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**LOS DERECHOS CIVILES Y POLÍTICOS, EN PARTICULAR LAS
CUESTIONES RELACIONADAS CON LAS DESAPARICIONES
Y LAS EJECUCIONES SUMARIAS**

Ejecuciones extrajudiciales, sumarias o arbitrarias

**Informe de la Relatora Especial, Sra. Asma Jahangir, presentado
en cumplimiento de la resolución 2002/36 de
la Comisión de Derechos Humanos**

Adición

Misión al Afganistán (13 a 23 de octubre de 2002)*

* El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe figura en el anexo del resumen y se distribuye únicamente en el idioma en que se presentó.

Resumen

Del 13 al 23 de octubre de 2002 la Relatora Especial sobre las ejecuciones extrajudiciales, sumarias o arbitrarias, de la Comisión de Derechos Humanos, Sra. Asma Jahangir, realizó una misión al Afganistán.

El principal objetivo de la visita era examinar la situación en el terreno en el marco de su mandato. Debía determinar cómo afectaban a la situación existente y al futuro del proceso de paz las violaciones de los derechos humanos que se habían cometido y se seguían cometiendo. Pero había algo más importante, que era determinar qué medidas, criterios o políticas permitirían apoyar el proceso de paz para que los civiles estuvieran a salvo.

Durante más de 23 años el Afganistán ha venido padeciendo conflictos y graves violaciones de los derechos humanos, incluidas ejecuciones extrajudiciales, sumarias o arbitrarias. El proceso de paz iniciado con el Acuerdo de Bonn brinda una importante oportunidad de abordar las cuestiones relacionadas con la responsabilidad y la justicia de transición.

Los esfuerzos de la Administración Transitoria del Afganistán, la Misión de Asistencia de las Naciones Unidas en el Afganistán (UNAMA) y la Fuerza Internacional para la Seguridad (ISAF) son realmente admirables. Sin embargo, hasta ahora no se ha abordado suficientemente, en el marco del proceso de paz, la cuestión de cómo encarar el pasado y garantizar la justicia y la reconciliación. Las instituciones nacionales existentes no tienen suficiente capacidad para garantizar la justicia. A juicio de la Relatora Especial, si no se resuelven esos problemas existe el riesgo de que fracase el proceso de paz, se reincida en la violencia y haya un nuevo éxodo de refugiados. A este respecto, es sumamente importante garantizar la seguridad en todo el país.

En vista de esa situación, la Relatora Especial recomienda lo siguiente:

La Relatora Especial recomienda que se constituya una comisión investigadora internacional independiente, respaldada por las Naciones Unidas, como primer paso para garantizar la responsabilidad. El mandato de esa comisión debería limitarse a realizar un registro e inventario inicial de las graves violaciones de los derechos humanos cometidas en el pasado, que podría constituir perfectamente un catálogo de crímenes de lesa humanidad. El período debería comenzar con la "Revolución Saur" (1978) y concluir con el establecimiento de la Autoridad Provisional.

Al mismo tiempo se debería alentar a la comisión independiente de derechos humanos a celebrar debates y solicitar una amplia opinión sobre los posibles mecanismos de la justicia de transición y se la debería apoyar en ese cometido.

Además, se debe reforzar el sistema judicial nacional y equiparlo para que se ocupe eficazmente de la cuestión de la impunidad. La comunidad internacional debería apoyar firmemente a la Comisión Judicial y la Comisión Constitucional.

El siguiente paso en el proceso de la justicia de transición debería darse tras las amplias consultas que se celebrarían entre la comisión investigadora internacional y la comisión independiente de derechos humanos.

Se debería aumentar la capacidad de la UNAMA en la esfera de la vigilancia de los derechos humanos hasta que el país dispusiera de capacidad suficiente.

La comunidad internacional debería seguir estudiando opciones para apuntalar la situación en materia de seguridad en el Afganistán, incluso opciones para extender el cometido de la ISAF fuera de Kabul.

Se deben llevar a cabo con determinación el desarme, la desmovilización y la reintegración de los milicianos y los comandantes. Todos los gobiernos concernidos deberían prestar apoyo político a la Administración Transitoria y la UNAMA en ese esfuerzo.

La reconstrucción del Afganistán debe incluir la creación de instituciones y estructuras sobre bases sólidas. Las fuerzas del orden deberían estar integradas por personas a las que no se hubieran imputado graves violaciones de los derechos humanos. Se debería adoptar una metodología de examen eficaz y llevar una base de datos fidedigna. Las fuerzas del orden y de seguridad deberían recibir formación en las normas internacionales y preparación para proteger y promover los derechos humanos. Se debería impartir formación con carácter exclusivo a una dependencia de la policía para que realizara investigaciones y garantizara el enlace con el ministerio público. Se deberían mejorar los conocimientos forenses de la policía.

Se debería prestar debida atención a la selección de los jueces y su formación continua. La naturaleza de la formación destinada a los miembros del poder judicial y los fiscales debería determinarse durante el cumplimiento de su labor y en estrecho contacto con cada juez y fiscal. Además, debería ponerse en funcionamiento una academia judicial integral. Debería garantizarse la seguridad de los jueces.

Hasta que el sistema legal y judicial del Afganistán pudiera garantizar el cumplimiento de las salvaguardias y restricciones de las Naciones Unidas relacionadas con la imposición de la pena capital, se debería suspender la imposición de la pena de muerte y aplicar una moratoria en las ejecuciones.

Annex

**REPORT BY MS. ASMA JAHANGIR, SPECIAL RAPPORTEUR ON
EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS
ON HER MISSION TO AFGHANISTAN (13 TO 23 OCTOBER 2002)**

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Introduction

1. From 13 to 23 October 2002 the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, undertook a mission to Afghanistan with the general aim of assessing the current as well as the past situation with regard to extrajudicial, summary or arbitrary executions, and to provide recommendations to relevant actors for future action relevant to her mandate. The mission took place following consultations with the Afghan Interim Authority and then the Afghan Transitional Administration and the Special Representative of the Secretary-General for Afghanistan, Mr. Lakhdar Brahimi.
2. The Special Rapporteur wishes to thank the Islamic Transitional Administration of Afghanistan for the cooperation and support extended to her and for its openness exhibited throughout the mission. During the entire mission the Special Rapporteur was able to travel freely throughout the country, except where security concerns did not allow it, and to meet with a wide range of individuals and gather information from a variety of sources without any impediment or obstruction.
3. The Special Rapporteur also wishes to express her appreciation to the United Nations Assistance Mission to Afghanistan (UNAMA), the Special Representative of the Secretary-General for Afghanistan, Mr. Brahimi, who assisted in the facilitation and logistical support of the mission. In particular she wishes to thank staff of the Human Rights Unit of UNAMA for facilitating the mission despite the very limited resources at their disposal.

1. Programme of the visit

4. During the visit, apart from various meetings in Kabul, the Special Rapporteur undertook a series of daily missions to the following areas and regions: on 17 October to Herat; 18 October to Kandahar; 20 October to Mazar-e-Sharif and 21 October to Paghman, outside Kabul.
5. In Kabul the Special Rapporteur met President Hamid Karzai; the Minister of Justice, Mr. Abdul Raheem Karimi; the Minister of the Interior, Mr. Taj Mohammad Wardak; the Attorney-General, Mr. Abdoul Mahmood Daqqiq; the Chief Justice of the Supreme Court, Mr. Fazil Hadi Shinwari, and his deputy Mr. Fazel Hamad Manawi; and the Commander of Kabul Police, General Bashir Salangi. She also met with members of the Afghan Independent Human Rights Commission, including its chairperson, Dr. Sima Samar. She met with a number of representatives of civil society, including national and international human rights non-governmental organizations, local lawyers, as well as representatives of political parties. She also met with a number of representatives of the diplomatic corps in Kabul, including the Ambassador of the United States of America, Mr. Robert Patrick John Finn, and the Representative of the European Union in Afghanistan, Mr. Francesc Vendrell. She had a separate meeting with General Karl Eikenberry of the United States military forces in Afghanistan. She held meetings with various staff of UNAMA, UNHCR and the heads of the United Nations agencies in Afghanistan, as well as the legal adviser of the United Nations-mandated peacekeeping force in Kabul, ISAF. She also met with the head of the delegation of the International Committee of the Red Cross (ICRC), Mr. Pierre Wettach. In addition, she met with various individuals who had specific information relevant to her mandate,

including families of victims and eyewitnesses to a number of incidents of some alleged summary executions. During her stay the Special Rapporteur also had the opportunity to visit a local prison in Kabul and observe the retrial on 15 October 2002 of Mr. Abdullah Shah, an individual accused of several murders.

6. In Herat the Special Rapporteur met with the provincial governor, Mr. Ismael Khan; the provincial chief justice, Mr. Maulawi Khudaydad, the local chief State prosecutor, local lawyers and prosecutors, as well as with a local association of professionals. In addition the Special Rapporteur held talks with various United Nations officials based in the region.

7. As the visit to Kandahar took place on Friday, 18 October 2002 (Friday being a non-working day in Afghanistan), it was difficult to arrange meetings with local officials. The Special Rapporteur, however, did have a meeting with the provincial Chief Justice, Mr. Mullawi Hadji Rahmat Ullah and some of his colleagues. In addition, the Special Rapporteur had meetings with various United Nations officials and also visited a local camp of internally displaced persons from the north of Afghanistan who had been displaced recently.

8. In Mazar-e-Sharif the Special Rapporteur met with representatives of the five regional leaders - Mr. Zalmay Yunusi (Jamiat-i Islami), Mr. Fayzallaf Zaki (Junbish-i Milli-yi Islami), Mr. Sardar Saidi (Hizb-i Wahdat-Khalili), Mr. Safai (Hizb-i Wahdat-Akbari) and Mr. Najib (Harakat-i Inqilab) as well as a number of NGOs. She also visited a site in the outskirts of Mazar-e-Sharif, which allegedly contained the remains of thousands of ethnic Hazaras summarily executed by the Taliban, and she met with families of some of the victims.

9. In Paghman the Special Rapporteur met with a local leader as well as officials in the regional police office and other private individuals.

2. The purpose of the visit

10. The Special Rapporteur has keenly followed the developments in Afghanistan and undertook the mission after consulting with the Special Rapporteur on the situation of human rights in Afghanistan, Mr. Kamal Hossain.

11. The new turn of events in Afghanistan, after 11 September 2001, brought relief and a ray of hope for peace for the ordinary citizen, but it also brought fresh challenges for the Afghans as well as their well-wishers around the world. The main challenge now is to establish security and respect for the rule of law in order to sustain the peace process. Security remains notional in the absence of the rule of law. At the same time, rule of law can only be properly enforced in a secure atmosphere. The Special Rapporteur is of the view that mere absence of conflict will not protect the lives of people and the respect for the rule of law is central to the peace process and in providing security. She is concerned that the grave human rights violations committed in the past impinge upon the present situation and future developments in Afghanistan. Reports of extrajudicial and summary executions (though nowhere near the scale of the past) continue to be received. A number of such extrajudicial or summary executions are being carried out by local or regional commanders or militias under their control.¹ Reports of reprisal killings by the commanders have also been brought to the attention of the Special Rapporteur. According to the information received, the cycle of violence has not ended and impunity remains fully entrenched

in the “new” system. Simultaneous steps will have to be taken to address both security concerns and to build institutions for redress so that a sense of justice begins to prevail.

12. The main objective of the visit was, therefore, to examine the situation on the ground within the framework of the present mandate. How do past and present violations of human rights affect the present situation and impact on the future of the peace process? More importantly, the purpose was to search for actions, approaches or policies, which would support the peace process so that the lives of civilians are protected. It should be noted that the Special Rapporteur is conscious of the fact that a comprehensive assessment of the past and present violations is a tremendous task, and this report can in no way claim to be comprehensive with regard to the issue. Rather, the Special Rapporteur believes that she can best carry out her mandate by pinpointing issues which need to be addressed and to indicate various options for future action.

3. History of Afghanistan

13. Afghanistan gained complete independence in 1919 under the reign of King Amanullah, who brought about a number of social and political reforms. In particular he discouraged the seclusion of women and abolished slavery and forced labour. The first Constitution (in 1923) was introduced, which included political rights. His reforms were resented by religious leaders, local tribal chiefs and members of the armed forces. Following a revolt, he abdicated in favour of his older brother, who ruled for three days and was succeeded by Habibullah Khan, more popularly known as Bacha-I-Saqqo (son of the water carrier). After his nine-month rule he was overthrown by Nadir Khan. Bacha-I-Saqqo was captured and executed on 3 November 1929. Nadir Shah reversed the reforms of Amanullah and promulgated a new Constitution in 1931. He was able to reunite the fragmented multi-ethnic society of Afghanistan, but could only hold on to power for four years, at the end of which period he was assassinated in 1933.

14. King Zahir Shah, the son of Nadir Shah, succeeded his father and ruled Afghanistan for 40 years - from 1933 to 1973 - mostly under the influence of his uncles. During his rule, Afghanistan joined the League of Nations (1934) and proclaimed neutrality at the beginning of World War II. By 1963, a political process was set in motion whereby elections were held and the country moved towards a constitutional monarchy with a parliamentary system. A new Constitution was debated by the Loya Jirga² and adopted in 1964, but was only partly enforced. The transition towards democracy, however, remained slow as political parties could organize but the law allowing them to contest elections was never signed by the King. Nevertheless, political movements were organized on university campuses and in other sections of civil society. These later emerged in a polarized atmosphere. The Communist/Marxist movements and the Islamists were the two main rivals. The Government under Zahir Shah was also reported to persecute political rivals and members of political movements.

15. King Zahir Shah was deposed in a bloodless coup whilst abroad. His cousin and former Prime Minister, Muhammad Daoud, seized power in July 1973 as President and introduced a new Constitution in 1977, thereby ending the monarchy. Daoud's allies in his coup included Marxists from the People's Democratic Party of Afghanistan (PDPA). The regime faced armed opposition from the Islamist parties, including a reported coup attempt in December 1973 and attempted uprisings in Kounar, Laghman and Pansheer, in July 1975. The regime lost no time in

settling scores with the Islamists and up to 600 Islamic activists were arrested and many were later executed. A ruthless secret police was introduced. The Daoud regime also pushed the Pakhtoon issue with bordering Pakistan, which renewed tensions between the neighbours. But the alliance that had mounted the coup against Zahir Shah fell apart and the PDPA staged a bloody coup in April 1978 killing the incumbent President, his family members and the palace guards.

16. The 1978 “Saur Revolution” (otherwise known as the “Saur coup d’état”), as it was labelled, was a turning point for Afghanistan. The low-intensity rebellion turned into a war of national destruction with regional and international dimensions. Nur Mohammad Taraki assumed the Presidency but was progressively stripped of power by his dominant Prime Minister, Hafizullah Amin. The Government was supported and protected by the Soviets, who are reported to have poured weapons and sent a number of “advisers” to Afghanistan. During this period it is estimated that thousands of tribal and religious leaders, intellectuals and non-Pashtun prominent persons were executed.

17. On 14 September 1979, Amin ousted Taraki and had him murdered. On 24 December 1979 Soviet troops landed at Kabul airport and took control of all strategic positions in the capital, accompanied by anti-Amin figures in the PDPA. The Presidential palace was attacked and Amin was killed. He was replaced by Babrak Karmal, who presided over the PDPA regime, with the backing of the Soviet military, until May 1986. At this point Karmal was replaced by Mr. Mohammad Najibullah, former chief of the secret police (KhAD). Disappearances and summary executions peaked during the period 1978 to 1979. The Taraki-Amin regime undertook mass arrests of suspected political opponents and in 1989 the Najibullah regime published a list of 11,000 political prisoners who it said had been summarily executed in this period.³ Karmal and Najib presided over counter-insurgency operations throughout their period, 1980 to 1992, and there were persistent reports of use of excessive force and breaches of international humanitarian law in operations against the civilian population and armed opposition.

18. The armed Islamist opposition, that had commenced operations in 1973, expanded rapidly after the PDPA takeover in 1978. During this period, the Mujahideen were armed, trained and supported in Pakistan. It is reported that Pakistan’s Inter Services Intelligence (ISI) and the United States administration supported the Mujahideen, who waged guerrilla warfare in Afghanistan. The extreme repression of the Taraki-Amin period, and then the deployment of Soviet troops throughout the country, were accompanied by widespread armed resistance and revolts. The first documented massacre of the Afghan war occurred in March 1979, in Kerala village, on the outskirts of Asadabad, Kounar. An Afghan army unit fired indiscriminately on a gathering of men and boys, resulting in the deaths of over 1,000. Subsequently, for the duration of the conflict, armed factions, affiliated to Government and opposition, were accused of undertaking numerous mass or indiscriminate killings of civilians and combatants “hors de combat”.

19. By 1987, the growing Soviet-American rapprochement increased pressure for a settlement on Afghanistan. The Geneva Agreement was signed on 14 April 1988, calling for a phased Soviet withdrawal, which was carried out by February 1989, but the civil war continued now amongst the Mujahideen themselves and between them and the government forces. This was a moment of lost opportunity to forge peace.

20. In early 1992, the United Nations produced a peace plan, on the basis of which Mr. Najibullah agreed to step aside to allow a multiparty Government to function. In return he was offered a safe passage out of the country under the protection of the United Nations. This failed, as northern militias were already moving into Kabul and he was returned from the airport to the safety of the United Nations compound. By April 1992, the Mujahideen entered Kabul and on the basis of the Peshawer Accord, Sibghatullah Mojaddidi headed a 10-party government. After two months he peacefully handed over power to Burhanuddin Rabbani, the leader of Jamiat-I-Islami. Rival armed factions struggled for control of Kabul throughout the period 1992-1996. Some estimates say that around 50,000 people were killed in Kabul between April 1992 and September 1996. The factional fighting was brought to a conclusion when the Taliban captured the city. However, the Taliban's first act upon arrival in Kabul was to forcibly remove former president Najibullah and his brother from the United Nations compound and to summarily execute them in public. It has been widely reported that this operation was supervised by Mulla Abdul Razak Akhund, subsequently appointed interior minister of the Islamic Emirate.

21. The Taliban movement emerged in Kandahar province in 1994. During 1994 to 1996 the movement spread rapidly through south-western Afghanistan, to the point where it was able to lay siege to Kabul. The movement captured Kabul and the east in September 1996. It staged an abortive attempt to take over north-western Afghanistan in 1997, and was then successful in capturing north-west and central Afghanistan in 1998. In the course of their military campaigns, the Taliban established a new pattern of human rights abuses, including several massacres of civilians, mass arbitrary arrests and deliberate destruction of housing and livelihoods in the Shomali plain, Bamyan, Khwaja Ghar and Darra Souf. By 1996, the groups opposed to the Taliban formed an alliance called the United National Islamic Front for the Salvation of Afghanistan, or the United Front, representing the ousted Rabbani government. The real power behind the United Front was their military leader, Commander Ahmed Shah Massoud. He was assassinated days before 11 September 2001. By then, the Taliban were in control of well over 80 per cent of the country. However, diplomatic recognition was withheld by all United Nations Member States with the exception of Pakistan, Saudi Arabia and the United Arab Emirates. It is reported that the ISI soon made contacts with the Taliban and are widely accused of supporting them right to the end. All Governments in Pakistan have denied any support to the Taliban but accounts indicate otherwise.

22. By early 1997, Osama bin Laden, a Saudi millionaire, had taken refuge in Afghanistan and a network of Islamist militants from across the world entered the war. A number of Pakistani and Afghan refugees studying in Madrassas (religious schools), run by hard-line religious leaders in Pakistan, joined the networks in Afghanistan.

23. Alarmed at reports that the Taliban were providing “sanctuary and training for international terrorists and their organizations”, in October 1999 the Security Council froze funds and financial resources claimed by the Taliban. The Council demanded that Osama bin Laden (already indicted by the United States for involvement in the 1998 bombing of American embassies in Kenya and Tanzania) be handed over to the “appropriate authorities”. In December 2000, the Security Council judged that the Taliban had failed to respond to its demands and that this constituted a threat to international peace and security. The Council decided to impose further sanctions that constituted an arms embargo and prohibition on all military assistance to the Taliban. The Taliban reacted by closing down the offices of the United Nations Special Mission in Afghanistan.

24. Following the tragic terrorist attacks in the United States on 11 September 2001, it launched an attack against the Taliban and al-Qa’idah forces in Afghanistan in November 2001. A few weeks later, the Taliban withdrew or surrendered and Afghan opposition groups met in Bonn to negotiate a transitional settlement.

4. The Bonn Agreement, transition to peace and better governance

25. After nine days of intensive negotiations, on 5 December 2001 the United Nations-sponsored talks in Bonn, Germany, culminated in the signing of an agreement on a provisional arrangement in Afghanistan pending the re-establishment of permanent government institutions. The Bonn Agreement was backed by Security Council resolution 1386 (2001).

26. The Bonn Agreement contains a number of strong and specific human rights clauses, including the provisions binding the authorities to international human rights standards during the transitional period, securing political participation for women, providing for the establishment of an independent human rights commission, granting the right to the United Nations to conduct human rights monitoring and investigations and to recommend corrective action, and calling for a national programme of human rights education in Afghanistan.

27. Following the establishment of the Afghan Interim Authority, the Bonn Agreement sets out specific time-bound steps towards establishing a full-fledged Government:

- A Special Independent Commission to convene an Emergency Loya Jirga to be opened by King Zaher Shah within six months of the transfer of power to the Interim Authority. A Transitional Administration was agreed upon headed by Mr. Hamid Karzai (Loya Jirga held on 18 June 2002);
- A Constitutional Loya Jirga to be convened within 18 months of the establishment of the Transitional Authority, in order to adopt a new Constitution⁴ (around end of 2003); and
- A Government to be elected through free and fair elections to be held no later than two years from the date of the convening of the Emergency Loya Jirga (around June 2004).

28. In terms of the specific human rights activities, an Independent Human Rights Commission is to be the first component, and is to then serve as the centre-point of the entire programme, which will include activities in the following areas:

- Establishment of the independent human rights commission, and the building of its capacities;
- A programme for the advancement of the human rights of women;
- A national programme of human rights education; and
- A national process of consultations on transitional justice.

29. With regard to the legal framework and judicial system, the Bonn Agreement stipulated that until the adoption of a new constitution, the Constitution of 1964, to the extent that its provisions are not inconsistent with those contained in the Bonn Agreement, would be the valid constitution of Afghanistan. Furthermore, the Bonn Agreement also notes the exception of those provisions of the Constitution “relating to the monarchy and to the executive and legislative bodies provided in the Constitution; and existing laws and regulations, to the extent that they are not inconsistent with the Bonn Agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations”.

30. The Bonn Agreement further stipulates that the judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The agreement also provides for the Interim Administration to establish, with the assistance of the United Nations, a judicial commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.

31. Following the Bonn Agreement, the Security Council on 28 March 2002 adopted resolution 1401 (2002), which established the United Nations Assistance Mission in Afghanistan (UNAMA) as proposed in the report of the Secretary-General of 18 March 2002 (S/2002/278). UNAMA is intended to ensure that all United Nations assistance efforts are channelled towards supporting the implementation of the peace process by the Afghan people. Its size and structure is relatively lean. Human rights were conceptualized as a cross-cutting issue in both pillars of UNAMA.⁵ During her mission, the Special Rapporteur was greatly impressed by the work of UNAMA, whose staff is working under very stressful conditions and pressing deadlines.

5. International human rights instruments to which Afghanistan is a State party

32. Afghanistan is a State party to most of the key international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the

Child. Afghanistan is also a signatory of the Convention on the Elimination of All Forms of Discrimination against Women. Given the many years of conflict, it will be no surprise that Afghanistan has not been in a position to submit reports to the treaty bodies for many years. As an example, the last submission of a report under the ICCPR was in October 1991. Afghanistan's obligations under international law were also recognized in the Bonn Agreement. It said that the legal framework will not be inconsistent with the international legal obligations to which Afghanistan is a party.

33. During the visit of the Special Rapporteur to Afghanistan, President Hamid Karzai indicated that Afghanistan would shortly accede to the Rome Statute of the International Criminal Court. In January 2003 it was reported that the Government had in fact completed the accession procedure. If these reports are accurate, the Special Rapporteur welcomes this development.

6. A glimpse of grave human rights violations of the past

34. The history of violence throughout the years of conflict has been reported by various authors, journalists, NGOs and United Nations reports. But there is no official independent and comprehensive account of it. Some courageous local groups and other individuals have documented major incidents of grave human rights violations and are continuing to do so. Mass graves have been identified and it was pointed out to the Special Rapporteur that a number of suspected perpetrators of grave human rights violations continue to live comfortably in Afghanistan. Some also hold important positions or authority in the new set-up. While practically everyone supports the Transitional Administration led by President Hamid Karzai, who has earned respect amongst the people, they fear elements within the new set-up, who continue to threaten their lives, particularly of those living outside of Kabul.

35. It was the clear impression of the Special Rapporteur that amongst the people there is a strong desire for justice and a craving for peace. Most people realize that the Transitional Administration is facing a delicate situation. Any wrong step towards transitional justice or demobilization and disarmament could face a revolt from within the Transitional Administration itself and by local or regional commanders.

36. At the same time, a deadly silence on the question of impunity will open up all opportunities for serious human rights violators to entrench themselves into the system. This could, by itself, lead to a reversal to the peace process, a relapse into renewed violence and fresh refugee outflows. The decision for any action or inaction must be based on the realities on the ground and the seriousness of the crimes committed. According to the overwhelming information of killings committed in the past,⁶ the Special Rapporteur is inclined to believe that some human rights abuses would constitute crimes against humanity. She can only share limited information because of space constraints and security risks for those who provided her with this information. The narrative above has already noted the pattern of arbitrary detentions, summary executions, massacres of civilians and use of unjustified, excessive force, during counter-insurgency operations and armed resistance, 1978-1992. In addition, specific incidents also reported to the Special Rapporteur clearly illustrate the magnitude of the issue:

- In 1980, troops shot at protesters who were distributing pamphlets against the regime. They were shot at with live ammunition, and rockets were fired on them from helicopters. Some 800 people are reported dead. The same year a student procession ended in a hail of bullets. Over 100 students were allegedly executed;
- A schoolteacher arrested in 1981 described her detention centre, where fingers, noses, ears, legs, hands, breasts, and hair of women were piled. In one corner there was a decayed corpse;
- Soviet forces carpet-bombed the western city of Herat in 1984, resulting in hundreds of civilian casualties;
- Under the Soviet period, the intelligence agency KhAD engaged in widespread torture and killing of political opponents. According to information received by Amnesty International, more than 8,000 people were executed after summary trials by special courts between 1980 and 1988;
- In 1992, Junbish forces killed a number of women in Kate Now, North Kabul. They were raped, mutilated and then killed. Corpses of five women were later identified;
- In 1993 the sustained rocket attacks on Kabul carried out by armed factions, most notoriously by Hizb-I-Islami forces, reportedly raped women and caused tens of thousands of civilian deaths;
- In February, 1993 Jamait and Ittihad-i-Islami forces went on a rampage in the civilian neighbourhoods of West Kabul, mostly inhabited by Hazara population. They are reported to have raped a number of women and killed over 100 civilians;
- A number of incidents have been reported between 1992 and 1997, where forces of various Mujahideen groups hijacked vehicles (800 documented) and in a number of cases their drivers and passengers were shot dead;
- Hindu and Sikh communities were targeted in 1994, with around 40 people hunted down and killed;
- On 29 July 1994 the BBC correspondent, Mir Wais Jalil, was killed reportedly by militants of Hizb-i-Islami;
- In May 1997, following a revolt in Mazar-e-Sharif after the Taliban captured the city, hundreds of Taliban were killed. It is reported that hundreds were taken into custody and executed in batches. Some bodies were bound together and hundreds thrown down the wells, possibly after being shot;
- In September and December 1997, the Taliban again attempted to take control of Mazar-e-Sharif, but were repulsed. During their retreat they reportedly carried out

massacres in a number of villages in Qizilabad and around Qaiser, Faryab Province. It is reported that at least 600 people were massacred in Qaiser city alone;

- In August 1998, the Taliban took control of Mazar-e-Sharif, massacring mostly Hazara civilians. Reports claim that 2,000 people, mostly Hazaras were systematically hunted down and killed. Some were boiled or asphyxiated to death. There are reports of foreign elements leading the massacre. The Special Rapporteur met some victim families of this tragedy. She also visited one mass grave, where bare human bones were vividly visible. Women family members of those executed were keen to see justice. One of them said that she had buried her husband and son by herself in her courtyard and was sitting on their graves waiting for justice to be done. The Special Rapporteur reported the massacre in her report to the Commission on Human Rights (E/CN.4/1999/39);
- In May 2000, the Taliban tortured and killed 31 ethnic Hazara prisoners in an area known as Hazara Mazari, on the border between Baghlan and Samangan Province;
- The Taliban are reported to have used detainees for clearing mines in Shamali, Dara-i-Suf, killing a number of people;
- Between January and April 2000, mass arrests were made by the Taliban in district Sangcharak. Two days later bodies of 26 people, from amongst those arrested, were found at a place called Lalli Khandand. Seventeen elders were summarily executed in the village Khassar in Gosfandi province;
- A series of massacres took place in Yakawlang between January and June 2001. At least 176 people were brutally killed. In one village all adult males were killed. Old men and women survivors were allowed to bury their dead ones after a couple of days. Footage and photographs taken after the incident suggest that there were foreign fighters amongst the Taliban forces. Some wrote warnings on the walls of buildings in Urdu. This report has also been previously reported on by the Special Rapporteur (E/CN.4/2002/74);
- In 2001, the Taliban advanced towards Khwajaghar into an area under the control of the United Front (UF). The UF forces retreated but took back the area after 10 days. During the 10 days of Taliban control 15 civilians, including a 15-year-old boy, were bound and then shot in the head and neck. The victims were all farmers. In Takhmali six villagers were shot while trying to escape;
- Several reports were received of summary trials of homosexuals, who were convicted and buried alive in the ground during the period of the Taliban;
- In May 2001 the Taliban took over the district of Zari in Balkh province from forces loyal to Commander Dostum, summary executions of unarmed civilians was carried out;
- In September-October 2001, while retreating, the Taliban killed 80 civilians, mainly Hazaras, in Kand-i-pusht, while they were fleeing for Pakistan. Other people

belonging to ethnic and religious minority groups were shot dead near the airport in Shindand;

- After 11 September 2001 and before the Interim Authority assumed office, a number of summary executions have been reported which were allegedly carried out by the retreating Taliban and their foreign allies; and
- In November 2001, thousands of Taliban, including their foreign allies, surrendered or were captured in Kunduz, after United States bombings from the air and the Northern Alliance on the ground overpowered them. Several hundred prisoners of war were put in containers for transportation by road. On the way to Sheberghan Jawzjan province, most of them reportedly died of suffocation. The Northern Alliance commanders allegedly buried them in a mass grave in Dasht-e-Layli. The Office of the United Nations High Commissioner for Human Rights initiated a preliminary forensic investigation, which was carried out under the auspices of UNAMA. The Special Rapporteur met an eyewitness to the incident, who confirmed that heavy machinery was used to prepare the gravesite. According to the information received further forensic investigation on a few gravesites is planned for the spring of 2003.

37. The Special Rapporteur found that present situation in Afghanistan is unique as the Transitional Administration, the international community and, most importantly, the people of Afghanistan are collectively rebuilding a society and a country, which has suffered from more than 23 years of conflict and a series of grave human rights violations. The circumstances are bound to be complex, as the legacy of the past cannot be wiped away in a matter of months. At the same time, it is essential to initiate under the United Nations auspices a gradual process of accountability that will serve to strengthen the rule of law. The process must take place concurrently with political developments. As Afghanistan moves towards formalizing a constitutional structure, it is imperative that the process of formalization be accompanied by increasing levels of accountability and recourse to law. In the opinion of the Special Rapporteur, the lack of political developments with safeguards to protect the lives of the people, has led, and is likely to lead once again, to the marginalization of the Afghanistan population and strengthening of unconstitutional centres of power. If this is allowed to happen, the right to life is likely to remain under threat and to be frequently violated by those who have gained power on account of historical impunity for past violations. This could lead to a collapse of the peace process which has so painstakingly been put in place.

38. There is a general awareness of the atrocities committed by various groups, actors and authorities in Afghanistan but knowledge about the level of cruelty experienced by the Afghan people has not reached ordinary people elsewhere throughout the world. In particular, for lack of proper information, many Muslims look up to the Taliban rule as truly Islamic. This disinformation or misconception has to be corrected so that religious-based prejudices are contained and addressed. An accountability process, which is slow but sure, will be another opportunity to set the record straight and to shift public attention to the actual cause of some of the major and grave human rights violations.

39. There are fears of losing witnesses and evidence as time goes by. The Special Rapporteur was informed of intimidation of witnesses and some of them feared reprisals. The

process for accountability must therefore be initiated sooner rather than later. It must be even-handed and not seen to target any one ethnic or sectarian group. It is therefore imperative to take stock of excesses committed during the past many years of conflict.

40. At the same time there are also increasing calls for national reconciliation within the ongoing peace process. However, the lack of any process of accountability may actually impede this. For example, many are now calling for the political rehabilitation of people previously associated with the Taliban movement. The fact that there has been no progress towards accountability for the Taliban responsible for massacres or other violations makes it all the more difficult for the victims of the Taliban to accept that any Taliban should again be able to play a political role or participate in national reconciliation. The start of accountability is the basic guarantee to victims of grave abuses that national reconciliation is compatible with justice.

41. Consultations undertaken by the Special Rapporteur also indicate that the many Afghan combatants - on all sides - who have conducted themselves honourably are supportive of moves to hold to account those who have caused unnecessary suffering by breaching international humanitarian law. Successive international resolutions and agreements, most lately the Bonn Agreement itself, have affirmed the basic legitimacy of the Afghans' armed struggle. However, it is a principle of international law that both sides in a legitimate armed conflict must be held accountable for the conduct of their forces, in particular with regard to the treatment of civilians and those "hors de combat".

7. Reports of present violations of the right to life

42. The information collected during the mission indicates that incidents of extrajudicial and summary executions have dramatically decreased since the transition, but nevertheless are frequently taking place and the situation warrants concern. In many places an atmosphere of fear prevails, especially in areas outside of Kabul. For example, during preparations to the Emergency Loya Jirga and leading up to it, the situation was tense. More reports of threats and killings by local and regional commanders were recorded. Political patronage to these commanders is also a factor which emboldens them. The Special Rapporteur was told, without any cogent proof, that neighbouring countries were suspected of backing some of these commanders or officials of the administration. The United States-led coalition appears to have provided resources and arms to some key commanders until October 2002, which were, according to some reports used to maintain their militias. A full assessment of the situation can obviously not be rendered given the still very weak structures for monitoring violations of human rights, both in terms of national capacity as well as that of the international community. Some of the persons who met with the Special Rapporteur were able to slip written accounts to her. The accounts given below do not give the entire picture but only a few glimpses of the situation.

- In August 2002 approximately seven prisoners from a prison in Kabul were allegedly killed extrajudicially during an attempted escape. It is unclear how and by whom they were killed. It is reported that President Karzai ordered an investigation. The Special Rapporteur was not, however, able to retrieve any information regarding the result of the investigation;

- In June or July 2002 in Uruzghan Province an individual suspected of murder was allegedly apprehended by local police officers and subsequently summarily executed by the same police officers on their way back to the police station. No inquiry was conducted;
- Another reported case dates back to around August 2002 in Kandahar Province. A recent recruit of the army had allegedly fired shots at a patrol of United States troops driving by. The American forces left the area, and subsequently the local commander managed to convince the recruit to hand over his weapon. It is reported that the commander then shot and killed the recruit on the spot. It is further reported that the following day the body of the recruit was found hanging from a lamppost in Kandahar with a sign attached to his body with an inscription in Urdu reading “This is what happens to those who shoot at the Americans”. It should also be noted that other conflicting reports claim that the individual was killed in a cross-fire which followed his initial shot at the US troops. However, no inquiry was held to ascertain the facts;
- The lives of women remain vulnerable and there are reports of killings of women by their family members in the name of morality. Despite interventions by local NGOs, the authorities have looked away, and have taken no action to investigate such murders. Such gender-based impunity by any State is a clear discrimination of the right to life of women;
- There were reports claiming that renewed forced recruitment was being carried out by various militia groups in provinces of the North of the country. Some reports indicated that local militias summarily executed persons who had refused the recruitment;
- The Special Rapporteur also received information about a bomb attack against a wedding party in Paghman which resulted in at least two deaths. It was alleged that sometime in September or October of 2002 a bomb had been thrown at a house in Paghman where a wedding party with music and dancing was taking place. According to local law enforcement officials the incident was under investigation but no suspects had been identified. Other sources claimed that one of the local leaders of Paghman had been behind this attack as he had banned dancing and music and warned of dire consequences if anyone violated his orders;
- During her visit to Kandahar, when the Special Rapporteur interviewed internally displaced persons from the North (mainly from Faryab Province), she was informed that these people - mainly ethnic Pashtoons - had allegedly left their area of origin as their local tribal leaders had been summarily executed by local militia. It was unclear to which extent these killings were currently under investigation;
- Another example concerns a man from a village in the North, who was killed by a local militia for intervening in a dispute over factional control of access to water sources. The leadership intervened and the militia leader apologized to the other

villagers by offering compensation for the crime. The villagers have refused and are requesting that the militia leader be arrested and charged - so far no action has been taken;

- There were reports of deliberate killing of over 20 civilians, including women and children in Borgh village of Chemtal district in January 2002. No investigation was made despite allegation of extrajudicial killings;
- Haji Ramat Khan was kidnapped from Nahri Toop District and killed in January 2002. His body was found two days later in the desert south of Mazar. It is suspected that he was kidnapped on the orders of a high official;
- In January 2002, 30 civilians have reportedly been massacred in Qala-I-Zal district of Kunduz during clashes between Junbish and Jamiat. Similarly in Sholgara and Khairabad during these clashes, 80 villages were looted and a large number of civilians were reportedly killed;
- In February 2002 a family of seven members was massacred in District 9 of Mazar City. The father and eldest son of the family were thrown alive in the shallow well of the house and the wife of the eldest son, two daughters, a small child and the mother of the family were killed in the house. The eldest daughter, who was 14 years old, and the wife of the eldest son of the family had no clothes on their bodies and had clear signs of sexual attack/rape. The locals alleged that the killings were carried out on the instructions of a local commander;
- In March 2002 a pickup of Haji Habib, Commander of Military Division 18 from Junbish, collided with a public minibus full of passengers on the road close to Shiberghan. Although it was the fault of the commander's driver, the commander and his men killed the driver and his 10-year-old son on the spot;
- In April 2002 a senior Professional staff member of FAO was killed in the evening at home by armed men. His case is still pending. The alleged killer is not detained or handed over to the police by Junbish, as he is closely associated with commander Lal from Junbish;
- The Chief Justice of Kandahar expressed fear of armed people, who he said intimidated the judiciary. He expressed his inability to deliver justice in such an atmosphere;
- In Herat, the Special Rapporteur heard and received several reports of threats by the provincial and local administration; and
- In Kandahar, a high official of the intelligence services of the provinces was to have ordered torture of prisoners, three of them died as a result. None can even speak about it.

43. On 1 July 2002, United States forces conducted an aerial attack on Mazar village, then on Syahsang village, followed by attacks on Shartoghay village. The region is extremely isolated and can be reached after nine hours of driving. In the Karaka village a wedding party was being hosted, while American aircraft were flying close to the ground. They reportedly used heavy machine guns and grenades. There are reports alleging that at the time United States/coalition ground forces were seen present on the ground prior and during the air attacks. The number of casualties could not be determined. The United States is reportedly admitting the deaths of approximately 40 people, while the locals claim a higher death toll. According to some reports the wedding party had been attacked by United States forces as some persons present at the party had fired rifle shots in the air in a celebratory manner. These shots had allegedly been perceived as hostile fire by American forces, which had subsequently returned fire. This was denied by local residents, who pointed out that the presence of ground forces indicate some advance planning. It was also reported to the Special Rapporteur that the United States/coalition force thoroughly searched the area after the incident. The hands of the surviving men and women were allegedly tied behind their backs and according to reports received, signs of combat, like bullets, shrapnel and blood stains, were removed by the United States/coalition forces.

44. The Special Rapporteur raised this issue with both the United States Ambassador as well as with American General Karl Eikenberry. It was confirmed that an investigation had been carried out by United States military forces. However, the findings of the investigations had not been released publicly. The Special Rapporteur requested a copy of the investigation report, but none has so far been received. Other official and preliminary investigations have also taken place, and it is regrettable that none of the investigation reports have been publicly released.

45. It should also be noted that the Special Rapporteur did not receive any information which claimed that the international peacekeeping force in Kabul, ISAF, had been involved in any extrajudicial killing. On the contrary, many sources reported that the Turkish-led peacekeeping force was conducting its work in an exemplary manner. All sources affirmed that, without the presence of the force in Kabul, it would be very likely that incidences of extrajudicial killings would be very high.

46. In general, the Special Rapporteur wishes to note that the human rights monitoring capacity of the United Nations as well as that of the Transitional Administration is thoroughly inadequate, which makes it impossible to have a clear picture of the human rights situation throughout the country.

8. The case of Abdullah Shah

47. During the mission, the Special Rapporteur had the opportunity to observe a trial of Abdullah Shah and his nephew Mohammad Arif. Shah was arrested in April 2002 on the complaint of his wife Makai. She expressed fear of being killed by him and alleged that he had already murdered three previous wives and tortured the fourth, who escaped. According to the Public Prosecutor, Shah poured scalding water on Makai and then doused her with petrol. While Shah was looking for a match Makai tried to escape upon which Shah shot at her and was arrested in this act.

48. After his arrest, over 30 witnesses complained of crimes committed by Shah from 1992 onwards. He was also accused of being responsible for the killings of around 200 people, who are allegedly buried in a mass grave in the garden of Zareef and Haider in a large irrigation well. These were conducted when Shah was a commander with Ittehad Islami.

49. A number of people concerned or connected to the trial provided the Special Rapporteur with further information about Shah. They described the condition of his wife who was disfigured from burns and her genital areas were also burnt. She had deep wounds from being bitten by Shah. He had a reputation of biting people and acquired a nickname, Sag-e-Zardad, the dog of his commander Zardad. He became a mujahid in 1980 but gained notoriety in the early 1990s during his posting at a checkpoint on the main road running from Jalalabad to Kabul. It is said that Abdullah Shah was affiliated to Hizb-I-Islami when he joined commander Zardad. He is alleged to have carried out a number of mass murders. He reportedly hijacked a bus load of 50 Hazaras during an operation in 1992 and killed all the passengers by dousing them with fuel and blowing them up with rocket-propelled grenades at his base. His co-accused was reported to have tortured people to death by shooting at different parts of their body and see them “dance to death”.

50. Shah and Arif were originally tried in the Special Security Court (*Maqama Ikhtessasse Amaniya Milli*), Kabul in camera. The investigation was carried out and apparently evidence recorded at the site of the mass grave. Statements of local elders of his village were also heard. According to the information given to the Special Rapporteur by the law officers, the presiding judge was bribed by Shah. The trial court convicted him and sentenced him to 20 years’ imprisonment. Arif was acquitted.

51. There was a great deal of public interest in the case and there was a demand that Shah be given the death penalty. There was a general disappointment and dissatisfaction expressed by those observing the trial. In their opinion, the sentence was disproportionately low in comparison to the crimes attributed to Shah. The witnesses and their families also expressed fears of reprisals by Shah’s associates. They claimed that influential people like Shah could easily bribe their way out of prison and would “undoubtedly” kill them all. This was their justification for expecting nothing less than a death penalty. The emphasis was on their survival and on revenge rather than to see justice done in accordance with due process. The Special Rapporteur can understand their sentiments and anguish but believes that any form of accountability must be carried out on a stronger footing based upon reasonable standards of trial. In particular, the death penalty should only be awarded with due regard to the United Nations guidelines on safeguards and restrictions relating to the imposition of capital punishment.

52. On appeal, the case was remanded to the Public Security Court. Before the retrial was heard, the Chief Justice of the Supreme Court, probably moved by the pleas of the victims and their families, gave a public statement that the two accused should have been given nothing less than the death sentence.

53. On the first day of the retrial, the Special Rapporteur was present. It was an open trial, with over 200 people packed in the courtroom to hear the proceedings. There were a number of women and women lawyers observing the trial. The proceedings were held in an orderly manner

and the Special Rapporteur was impressed by the public prosecutor who said that he was seeking justice and was therefore not afraid of the accused. Three presiding judges also impressed the Special Rapporteur, as they sought to conduct the trial in a serious and dignified manner. A great number of witnesses had the courage to speak out in public, which in the present circumstances is commendable. The accused was given an opportunity to make a statement and he pleaded not guilty.

54. Despite these positive efforts to address the issue of impunity, the Special Rapporteur was seriously concerned about a number of issues with regard to the trial. The trial, which resulted in convicting the accused to death, lasted for a total of not more than three hours. Thus the prosecution presented only a brief summary of its case against the accused, the witnesses (more than 10) were asked by the court to provide only a brief summary statement, and no cross-examination of the witnesses took place. Most testimonies were based on hearsay and not direct witnessing of crimes allegedly committed by the accused. No documents were examined or presented. Minutes after the trial concluded the death sentence was pronounced by the court. The accused has an opportunity to appeal against the conviction.

55. Given these circumstances, it is understandable that the Special Rapporteur subsequently expressed her concern with regard to the trial and the death sentence. The trial was clearly not in conformity with the United Nations safeguards and restrictions relating to the imposition of capital punishment (for a more detailed account regarding the minimum standards, see E/CN.4/2002/74).

56. The Abdullah Shah case has encouraged others to follow their lead. A couple of members of victims' families interviewed by the Special Rapporteur also expressed their intention of instituting criminal proceedings against perpetrators of extrajudicial, summary or arbitrary executions carried out in the past. The dilemma is that local capacity to deal with such trials is limited but at the same time the demand for justice cannot be shut out. As long as there is a legal and judicial system - efficient or deficient - trials will be held. Local capacities must therefore be assessed and supported at every level for melting down the culture of impunity.

9. Security

57. Eighteen countries have contributed to the International Security Assistance Force (ISAF), the peacekeeping mission in Afghanistan, which was sanctioned by the Security Council in resolution 1386 of 20 December 2001. Some 1,200 troops will work closely with the United Nations and the Transitional Administration in aiding the Transitional Authority in developing national security structures, assist the country's reconstruction as well as to assist in developing and training future Afghan security forces. The mission of ISAF is currently limited to Kabul and its environs. Recently, the one-year mandate of ISAF was extended by another year by the Security Council in resolution 1444 of 27 November 2002, but there was no change in the size and geographical area of its operation.

58. There are constant calls for the expansion of ISAF by the Afghan people and those in authority. President Karzai has also stressed upon it on a number of occasions. There are a few security concerns in Kabul but insecurity prevails in areas outside of the capital. But even in

Kabul security remains superficial and dependent on the presence of ISAF. Its representative who met the Special Rapporteur also pointed out that security can only take root if the rule of law begins to be instilled.

59. The estimates regarding the number of armed men with combat experience range from 200,000 to 300,000. They will aspire to be inducted in the army if an effective demobilization effort begins. The Defence Minister hopes to form a national army of 250,000 soldiers. Other sources put the figure to 50,000 to 60,000 as being more realistic. Intensive training of some men has started. They are being trained by troops from Britain, Turkey, France, Italy and Germany. It is a promising beginning but preparing an organized national army will take time and will serve its nation well if methods of screening and disarming are efficient enough to exclude suspected criminals. An information database and a more systematic approach for screening criteria has to be maintained. Demobilization of militias is paramount. National armies perform best if they are for external combat, rather than to be used to counter national militias.

60. With regard to the police force, the Special Rapporteur was told by the Minister of the Interior that human rights will be integrated in the training for the police and the national army. Germany has taken the lead in training the police force, and initial training of a few officers has taken place. It appears, however, that the process will be long and difficult, and will continue to be in need of sustained international financial and political support.

10. Justice in relation to crimes against humanity and violations of the right to life

61. The Bonn Agreement stated that the “judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration”. Under the 1964 Constitution the Supreme Court is accorded a high degree of supervisory jurisdiction. All judges, other than the judges of the Supreme Court, are appointed by the King on the recommendation of the Chief Justice. The strength of the Supreme Court, according to the 1964 Constitution, is nine judges. At the moment appointment of judges is being made by provincial governors, the central administration and the Chief Justice. No particular merit-based criteria are being followed. The Supreme Court has been expanded beyond the constitutional requirement and there are 137 judges. In the 32 provinces of Afghanistan 244 District Courts are operative. According to the Ministry of Justice and the office of the Attorney-General there are approximately 4,000 judges and 3,000 prosecutors are currently employed in the country.

62. Afghanistan’s judicial system does not seem to follow any uniform criminal legal system. The Law Ministry and the Attorney-General’s offices have recently distributed law books to the judiciary and public prosecutors in the entire country. It appears some courts are following traditional or customary law, while others follow different interpretations of Shariah law, without any form of consistency. There is uncertainty pertaining to a number of laws, including penal laws. The Chief Justice, a pious man of 72 years, had his own set ideas of justice. He did, however, clearly state that he was familiar with international human rights law and norms, and the Special Rapporteur was pleased to hear that, in his opinion, he found no inconsistencies between international human rights norms and Shariah.

63. Italy is the lead donor State for work on the judicial system. This judicial reform process was partly hampered by the fact that a Judicial Commission, was formed, dissolved and then constituted afresh. The Commission has a wide mandate, but so far it has not prioritized its work. The Special Rapporteur was told that it intends to build on the present structures, thereby accommodating all the judges so far appointed - even if they do not qualify. The recommendations of the Judicial Commission regarding the judiciary must be made in time to be incorporated in the drafts prepared by the Constitutional Commission for which the deadline is the end of year. The time frame for the Constitutional Commission to present a draft to the Constitutional Loya Jirga is also end of 2003. The Special Rapporteur was told that so far the progress is slow and the two Commissions have not held a single consultation amongst each other.

64. The Independent Human Rights Commission established by the Bonn process is the key institution to start work on transitional justice. During the visit of the Special Rapporteur, the members of the Commission told her that, for the time being, they would confine their work to awareness-raising and education on human rights issues. Security concerns did not allow them to launch any meaningful project or debate on transitional justice. The Special Rapporteur admired the openness with which they discussed their limitations. The members of the Commission are well respected and prominent individuals and therefore the civil society has many expectations from them. The Commission has to be encouraged and their security concerns addressed because their mandate for transitional justice is crucial.

65. From the reports provided to the Special Rapporteur, there appear to be no forensic expertise or tools available in Afghanistan. Three laboratories in Kabul, which are in serious need of technical equipment and training, serve the national need.

66. At the time of the Special Rapporteur's visit, reports were received of disappearances of witnesses to serious human rights violations. She met one such witness who was living under cover. Local groups working informally assist such witnesses under threat. UNAMA's presence and good offices are also used as a form of protection. In general, the Special Rapporteur was very conscious of the lack of adequate witness-protection programmes in Afghanistan. UNAMA is aware of the crucial need for strengthening the witness-protection capacity of Afghanistan in the context of further progress with regard to accountability.

67. The Special Rapporteur was encouraged that national initiatives are being taken and local human rights groups are being organized. She was particularly impressed with the Association of Professionals in Herat and a number of women organizations. So far their monitoring capacities are limited but some of them are undertaking risks in documenting ongoing and past violations of human rights. The Special Rapporteur would like to acknowledge the work being carried out by a few nameless or faceless NGOs and journalists who provided her with important information and contacts. They are fearlessly searching for evidence with a view to ending impunity for crimes against humanity and war crimes, regardless of the nationality, religion, gender or ethnicity of the victims or the offenders.

CONCLUDING REMARKS AND RECOMMENDATIONS

A. Concluding remarks

68. It is clear that at the present moment, the Afghan Administration is simply not equipped to successfully negotiate the demands of both assessing the violations of rights of the past and ensuring that those violations are not recurring in the present. The Special Rapporteur has reasonable cause to believe that grave human rights violations, and possibly extensive crimes against humanity have been perpetuated in the past. If such crimes against humanity have in fact taken place, it is the obligation of the international community to take the lead in bringing them on the record with a view to move towards setting up mechanisms for transitional justice. The Special Rapporteur is aware of the fact that such an undertaking would be challenging for both the international community as well as the Transitional Administration. However, inaction on this issue is only likely to entrench a culture of impunity and promote the recurrence of grave human rights violations in Afghanistan and elsewhere in the world.

69. The Special Rapporteur stresses that the approach must be gradual and systematic, taking into account the realities on the ground at each step. Further these steps must incorporate wide levels of consultation with the Afghan civil society and authorities. This process should also be able to identify and distinguish between the legitimate violence of resistance and human rights abuses.

70. Afghanistan's institutions and structures are in their infancy. They will remain fragile unless more resources are put at their disposal. The Special Rapporteur feels encouraged by the progress made but is apprehensive that, if these institutions do not receive long-term support, they may become dysfunctional.

71. The security concerns in Afghanistan are worrying, especially outside of Kabul. Threats and extrajudicial, summary or arbitrary executions continue to be carried out by agents of the parties in power, by authorities in the provinces as well as by regional and local commanders.

72. Impunity remains entrenched in the system. There are hardly any investigations or inquiries made on allegations of extrajudicial, summary or arbitrary executions. The support to institutions of governance in Afghanistan has not focused enough on ending impunity.

73. The rebuilding of national security forces is being undertaken, but the screening process of its members is not being carried out in an effective manner.

74. Demobilization and disarming of militias is vital as it is a major stumbling block to political, economic and social progress in Afghanistan.

75. There is a climate of fear and those who leak information on violations of human rights are threatened. National and local civil society groups lack the capacity to monitor the situation. The monitoring capacity of UNAMA is also weak.

76. With regard to the death penalty, the legal and judicial system is not yet strong enough to ensure that all the internationally recognized safeguards and restrictions can be applied.

B. Recommendations

77. The Special Rapporteur recommends that an international and independent Commission of Inquiry be constituted, backed by the United Nations, as a first step towards accountability. The mandate of the Commission should be limited to undertake an initial mapping out and stock-taking of grave human rights violations of the past, which could well constitute a catalogue of crimes against humanity. The period should begin from the “Saur Revolution” (1978) and end with the establishment of the Afghan Interim Authority.

78. Parallel to this, the Independent Human Rights Commission should be encouraged and supported to debate and solicit wider opinion on possible mechanisms for transitional justice.

79. In addition, the national legal system needs to be buttressed and equipped to deal effectively with the issue of impunity. The Judicial Commission and the Constitutional Commission should be firmly supported by the international community.

80. The next step in the transitional justice process should be taken after extensive consultations between the International Commission of Inquiry and the Independent Human Rights Commission.

81. The human rights monitoring capacity of UNAMA should be strengthened until sufficient national capacities are available.

82. The international community should further explore options for supporting the security situation in Afghanistan, including options for expanding ISAF’s role outside Kabul.

83. Disarmament, demobilization and reintegration of militias and commanders must be carried out firmly. All concerned Governments should lend political support to the Transitional Administration and UNAMA in this endeavour.

84. The reconstruction of Afghanistan must include the building of institutions and structures on a sound foundation. The law enforcement agencies should be comprised of individuals who are not suspected of having carried out serious human rights violations. An effective screening methodology should be adopted and a reliable database maintained. Law enforcement and security forces should be trained in international standards and prepared for protecting and promoting human rights. A section of the police should be exclusively trained to carry out investigations and given skills to assure liaison with the office of the public prosecutor. The forensic expertise of the police should be enhanced.

85. Serious consideration should be given to the selection of judges and their further training. The nature of training for the judiciary and public prosecutors should be carried out during the course of their work and in close contact with individual judges and prosecutors. In addition a fully functional judicial academy should be made operative. Security for judges should be ensured.

86. Until the legal and judicial system in Afghanistan can guarantee compliance with United Nations safeguards and restrictions relating to the imposition of capital punishment, imposition of the death sentence should be suspended and a moratorium on executions should be implemented.

Notes

¹ Many of these commanders have an official position, while others control areas outside of Kabul, like little fiefdoms.

² The Loya Jirga is a consultative body comprising of tribal chiefs, village elders and influential people from across the country. All ethnic, linguistic and religious groups were meant to be represented. It was also sometimes used to rubber-stamp the will of the ruler but retained informal political recognition. To begin with all members were men but gradually women were included. The institution of the Loya Jirga or the Great Council was recognized in the 1964 Constitution. It comprised of the members of the Parliament and the Chairman of the Provincial Councils. In 1976 it expanded its composition including, amongst others, members of the Supreme Court and armed forces. Subsequent Constitutions also recognize similar versions of the Loya Jirga (1987 and 1990).

³ Henry S. Bradsher, *Afghan Communism and Soviet Intervention*, Oxford University Press, 1999, p. 121.

⁴ After two months of the formation of the Transitional Administration, a Constitutional Commission was to be established by the Administration with the assistance of the United Nations to assist the Constitutional Loya Jirga. It was established in November 2002.

⁵ Political affairs; and relief, recovery and reconstruction.

⁶ The conflict between 1978 and 22 December 2001, is referred to as “the past” or “during the period of conflict”.