were costed with the specificity of the SC plan, the numbers would likely be similarly significant, particularly given the focus on salaries and infrastructure.

Given that any serious progress on a consolidated vision of the SC, MOJ and AGO plans will require substantial donor support, costing for these programs is required along with a clear assessment of expected impact and a system for monitoring implementation. However, at present, Afghan institutions lack clear guidelines to engage in a costing exercise. The ANDS process has been designed to develop strategies to address institutional needs with no clear guidance regarding the availability of resources. This places Afghan stakeholders in a difficult position.

Developing a consolidated plan based on the ANDS documents – The current situation presents something of an impasse. The implementation of all or part of the ANDS strategies – whether consolidated or viewed independently – can only be realized with international support. Yet, the international community has yet to agree on the amount of financial support available or possible conditions for the availability of support. Afghan institutions cannot make progress on a developing a specific vision of justice sector reforms that can be truly realized (as opposed to a strategic plan that expresses what Afghan stakeholders would like with no resource limitations) without having a reasonable sense of the availability of resources. Similarly, donors may be unwilling to commit substantial resources in the absence of a clear understanding of exactly what they are supporting and how this support will enable genuine rule of law reform that can be effectively monitored to ensure actual impact.

To address this situation, there is a need for clear and open communication between donor nations, Afghan justice institutions and the general Afghan government as well as improved coordination among the donors themselves. The Rome Conference can enable this process which will likely require a series of consultations that should begin with a pledge of increased financial support on the part of the international community for rule of law reform. Following an initial commitment of funds, it will be possible to discuss the nature, structure and vision of a consolidated plan. This process may reasonably include conditions for continued funding that

must be met by Afghan partners. Ideally, initial pledges will be increased and adjusted based on monitoring and successful performance.

5. General Challenges, Gaps and Issues to be Solved

Creating a well-functioning, professional justice sector and establishing broad-based rule of law reform in Afghanistan is an extraordinary challenge. Given the social, economic and political reality of Afghanistan, it is essential that rule of law reform be discussed, planned and implemented with an open recognition of the social, economic and political realities of the country. This includes an acknowledgment of widespread poverty, low levels of education and a lack of awareness regarding basic legal rights. In addition, the nation faces a culture of impunity and the problematic acceptance of the State as the primary mode of meeting people's needs, particularly in the provinces. Addressing these issues requires a commitment to a comprehensive approach to rule of law reform which includes a review of general challenges and existing gaps.

The ANDS strategies represent an Afghan-driven plan for progress within the SC, MOJ and AGO. In this way, the ANDS documents reveal key needs within the justice sector, such as improved salaries, infrastructure and training needs as detailed above. This section of the paper reviews a number of significant gaps that are inadequately covered by the ANDS strategies.

Many of these gaps have been identified and discussed by Afghan stakeholders and the international community with varying degrees of specificity while others have received limited attention. Some issues can be addressed with minor alterations of the ANDS strategies. Others require the engagement of other state entities and civil society. Still others require a substantial reconceptualization of the field of justice sector reform.

Overall, this review of challenges, gaps and issues to be solved draws attention to the importance of adopting a comprehensive approach to justice sector and rule of law reform. The material presented below does not outline a complete list of gaps, but instead describes a number of key rule of law concerns in need of attention. The issues covered range widely and cover many distinct themes and they are not presented in order of priority. They begin with a series of general concepts under the heading "overarching challenges, gaps and issues to be resolved" which is followed by a number of more specific, yet overlapping, categories including: "institutional coordination"; "capacity building and training"; "data collection, analysis and information management"; "monitoring, evaluation and mechanisms of accountability"; and, "additional technical needs and interventions."

Overarching challenges, gaps and issues to be resolved

- *The Islamic foundation of rule of law in Afghanistan* – As clearly stated in the Constitution, Islamic law provides the foundation for justice in Afghanistan. It is essential that justice sector reform openly and positively engages this basic element of Afghan legal culture and general Afghan society. The formal legal system links *fiqh* (jurisprudence) and *qanun* (statute) and the Constitution seeks an integration of these two concepts as part of an Islamic democratic state. In general, the government defines *qanun* and religious authorities interpret and control *fiqh*. While this relationship is complex and evolving within contemporary Afghanistan, it is essential that it be taken into consideration for rule of law reform. Substantive justice sector reform should include a role for Islamic scholars. President Karzai, mindful of these considerations, has turned to the Council of Ulama for support certain major issues, such as drafting the new constitution and ensuring equal gender participation in the elections. While the Council of Ulama is not a part of the government and is not mentioned in the Constitution, it exercises legal and moral authority as expressed through *fatami* (plural of *fatwa*). It is important for the international community to understand that these *fatami* have a significant impact on Afghan society. Most structural reform efforts addressed in this report do not involve substantive questions of Islamic law. Instead they deal with matters outside substantive law such as: increasing salaries, supporting infrastructure, improving institutional communication and enabling monitoring and evaluation. Substantive legal issues directly linked to Islamic law include reviewing new legislation, establishing legal curricula and creating appropriate trainings and capacity-building programs. Internationally supported rule of law programs tend to ignore or avoid issues of Islamic law. This negatively impacts the acceptance of these programs by Afghan society. It is therefore necessary that rule of law programs openly engage Islamic law as well as Islamic legal authorities as a means of ensuring their success. It is important that programs are sensitive to the considerations mentioned above by seeking formal links with Islamic legal authorities and involving international experts familiar with Islamic law.
- *Informal justice* – In much of the country, disputes are resolved through *shuras* and *jirgas* and other locally-defined, non-State

mechanisms of social order that, taken together, constitute the informal justice system. The majority of Afghans, especially in rural areas, rely on informal justice systems as a means of resolving disputes. These traditional mechanisms of conflict resolution and adjudication often involve tribal councils made up of respected elders who apply their vision of law linking Islamic shar'ia with local customary law (*'adaat*). The rules used are often widely accepted, though they are not codified as is typical for informal justice systems around the world. While mechanisms of informal justice vary widely by region, they are unified in their high level of legitimacy and general acceptance by Afghans in the communities where they operate. This stands in marked opposition to the general understanding of formal justice mechanisms in these areas. Nevertheless, policy discussions of rule of law reform in Afghanistan tend either to fail to acknowledge the significance of the informal justice system or make general references to its significance while offering limited concrete suggestions on improving its integration with the formal legal system. There are, of course, many serious concerns with the informal system particularly human rights violations including: lack of due process protections; inequitable adjudication; corruption; and, very significant concerns about gender justice. Yet, despite the very real problems of this sector, many Afghans view the informal system as more accessible and less corrupt than the formal justice system. While there are some very useful studies of informal justice in Afghanistan, most policy discussions of the issue are based on anecdotal evidence. There is a pressing need for rigorous field-based research on informal justice systems throughout the country that builds on existing studies. This will allow Afghan stakeholders and representatives of formal justice institutions with an opportunity to determine how to uphold rule of law principles while working cooperatively with informal justice actors. For example, it may be determined that the informal system is a reasonable method of adjudicating certain categories of claims such as land rights or allegations of property theft, as opposed to more serious crimes. There are many ways in which this cooperative arrangement could progress including using the general legitimacy of the informal justice system as a means of increasing the legitimacy of the formal justice system. This may be accomplished by allowing informal justice system decisions to be registered in State courts

and generally encouraging formal connections and mutually reinforcing practices.

- *Corruption* – Corruption and the sense among Afghans that particular government institutions are corrupt represent among the most pressing problems of governance. The justice sector is widely viewed as extremely susceptible to corruption and this understanding severely impacts its legitimacy and capacity. Corruption has many causes and cannot be easily or quickly addressed. Afghanistan is one of the poorest countries in the world. It has a generally weak state and a highly empowered and wealthy class of individuals involved in illicit activities, particularly the narcotics industry. These and other key elements of Afghan society cannot be resolved through rule of law reform and are unlikely to change substantially in the near future. It is important to acknowledge and accept these fundamental aspects of contemporary Afghan social reality. However, there are many possibilities for improving the fight against corruption in the justice sector. For these efforts to be successful, it is necessary, at a minimum, to provide justice sector professionals with adequate salaries and to create clear systems for monitoring, reviewing and punishing those found to be corrupt. These efforts should encourage popular participation through complaint mechanisms and ombudsmen and focus on high profile cases that may receive media attention and display a willingness on the part of the State to fight corruption.
- *Legal aid and access to justice* – There is a pressing need for improved access to the formal legal system for the vast majority of Afghans. This process requires substantially improved legal aid for criminal and civil cases. The MOJ is charged with this responsibility and there have been various discussions about the development of a legal aid service. To date, these needs have been largely met by NGOs, many of whom have been among the most active international entities working on rule of law in the provinces. It is essential that advances are made in the area of legal aid, including the creation of a national Afghan-led system of public defenders and civil legal assistance providers. This process may involve a variety of coordinated relationships involving Afghan government institutions, donors, UNAMA and NGOs. These services are of special value for disenfranchised and marginalized populations such as returning

refugees and internally displaced persons (IDPs), minorities, women and the poor.

- *Legal education* – Legal education in Afghanistan involves two distinct formal university programs managed independently by the law and *shari'a* faculty. While many rule of law professionals have university level training from these faculties, a striking number have other training, both formal and informal. In general, justice sector coordination and rule of law would be served by establishing an open, communicative and productive relationship between all aspects of legal training in Afghanistan. The legal system clearly involves the integration of Islamic law and civil law principles within an Islamic democratic system of governance. This is similar in overall approach to the legal systems in some other Islamic countries, while also presenting many elements unique to Afghan culture and to the particular nature of the current State and its exceptional dependence on international assistance. There is no simple or singular means of reforming and improving legal education in the country. However, long term success is likely to result from broad consultations with all legal experts including, professors from the law faculty, the *shari'a* faculty, respected members of the *ulama*, internationals (including those from other civil law systems and Islamic countries) and select representatives of the informal justice system. The key challenge in reforming legal education involves substantially improving curriculum, training and capacity while respecting the unique, Afghan-specific nature of law in the country.
- *National Directorate of Security (NDS)* – Most discussions of rule of law reform fail to engage with the activities of the NDS which is charged with protecting domestic security. The NDS structure dates back to the era of Soviet influence, domination and control. The NDS has a focused rule of law mandate which empowers the organization to detain, investigate, prosecute and adjudicate those who fall under its broad understanding of security issues. The NDS operates on the basis of laws and decrees issued in 1987 and 2004, aspects of which are classified. It has its own National Security Court system whose activities are hidden from view. Many serious allegations of human rights violations on the part of the Afghan government, including torture and severe due process violations are associated with the NDS which is generally feared by many Afghans. In addition,

there are serious allegations that the NDS is used to intimidate individuals for political and personal ends unrelated to domestic security concerns. There is a pressing need for greater transparency and monitoring of the NDS' legal activities, including its investigations, detentions and adjudicative processes. Technically, the existing justice sector institutions have some level of oversight, although this has not generally been used to address these problems. For example, judges working in the NDS courts operate within the SC and are accountable to that body. Genuine rule of law reform that respects basic human rights principles requires a mechanism of holding the NDS accountable for its legal actions while also respecting the complex demands of protecting domestic security.

- *Women's rights and gender equity* – Women's rights and gender equity represent a truly cross-cutting issue that influences all aspects of justice sector and rule of law reform. Women's rights are profoundly linked to virtually every component of law, including legislative drafting, due process protections, access to justice, public awareness, hiring decisions, training, etc. The three key justice institution ANDS strategies fail to address these issues adequately. With this in mind, the key justice sector institutions and other planning processes should place greater emphasis on the central importance of women's rights and gender justice, including the elaboration of specific policies and benchmarks.
- *Land issues* – One of the most pressing legal issues in Afghanistan for ordinary citizens is the question of land rights. In general, Afghans lack title to land where they live and work. This problem is especially serious among refugees and IDPs who have returned to their communities. There have been serious efforts to address legal land issues, but these have not been fully successful. While the issue is enormously complex in technical and financial terms, land rights questions and titling represent a key means through which the State can support rule of law in a way that serves the population's practical day-to-day needs. It may make sense to establish new pilot projects and support existing pilot projects that seek to clarify land rights and provide legitimate owners with documentary proof that cannot be forged. This may involve building on the Land Information System, a reorganization of property archives and work by the

Land Registration Working Group. Even if this issue cannot be resolved, it is essential that it be recognized as one of the most important realms where formal legal processes impact the lives of ordinary Afghans.

- *Administrative justice* – In general, Afghanistan has substantial administrative justice needs that should be addressed as part of a comprehensive plan of rule of law reform. As the society modernizes, there will be pressing need for a variety of administrative law components. These issues should be resolved by Afghan stakeholders possibly in consultation with international experts that can develop a contextually relevant strategy developed in relation to models used in other countries.
- *Transitional justice* – Following decades of brutal conflict that produced the death of hundreds of thousands of Afghans, most of whom were civilians, the mass displacement of millions and extraordinary suffering, there is a pressing need for engaging with the violence of the past. Accountability for past human rights violations is of great significance for the Afghan people. This could be accomplished in many ways, including selective prosecutions, vetting systems and other key transitional justice policies. Ensuring the legitimacy of basic rule of law principles will be supported by measured actions to enable justice and reconciliation for past abuses. These processes should be developed in close consultation with the Afghan people and must integrate both Islamic law and Afghan cultural traditions. With this in mind, it is likely that religious and tribal leaders will play a substantial role on any effective traditional justice program for Afghanistan, especially as regards advances in local communities. The Afghan Independent Human Rights Commission has taken the lead on this issue which is in need of substantial financial and institutional support as well as a flexible and long term approach to these policies
- *Public awareness and legal representation* – In general, many Afghans are unaware of their legal rights and ill-informed as to how they can access the formal justice system. Throughout the country, there is a pressing need for improved public awareness regarding almost every aspect of rule of law. Citizen engagement with the justice sector is one of the most powerful elements of pressing for progressive and responsive change. In addition, genuine rule of law reform requires that people

internalize the values and rights provided to them by formal legal structures. For these and other reasons, Afghanistan needs an expanded public awareness campaign regarding rule of law reform, especially in the provinces. Public awareness for rule of law reform in Afghanistan requires great sensitivity to Islam and local cultural principles. Moreover, public awareness programs should be designed to enable and support mechanisms of protection aimed at guaranteeing the security of the Afghan people, with a special sensitivity to women and children. This is true both as regard substantive presentations regarding Islamic foundation of the Afghan legal system as well as the use of key symbolic acts for gaining public trust. Establishing genuine rule of law requires a commitment to helping local people to internalize the demands of formal legal systems and come to see the law as a basic structuring mechanism for positive social order. In this sense, there is already something of a clear legal culture in Afghanistan but it is bound to Islamic law (and local understandings of Islamic law) as well as Afghan traditions, which vary by region and ethnicity. Public awareness requires both the presentation of detailed information and the management of this information to encourage greater legitimacy for key justice sector institutions. However, awareness campaigns alone will only be truly useful if they are linked with a justice sector that provides genuine benefits for the people of Afghanistan.

Institutional Coordination

- *Cooperation between AGO and MOI/Afghan National Police* – As is widely recognized, the AGO and the MOI/Afghan National Police must do a better job of working together to clarify their respective roles regarding the criminal investigation process. The lack of cooperation and understanding results from institutional divisions, changes in basic responsibilities and the relative greater strength and capacity of MOI units. This needs to be resolved conceptually and at a high institutional level to ensure proper functioning of the criminal justice system. There is already a committee established to deal with this issue and its efforts should be supported and enhanced. In addition, it may be useful to implement more effectively the system whereby prosecutors interact with police to request additional investigations. To further fulfill the needs of the prosecutorial process, it is essential that crime scene data collection be

improved. This requires substantial capacity building, clear rules of evidence handling and the development of a scientific evidence laboratory to ensure that the evidentiary needs of prosecutors are addressed. There has been substantial preliminary work in the area of AGO/MOI cooperation with a major meeting over a year ago and the establishment of a inter-agency working group. However, it is essential that rapid progress is made on improving this situation to ensure the more efficient and effective management of criminal cases.

- *Legislative process* – Formal rule of law in Afghanistan involves the executive, the legislature and the courts, as well as various administrative entities within the government. The Taqin department within the MOJ helps draft new legislation has been continually and appropriately identified as in need of increased support and assistance. However, the legislative process is held back by various problems related to the functioning of the National Assembly. The current system is highly inefficient and leads to long delays in the drafting, review, redrafting and passage of new legislation. In many cases these delays present serious problems for rule of law reform as numerous important new and revised laws cannot be enacted. There are many ways to improve this situation including specific support to the Taqin, support to the legislative review elements of the national assembly and the exercise of political will and leadership to ensure that necessary laws are effectively drafted and approved in an efficient and timely manner.
- *Coordination with other justice institutions* – A comprehensive approach to rule of law reform requires that programming involving the three key justice institutions – SC, MOJ and AGO – be designed in a coordination with other justice institutions, including enforcement and adjudicative processes involving counter-narcotics and national security as well as the legislative activities of the National Assembly. Afghan stakeholders working with international assistance should work towards improved coordination between all justice sector institutions as part of a broad comprehensive plan. This includes coordination in the management, use and maintenance of buildings used by the SC, MOJ and AGO.
- *General lack of focus on civil as opposed to criminal law* – As a general rule, the majority of current reform efforts focus on criminal

law issues rather than those involving non-criminal cases. While criminal law is of great importance for domestic security and an acceptance of rule of law principles, Afghans require advances in other areas of law. This is especially true for land titling, licensing and elements of law necessary for daily life and commercial activities. Encouraging advances in these areas can connect the Afghan people with a State premised on the fair and equitable management of rule-based systems of dispute resolution and the establishment of social order.

- *International cooperation capabilities* – As a result of drug cultivation and trafficking, Afghanistan faces a serious problem of organized crime, money laundering and related international criminal activities. In response, there is the need for improved capabilities for international cooperation in criminal matters. This process requires advances in the capacities for extradition and mutual legal assistance involving capacity building, specialized training and the establishment of an office or team focusing on these issues. The team requires experience in international issues, prosecutions, knowledge of the English language and capacity to engage in international cooperation activities as part of a broad strategy of combating crime.

Capacity building and training

- *General training principles* – A substantial amount of resources have been invested in various training programs as a means of developing Afghan capacity. However, these programs have often been developed in an ad-hoc manner that is inefficient and may fail to enable sustainability. Efforts should be made to ensure uniform curricula for similar trainings across the justice sector. In addition, resources should be directed to train-the-trainer programs that ensure Afghan control and sustainability. These programs should encourage capacity building in local languages and enable trainings throughout the provinces. Trainings should be linked with follow-up programs and continuing education. It is important that the most capable trainers and trainees be identified for future trainings, hiring, promotions and other benefits. It is also crucial that a comprehensive database with detailed information on past, ongoing and future training courses be developed. This will provide better coordination of donor's activities as well as the work of implementing agencies. The newly established National

Legal Training Center, managed by Afghan authorities, should play a leading role in these efforts.

- *Professional staff quality* – Staff quality, capacity and performance is among the most important elements of any successful policy reform process, including justice sector initiatives. Current low salaries, poor infrastructure and related employment conditions make justice sector work relatively unappealing to more competitive and qualified professionals (while also encouraging corruption and the possible continued employment of less appropriate staff). Afghan institutions and donors alike are correct to invest resources in attracting the highest quality staff possible while also making a concerted effort to prosecute staff found to be corrupt and remove those who are incompetent and low-performing. It is also essential that resources are directed towards recruiting and training high-quality support staff and administrators for all justice sector institutions. These individuals are crucial to the efficient functioning of the MOJ, SC, AGO and other bodies.
- *Administrative and support staff quality* – The Afghan justice sector requires qualified administrative, support and security personnel, whose capacity building needs are often ignored. Without these key figures no justice system can function. It is essential that these key staff are considered in a comprehensive vision of rule of law reform.

Data collection, analysis and information management

- *Data collection, monitoring and information management* – Rule of law reform in Afghanistan requires the development of modern data collection, monitoring and information management systems. All civil and criminal case information should be stored in a database system that protects privileged information yet allows for clear tracking, information sharing and appropriate legal review. Ideally, these systems will facilitate inter-agency and inter-institutional communication. The development of a data management system of this type requires both infrastructure and staff capacity building. Over time, data collection of this type will enable performance monitoring and provide a clear vision of the key elements of the functioning of the justice sector.

- *Establishment of compatible computerized and database systems* – There is a need for an integrated database for all aspects of case management so that civil and criminal cases can be clearly traced throughout the judicial system. In order to maintain continuity and accessibility and ease of reference, it is necessary to have a uniform or at least compatible system which includes a common number system for each case. So, criminal cases will receive a singular identifying code starting with police intake and following through the complete adjudication process. Access and compartmentalization would be restricted depending upon the needs of each of these different bodies.
- *Storage and retrieval of court records* – There is a pressing need for filing and safe storage of all court records, past and present. An appropriate system will enable efficient retrieval of records, certifications and movement of files throughout the system. Off-site facilities should be established for closed cases. The system should include methods of retrieval and safe return of the records. Clearly, a truly modern file management system is an enormous challenge for Afghanistan, but plans for effective, computerized management should be considered and, where possible, implemented, especially in light of rapidly reducing technology costs.
- *Computerization of laws and jurisprudence* – It is necessary to have facilities, and possibly a separate department that deals with the computerization of laws and judicial decisions in a way that makes them accessible to all justice sectors as well as parliamentary committees, various ministries, associations, university researchers and others. This would require trained data-entry personnel and specialized legal experts to supervise the work.

Monitoring, evaluation and mechanisms of accountability

- *Monitoring and evaluation* – Afghanistan has extraordinary data collection and analysis needs. One of the biggest obstacles to any serious review of policy effectiveness is the lack of adequate data collection and the implementation of appropriate monitoring and evaluation systems. This is also an area where the ANDS strategies are lacking. In general, no baseline information on rule of law issues was gathered early in the reconstruction process. This makes charting progress difficult

and, at times, impossible. It is essential that programs are not evaluated in a solely anecdotal and at times self-serving manner. At present, many program evaluations do not track substantive achievements, such as reports on training programs that simply list the number of individuals trained with no measure of the impact of training on actual performance. There is a pressing need for basic information on almost every aspect of the justice sector. It is important that a broad-based research plan and data collection initiative be implemented as a means of providing clear monitoring and evaluation of justice sector activities. These processes can include surveys on institutional capacity, service, performance and related issues as well as fieldwork based qualitative reviews. Over the past year, more data has been collected and UNAMA has engaged in valuable research initiatives on detailing detention conditions and engaging in court monitoring. These activities can and should be developed in a cooperative manner with Afghan stakeholders.

Technical needs and interventions

- *Legal translation* – Afghan legal institutions often depend on foreign experts for advice and assistance. In general, these experts do not speak either Dari or Pashto and conduct their professional work in English. At times, these efforts include drafting legislation and engaging in other activities in which specific language choices have a substantial impact on the meaning of policy initiatives. This issue is especially serious where the defining national text represents a translation from material drafted in English. Similarly, there are many legal concepts that are only now being introduced to Afghanistan. And, there are many English documents and documents from other languages that are needed for legal reference and consultation and must be translated. While there have been some efforts at regularizing this system, there is a pressing need for an official translation body that can serve as the formal entity for legislative translation, defining new legal terms and other components of rule of law reform translation.
- *Library and research capabilities* – The Afghan legal system would benefit from a centralized law library to serve all justice sector constituencies. The library should also contain foreign source material and librarians with broad linguistic capabilities. In addition the same location should serve as a legal research

center, particularly with respect to foreign legal material which could serve a variety of constituencies within the government.

The essentially integrated nature of the rule of law requires a broad and comprehensive vision of justice sector reform. While all needs cannot be addressed, it is important to map the full scope of issues as a means of supporting a broader and ultimately more realistic engagement with the full scope of justice issues facing Afghanistan.

6. Conclusions and Recommendations – How the Rome Conference can assist in the development of a national strategy for comprehensive justice sector and rule of law reform

The Rome Conference offers the international community working with the Islamic Republic of Afghanistan a valuable opportunity to commit to a strong, serious and substantive approach to rule of law reform. Such reform should be designed to address Afghan needs while also meeting donors' concerns regarding monitoring, quality and impact.

Developing a comprehensive strategic plan for justice sector and rule of law reform requires a number of advances. Some are detailed here and can and should be accomplished at the Rome Conference. Other key elements cannot be presented in a document of this type and require additional Afghan-led and Afghan-controlled consultations.

Ideally, the Rome Conference will provide an opportunity for a critical review of past rule of law reform efforts coupled with a genuine plan of action and backed up by pledges of immediate and long term financial support. Given the complex history of the past five years, the Rome Conference may be most effective as a pivotal moment that defines a renewed commitment to rule of law reform that will yield a comprehensive strategic plan.

To begin this process, the Rome Conference should be driven by specific goals for the Islamic Republic of Afghanistan and the international community.

For the Islamic Republic of Afghanistan

1. *Commitment to institutional cooperation and comprehensive justice sector and rule of law reform* – The Islamic Republic of Afghanistan and especially the SC, MOJ and AGO should clarify their vision for comprehensive justice sector and rule of law reform. This involves building on already existing ANDS plans in a manner that defines a clear vision, with sequencing, timetables, clear mechanisms for monitoring and evaluation, and effective systems of accountability.

2. *Engagement with a strategic process involving the preparation of an action plan to enable comprehensive justice sector and rule of law reform* – It is essential that immediate efforts be made to make rapid advances in the preparation of an Afghan-led action plan to enable comprehensive justice sector and rule of law reform. This process includes clear prioritizing, timetables, costing and sequencing as well as an evaluation of an institutional capacity to manage funds coupled with clear mechanisms of systems management and consistent standards of accountability. In addition, this process should address key gaps in the existing ANDS documents as part of a process of developing a genuinely comprehensive plan. The Islamic Republic of Afghanistan should use the Rome Conference as an important step in a larger process of enabling improved communication and coordination with donors. This will involve taking the lead on defining a focused action plan that links reform with reasonable goals grounded in Afghan reality.

For donors and the international community

1. *Commitment to a comprehensive vision of rule of law reform in Afghanistan* – The donor community should issue a clear and forceful commitment to a comprehensive vision of rule of law reform in Afghanistan that supports plans and programs designed by Afghan stakeholders. This should involve a special focus on the issues outlined in the ANDS strategies, particularly salary increases, infrastructure development, training and capacity building and institutional reform. This commitment should explicitly acknowledge past failures to develop programming in line with Afghan reality particularly: the nation's status as one of the poorest in the world; its legacy of decades of devastating violence; the foundational constitutional role of Islamic law; and, inadequate attention to the provinces and local systems of conflict resolution. Above all, a renewed commitment to rule of law reform should be guided by local needs and carefully crafted to function within the challenging context of contemporary Afghanistan.
2. *Pledges of significantly increased funding for rule of law reform in Afghanistan* – The donor community should commit to a substantial increase in funding to support comprehensive rule of law reform. This process should involve pledges of immediate support to enable a series of discreet projects

identified in advance by the SC, MOJ and AGO and set to begin as soon as possible as well as long-term financial assistance.

Substantial efforts have already been invested in Afghan justice sector and rule of law reform. The Rome Conference should build on these achievements and thereby encourage and enable the ANDS process. The event should support cooperation and coordination among justice sector institutions as closely linked to the evaluation of quality, efficiency and effectiveness. In this way, the Rome Conference will provide substantive backing for Afghan initiatives coupled with a vision of greater integration whose specifics, technical elements and step-by-step action plan can be worked out through the a process involving a series of subsequent meetings.

To ensure a commitment to a comprehensive vision of justice sector and rule of law reform backed by genuine pledges of funding yields meaningful change, the Rome Conference should include advances in the following areas.

1. *Endorse a Donor Implementation Plan* – Donors attending the Rome Conference should endorse a Donor Implementation Plan involving clear pledges of specific immediate and long-term funding. The plan should address the key goals and needs defined in the SC, MOJ and AGO ANDS strategies, gaps within current plans and support for a process of elaborating a comprehensive vision of rule of law reform.
 - a. *Pledging of immediate support* – The Donor Implementation Plan should include a pledge of immediate funding by specific donors in a bilateral fashion to be allocated at the Rome Conference. These pledges should support a limited series of particular projects defined in short planning documents prepared in advance by the SC, MOJ and AGO. The projects should be ready for immediate implementation, should involve a short duration for completion and should have a total cost of not more than \$1 million per project. The implementation plans for these projects should include clear timelines and specific mechanisms of monitoring and evaluation. The pledge of immediate support will ensure that Afghan stakeholders view the Rome Conference as an event that yields immediate and tangible benefits for key justice sector institutions with a variety of substantial needs.

- b. *Pledging of long-term support* – Donors should also make specific tangible pledges of funding for medium and long-term support. This pledging should outline specific funding amounts that may be linked to particular actions or planned as general support for categories of activities based on Afghan stakeholder plans. Despite the specificity of these pledges, they should be explicitly linked to a demand on Afghan stakeholders to present clear programmatic documents outlining specific goals, mechanisms of meeting those goals, timelines, benchmarks and systems for monitoring and evaluation. They should also be consistent with a vision of long-term sustainability. The actual provision of the money pledged should be presented in a manner that rewards responsible financial management and specific accomplishments with additional funding.
 - c. *Commitment to long-term funding* – This pledging should be part of a broad vision of sustained donor financial commitments to rule of law reform. These plans should be understood to be fundamentally long-term (i.e. 7-10 years) with specific plans for 1-year, 3-year and 5-year pledges. These plans may be structured to reward the achievements of clearly defined benchmarks. Since donors have different funding systems and calendars, they should commit to support financial coordination and improved communication.
2. *Endorse and pledge to a Provincial Justice Coordination Mechanism* – Because of the pressing need for justice sector and rule of law reform in the provinces, donors at the Rome Conference should endorse the mandate for a Provincial Justice Coordination Mechanism (PJCM). The PJCM should be linked to existing ANDS strategies and integrated within the ICGJR framework. UNAMA may play a central role in administering this proposal which should be developed under the guidance and direction of Afghan stakeholders. Ideally the PJCM will be approved at the Rome Conference. If not, there should be an endorsement of a provisional plan coupled with specific preparations for outlining this plan, endorsing it and funding its key provisions.
3. *Make plans to establish a mechanism for coordinated donor funding and management* – Rule of law reform will benefit from a unitary,

coordinated funding mechanism. There are various ways that such a program can be designed and implemented. While it is unlikely that a fully operational mechanism for coordinated donor funding can be designed in time for the Rome Conference, substantial efforts are already being made to outline various possibilities. One possible strategy involves using the Afghanistan Reconstruction Trust Fund (ARTF) as a means of channelling assistance, particularly if the system utilizes rules that encourage and enable flexibility. The creation of a system of this type will not prevent donors from funding projects in a bilateral fashion outside of the system. However, a unified funding mechanism will allow for improved coordination and, if successful, will gain adequate credibility to become the primary mechanism of donor funding for rule of law reform. However, there are key limitations in this process, such as its exclusion of support for corrections which must be taken into account to enable comprehensive rule of law reform.

4. *Ensure that there is an Afghan-led mechanism to supervise comprehensive justice sector and rule of law reform* – Implementing comprehensive rule of law reform will require Afghan political will. It will also require close Afghan supervision with the engagement of the international community. This will be required for managing donor pledges, especially where the full amount is less than what is needed to fund all desired programs. In addition, there is a need for monitoring progress and issuing reports to donors. The general supervisory mechanism does not require the formation of new groups, but rather the establishment of a highly efficient and responsive process within existing institutions. Supervising and overseeing rule of law reform might be managed by a special team within the ANDS Secretariat working in close cooperation with the JCMB.
5. *Make preparations for a continued process of justice sector and rule of law reform* – Since the Rome Conference is a high-level donor conference, it is an appropriate venue for ensuring a broad international commitment to a comprehensive rule of law reform coupled with pledges of significantly increased funding. At Rome, commitments by donors and the international community can be discussed with high-level representatives of the Islamic Republic of Afghanistan, including the highest levels of leadership among the SC, MOJ and AGO. However, many key elements of the specific design, implementation, sequencing

and monitoring of much needed projects cannot be fully elaborated at the Rome Conference. For this reason, the event should be envisioned as a mechanism for stimulating an ongoing process to be defined through a series of additional high-level meetings in Kabul that will occur over the subsequent months. These meetings will coincide with the ANDS system of consultations, but will extend beyond that process to envision a comprehensive strategy for justice sector and rule of law reform. At the Rome Conference, the Islamic Republic of Afghanistan may choose to present a timetable for this process which might include the following actions:

- a. *At Rome (July 2007)* – Presentation of a brief strategic document presenting a consolidated vision of justice sector reform building on the ANDS strategies. Presentation of a list of key projects for the SC, MOJ and AGO to be funded through immediate support as detailed above.
- b. *Immediately after Rome (July – August 2007)* – Elaboration of a policy document that links the SC, MOJ and AGO ANDS strategies with a comprehensive vision of justice sector and rule of law reform. This should be linked to an evolving mechanism of prioritization, rationalized policy planning and engagement with previously identified gaps and challenges.
- c. *Kabul meeting on the development of a comprehensive strategy for justice sector and rule of law reform (September – October 2007)* – The first major meeting after the Rome Conference would be an event in Kabul that would link the presentation of a comprehensive policy coupled with a clear action plan. This document would outline a five-year strategy that maps onto the ANDS documents but also addresses key gaps and inter-institutional planning. This meeting would be linked with the development of the Donor Implementation Plan and the specific international community pledges. Specifically, this process would connect pledges for long-term funding by donors with key demands for policy planning, costing, monitoring and sequencing.
- d. *Subsequent meetings (November 2007 and on)* – The Rome Conference should be used to create momentum through a series of commitments and pledges that evolve within a steady process of specific policy elaboration. This process must be Afghan-led and should build on the ANDS

documents to elaborate a comprehensive strategy grounded in Afghan reality and expressive of Afghan needs.

It is still quite early to assess the full impact of the past five years of rule of law reform within the Islamic Republic of Afghanistan. Given the social, economic and political context of the country, many of the early promises were unlikely to be realized quickly. While Afghanistan presents many serious challenges, the Rome Conference offers a unique opportunity to develop a comprehensive approach to justice sector and rule of law reform that expresses local stakeholder priorities and builds the foundations for long-term sustainable improvements in the lives of the Afghan people.