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Afghanistan

Addressing the past to secure the future

Introduction

Afghanistan is slowly emerging from 23 years of conflict. The time has come to establish the truth about the widespread human rights abuses that marked those long years of conflict, bring to justice those responsible and provide redress to the victims and their relatives.¹ This report focuses primarily on the need to bring those who have committed crimes against humanity and war crimes to account.

To date, despite calls by the United Nations Secretary-General for an end to impunity and for ensuring accountability for the many gross and systematic violations of human rights of the past, neither the Afghan Transitional Authority nor the international community have taken steps to bring about such accountability. The need to ensure truth, justice and reparations for past human rights abuses is an essential component of any process to restore lasting peace in the country and build a foundation for future stability.

The current period, following presidential elections in October 2004 and leading up to parliamentary elections scheduled to be held in September 2005, presents a key opportunity to address this legacy of impunity by initiating a process whereby the people of Afghanistan can secure justice in the transition from conflict to peace. With continuing delays in justice, there are several serious risks. These include pertinent evidence for future prosecutions deteriorating, disappearing or being destroyed. Moreover, it is possible that those responsible for past human rights abuses will become further entrenched in positions of power, thereby being in a position to prevent the delivery of justice and ultimately to acting as a major obstacle to the restoration of peace and stability.

¹ Among others see: Amnesty International *Afghanistan: making human rights the agenda*, AI Index: ASA 11/023/2001, *Afghanistan: massacres in Yakaolong*, AI Index ASA 11/008/2001, *Afghanistan: executions in Panjshir*, AI Index ASA 11/040/2001, “*Afghanistan: children devastated by war, Afghanistan’s lost generation*, AI Index ASA 11/011/1999, *Afghanistan: women in Afghanistan: pawns in men’s power struggles*, AI Index ASA 11/011/1999, *Afghanistan: detention and killing of political personalities*, AI Index ASA 11/005/1999, *Afghanistan: continuing atrocities against civilians*, AI Index ASA 11/009/1997, *Afghanistan: grave abuses in the name of religion*, AI Index ASA 11/012/1996, *Afghanistan: incommunicado detention and disappearances*, AI Index ASA 11/001/1994, *Afghanistan: reports of torture, ill-treatment and extrajudicial executions*, AI Index ASA 11/001/1992.

Amnesty International welcomes the initiative by the Afghan Independent Human Rights Commission (AIHRC) to undertake a national consultation and propose a series of recommendations for the creation of accountability mechanisms for past abuses, as provided for in its mandate.² Amnesty International supports many of these recommendations. The report of AIHRC's consultation, entitled "A Call for Justice", highlights the extent to which impunity has become entrenched, as well as the lack of confidence of the Afghan population in the current transitional government's ability to deliver justice.³ As noted in the AIHRC report, "impunity is entrenched in the political system, by rewarding perpetrators with positions of power even though they continue to commit violations".⁴ However, in contrast, the report records the overwhelming desire of the Afghan population to see that those responsible for past crimes are held accountable. The AIHRC report recognises the institutional and security challenges that holding perpetrators accountable presents in Afghanistan today, particularly within the judiciary, but insists that justice must be a crucial component of post-conflict reconstruction in Afghanistan. The AIHRC recommends that President Hamid Karzai act to end the cycle of impunity in Afghanistan by making a clear and public commitment to: provide reparations for the crimes of the past; to implement a long-term, comprehensive strategy to seek justice for victims; and to ensure individuals cannot hold public office if they have been convicted of a serious criminal offence.

Amnesty International is appealing to President Hamid Karzai and the Afghan parliament, to be elected in September 2005, to ensure that delivering justice to victims, survivors and their families is an integral part of the government's efforts to establish stability and peace in the country. The organization is joining calls by the AIHRC for the development, in consultation with civil society, of a nationwide, Afghan-led strategic action plan for justice that will ensure that the truth is told, that justice is done and that a reparations program is provided for all victims. This action plan should be governed by fundamental principles recognised by the international community as essential components of a justice, truth and reparations process as set out in detail below. It should be comprehensive and incorporate the reform of the criminal justice system and the strengthening of the role of civil society, including the role of women, who have suffered particularly. The strategy should also address the

² "Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission," 6 June 200 and decree signed at the first National Human Rights Workshop in March 2002 where the AIHRC was specifically authorized by the Chairman of the Interim Administration of Afghanistan to consider past human rights violations.

³ "A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan", published in January 2005. Available in English at http://www.aihrc.org.af/Rep29_1_05call4justice.pdf

⁴ *Ibid*, p 44.

more specific question of what would be the most effective transitional justice mechanism appropriate to the situation in Afghanistan. For the overall strategy to be successful, a comprehensive and coordinated effort will be required as well as long-term commitment from the international community.

This Amnesty International report, building upon many of the excellent recommendations in the AIHRC report, sets out fundamental principles of international law and standards, in accordance with which any measures taken to ensure justice for past abuses in Afghanistan should be defined. The central pillar of a comprehensive justice program should be the reform of Afghanistan's criminal justice institutions. However, other complementary and transitional measures should also be adopted, including the establishment of a UN or civil society sponsored mechanism to begin the documentation and investigation of past crimes and the creation of an appropriate apparatus to establish the truth about the human rights violations committed during the 23 years of war. Any such effort should involve civil society, the international community and relevant Afghan authorities. Of course, any such mechanism must be temporary and its functions should be assumed by national, regional and local police and prosecutors as soon as they are able to do so independently, professionally and in a manner strictly in conformity with international law and standards.

The continued denial of justice

The Bonn Agreement, signed on December 5, 2001, signalled the end of more than two decades of almost continuous hostilities in Afghanistan and ushered in the interim government. Although it briefly addressed the issue of accountability, there was no explicit reference to a mechanism for ensuring that those who had committed crimes were held to account.⁵ This failure was compounded in June 2002 at the Emergency *Loya Jirga*, in which elected delegates chose who would preside over the transitional government. The participation of non-elected delegates, some of whom were suspected of having committed crimes under international law, created a climate of fear, with reports of intimidation and harassment of elected delegates.

⁵ "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions", adopted 5 December 2001 by Afghan military commanders, representatives of Afghanistan's different ethnic groups, expatriate Afghans, and representatives of the exiled king, mapping out the future of Afghanistan following the toppling of the Taleban government by a U.S. – led coalition. See <http://www.undp.org.af/bonnagreement.htm>

Afghanistan adopted a new Constitution in January 2004. Amnesty International welcomed the provisions in the Constitution that deny those who have been found guilty of having committed crimes against humanity from the opportunity to hold public office.⁶ This is the only reference in the Constitution to issues of accountability for past human rights abuses. Given the weak state of the judicial system in Afghanistan and the lack of progress in ensuring accountability for past human rights violations, this provision, is at present meaningless as no one has, as yet, been tried by a competent court in Afghanistan for crimes committed during the long years of the conflict. In addition, this provision should be expanded to include war crimes, extrajudicial executions, “disappearances” and all other crimes under international law.

Under international law, the state where war crimes, crimes against humanity and other crimes under international law have been committed has primary responsibility to investigate such crimes and prosecute those who perpetrated them. If a state is unwilling or unable to prosecute certain crimes under international law, under the principle of universal jurisdiction, any other state which is in a position to do so may – and in some cases – must – to investigate and prosecute.⁷ Afghanistan, with its weak and ineffective judicial system and inadequate criminal law and procedure, is currently unable to investigate and prosecute those perpetrators accused of atrocities without the aid and assistance of the international community. Until recently, it has been unwilling to address the issue of past war crimes and serious human rights violations in Afghanistan.⁸ The international community has not taken sufficient action to ensure that those responsible for past human rights violations and abuses are held to account.

⁶ Articles 85 and 86 of the Afghan Constitution, adopted in 2004.

Article 85, “A person who is nominated or appointed as a member of the National Assembly should have the following qualifications in addition to those considered by voters. (2) Should not have been convicted by a court for committing a crime against humanity, a crime or sentenced for deprivation of his civil rights”. Article 86, “Credentials of members of the National Assembly are reviewed by independent commission for supervision of the elections with law”.

⁷ See section 2 “Supplementary approaches to ensuring justice”, page 12.

⁸ In addition to the initiative of the AIHRC, the Office of the High Commissioner for Human Rights has prepared a survey of past violations committed from 1978 until 2001, based on publicly available documents, which has been presented to the AIHRC, in order to assist their documentation efforts. Furthermore, the independent advocacy and research organization, “The Afghanistan Justice Project” whose work involves documenting past crimes from 1978-2001 released an updated version of their 2004 report, entitled “*Addressing the Past: The Legacy of War Crimes and the Political Transition in Afghanistan*” on 29 January 2005.

There is no doubt that failure to address impunity for ongoing and past crimes not only resulted in continuing human rights abuses, but also lies at the heart of a pervasive climate of violence in the country. The Afghan government lacks the political and economic power, as well as independence, from powerful armed leaders to investigate and prosecute independently individuals for past atrocities. The UN Secretary-General has underlined the fact that a “sustainable peace cannot be built on a foundation of impunity”.⁹ He urged the international community and the Afghan people to “commit themselves to addressing the problems of the past by ending impunity and ensuring accountability for past abuses, including gross and systematic violations of human rights”.¹⁰

Amnesty International urges the international community to implement the recommendations made in the UN Secretary-General’s report on transitional justice.¹¹ Priority attention must be given to the restoration of respect for the rule of law in Afghanistan. A commitment to ensuring accountability for past crimes, as well as ending impunity and building a national justice system in order to ensure that justice and the rule of law are protected in the future, is integral to a durable peace in Afghanistan.

⁹ Report of the UN Secretary-General, “*on the situation in Afghanistan*”, UN Doc. C/2002/1157, 6 December 2001.

Report of the UN Secretary-General “*on the situation in Afghanistan and its implications for international peace and security- Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan*” UN Doc. S/2004/925, 26 November 2004.

¹⁰ Report of the UN Secretary-General “*on the situation in Afghanistan*”, UN Doc. S/2001/1157, 6 December 2001.

¹¹ Report of the UN Secretary-General, “*The rule of law and transitional justice in conflict and post conflict societies*”, UN Doc. S/2004/616, 3 August, 2004, which insists that justice, peace and democracy are mutually reinforcing imperatives, that the international community should base its rule of law support on country specific national needs assessments and national ownership- provided this meets international justice standards- and that there is a pertinent need to mobilize the resources for a sustainable investment and commitment towards justice. Amongst others, the report recommends the need to strengthen national justice systems in accordance with international standards; the creation of a roster of justice and transitional justice experts; categorically rejects any endorsement of amnesty for genocide, war crimes, or crimes against humanity; to evolve an ‘integrated and comprehensive approach’ in order to restore justice and the rule of law; and end impunity for crimes under international law in a gender sensitive manner.

1. Essential components of a successful transitional justice process

There are a number of key fundamental principles which should govern any approach to ensuring justice for human rights abuses in Afghanistan. These principles are derived from international human rights and humanitarian law and standards. Relevant legal provisions include:

Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR);¹²
Article 37 of the Convention on the Rights of the Child (CRC);
Article 2(1) and 7(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);
The Rome Statute of the International Criminal Court.¹³

In addition to the above, relevant international standards include:

The UN Standard Minimum Rules for the Treatment of Prisoners;
The UN Body of Principles for All Persons under Any Form of Detention or Imprisonment;
The UN Basic Principles on the Independence of the Judiciary;
The UN Guidelines on the Role of Prosecutors;
The UN Basic Principles on the Role of Lawyers;
The UN Standard Minimum Rules for the Administration of Juvenile Justice;
Van Boven-Bassiouni Principles on reparations;
Joinet Principles on reparations.

¹² Among others, Afghanistan has ratified ICCPR (24 April 1983); CRC (27 April 1994), CAT (26 June 1987); Geneva Conventions (1956); and the Rome Statute (2003).

¹³ As a state party to the Rome Statute of the International Criminal Court (ICC), Afghanistan has a duty to bring perpetrators to justice irrespective of any amnesty or statute of limitations. The standards set out in the Rome Statute, including rights of the accused, should be adhered to in procedures before any court or tribunal established to prosecute perpetrators. Furthermore, Afghanistan must ensure that it implements the Rome Statute into domestic law and passes the necessary legislation to ensure effective cooperation with the ICC.

1.1. Fundamental principles to ensure justice

(a) Universal jurisdiction

Universal jurisdiction permits all states to exercise jurisdiction over ordinary crimes, as well as crimes under international law, irrespective of the nationality of the perpetrator, victim or location of crimes.¹⁴ With respect to grave breaches of the Geneva Conventions and Protocol I and the crime of torture, all states have an obligation to exercise jurisdiction if a person suspected of these crimes is present in the state, or they must extradite the suspect to a state able and willing to do so in a fair trial without the death penalty. All states may act as agents of the international community to investigate crimes under international law and seek the extradition of persons suspected of crimes against the international community to stand trial, even when the suspect is not present in the state. The Afghan government should provide for the broadest jurisdiction permitted under international law, with the recognition that other states may choose to exercise universal jurisdiction if Afghanistan fails to investigate and prosecute those who commit crimes under international law.

(b) No impunity

The Afghan government must ensure that it eliminates any bars to prosecution under national law and that it ends any impunity for perpetrators suspected of committing war crimes, crimes against humanity and other crimes under international law.

(c) No statute of limitations

Suspected perpetrators of crimes under international law (including, but not limited to, genocide, crimes against humanity and war crimes), must be investigated and, where there is sufficient admissible evidence, prosecuted regardless of when such crimes were committed. As recognized in Article 29 of the Rome Statute and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, statutes of limitations for these crimes are prohibited under international law. Such prosecutions must be undertaken impartially and all crimes against humanity and war crimes should be included under the mandate of any tribunal and other justice mechanisms created in Afghanistan.

(d) No amnesties

Under international law, amnesties, pardons or similar measures for persons suspected of committing war crimes, crimes against humanity and other serious crimes under international law are prohibited, if such measures would prevent the emergence of the

¹⁴ Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018, September 2001.

truth, a final judicial determination of guilt or innocence, or full reparation for victims and their families.¹⁵ Amnesty International urges the Afghan government to ensure that amnesties and pardons are not granted.

(e) Independence and impartiality

Afghanistan has a pluralistic legal tradition, under which formal and informal justice systems have existed side by side for centuries. Any system put in place to address past human rights abuses must be truly independent. Suspected perpetrators should be tried solely on the basis of evidence and through a fair process, in strict accordance with international law and standards of fair trial (as set out in, for example, Articles 55 and 64 to 69 of the Rome Statute of the International Criminal Court, as well as in Articles 9, 14 and 15 of the ICCPR). Suspects should be prosecuted in proceedings that fully respect international law and standards for fair trial at all stages of the proceedings. The presumption of innocence must be respected from the moment a person becomes a suspect until he or she is proven guilty beyond reasonable doubt. Civilians must be tried only before civilian courts. Military personnel accused of war crimes under international law must also be tried before civilian courts.

(f) No selectivity

Anyone suspected of having committed serious crimes in Afghanistan must be investigated and, if there is sufficient admissible evidence, prosecuted. There should be no selectivity in the investigation, prosecution and trials of suspects on the basis of nationality, rank, ethnicity, religion, influence or any other grounds.

(g) Victim and witness protection

It is essential that an effective victim and witness protection program, building on the experience of international criminal courts, with sufficient resources is put into place, especially for women, before investigations into serious human rights abuses commence. Such protection must be available throughout the investigation, trial and appeal procedures, and thereafter as required.¹⁶

(h) No ill-treatment or torture

Suspects and accused must never be subjected to torture or ill-treatment. Statements or other information or evidence must never be obtained by use of torture or other

¹⁵ Amnesty International, *Sierra Leone: Special Court for Sierra Leone: Denial of the right to appeal and the prohibition of amnesties for crimes under international law*, XXX AI Index: AFR 51/012/2003

¹⁶ Amnesty International has made extensive recommendations concerning witness protection and support. *See, for example*, Amnesty International, *International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar*, April 1999, 1 April 1999.

forms of ill-treatment, and any evidence gained under such circumstances must be declared inadmissible before a court, except as evidence against the person accused of torture as evidence the statement was made or the information obtained. The perpetrators of torture or ill-treatment must be brought to justice.

(i) No cruel, inhuman or degrading punishment, including the death penalty

There should be no recourse to the death penalty or other forms of cruel, inhuman or degrading punishment, including corporal punishment, whatever the circumstances. The international community has excluded the death penalty as a punishment for genocide, crimes against humanity and war crimes in the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Panels in East Timor, the internationalized panels in Kosovo, the Extraordinary Chambers for Cambodia and the Special Court for Sierra Leone. Afghanistan retains the death penalty. Amnesty International considers that the death penalty violates the right to life recognized in Article 3 of the Universal Declaration of Human Rights (UDHR) and opposes it in all circumstances as the ultimate cruel, inhuman and degrading punishment, contrary to Article 5 of the UDHR and other international human rights instruments. No evidence has proved that the death penalty has a greater deterrent effect than other punishments. Amnesty International's latest figures show that 84 countries and territories have abolished the death penalty for all crimes. The organisation is concerned that despite the declaration of a moratorium on executions in April 2004, reports continue to be received of executions taking place in Afghanistan.

(j) The right to full reparation for victims and their families

The right of victims and their families to obtain full reparation for the violations they have suffered, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, must be guaranteed in law and there must be effective procedures enabling them to obtain such reparations.

1.2 Strengthening and reforming the criminal justice system

The above principles must also govern the reform of the criminal justice system. The effectiveness of the justice system and its ability to deter would-be criminals from committing crimes are intertwined. Reform and strengthening of the Afghan criminal justice system is integral to the creation of a long-term, comprehensive plan to ensure that justice is achieved and the rule of law is respected. The challenge in Afghanistan

lies in reconstructing a judicial system which has lain largely dormant for over twenty-five years.¹⁷ The law, the institutions, the practices and even the social attitudes which ensure the rule of law remain weak. Amnesty International has long been concerned about widespread human rights violations relating to the criminal justice system, including unfair trials; use of torture; the application of the death penalty; and the high level of discrimination and denial of access to justice faced particularly by female victims and defendants.

The current political and security environment prevents sufficient progress in reform of the justice sector to allow Afghans to have confidence in the judiciary to protect their rights. Furthermore, the rule of armed groups in the provinces; the political affiliations and lack of qualifications of local judges; corruption; lack of defence counsel; delayed dissemination of changes in law; and lack of sufficient and long-term training for judges outside Kabul, are all barriers to effective reform.

The judiciary has not received the support necessary to ensure its ability to resist pressures exerted on it. The failure of the international community and the Afghan transitional authorities to provide effective security and bring an end to the influence of armed groups has left the judiciary extremely vulnerable. Furthermore, the current lack of arrangements for the protection of courts, judicial officers, witnesses and victims undermines the capacity of the judiciary to assert its independence. As a consequence, certain individuals remain above the law because of their place in the community or because they are able to use threats, intimidation and other forms of pressure to influence judicial proceedings. Currently, there is a perception amongst many people that the judicial system is unable to properly serve the interests of justice; this perception was also noted in the findings of the AIHRC's national consultative process.

1.3 Strengthening of civil society

In post-conflict Afghanistan, civil society is in urgent need of support if it is to be able to play its vital role in any accountability process. Civil society has slowly begun to emerge, but it remains restricted by an environment in which freedoms of expression

¹⁷ See the following Amnesty International reports which contain detailed recommendations to the Afghan government and international donor community: Amnesty International *Afghanistan: No-one listens to us and no-one treats us as human beings: Justice denied to women* ASA 11/023/2003, *Afghanistan: Re-establishing the rule of law* ASA 11/021/2003, *Afghanistan: Crumbling prison: desperately in need of repair* ASA 11/017/2003, *Afghanistan: Police reconstruction essential for the protection of human rights* ASA 11/003/2003.

and movement are limited. Human rights campaigners and activists continue to face threats, harassment and intimidation in their everyday work, in particular when attempting to raise awareness of and address accountability issues.

Afghan human rights activists have consistently called for measures to be taken to end impunity and have underlined the importance of including accountability for past violations. A vigorous civil society is critical to restoring peace and creating a culture of respect for human rights. It is indispensable in instilling support for a national justice system; furthering demands for accountability; investigating the truth; documenting human rights violations; and encouraging wider participation of society, including various ethnic groups and women.

The AIHRC is an integral part of civil society in Afghanistan and as such was mandated at the first National Human Rights Workshop in March 2002 to “undertake national consultations and propose a national strategy for transitional justice and for addressing the abuses of the past”.¹⁸ Together with the end of the transitional phase of the Afghan government, the current mandate of the AIHRC will end once parliamentary elections are held. In accordance with the Afghan Constitution of 2004, the incoming legislature should promptly enact laws to continue the uninterrupted functioning of the AIHRC.

Amnesty International calls on the Afghan government to present the newly elected Parliament with draft legislation which will ensure continuity in the effective and independent functioning of the AIHRC in line with the Paris Principles.¹⁹

1.4 Promoting the role of women

The specific needs and contribution of women are often overlooked when formulating transitional justice strategies. Afghan women have suffered disproportionately during

¹⁸ Established under the Bonn Agreement, the AIHRC was specifically mandated to consider the issue of transitional justice through a decree signed by the Chairman of the Interim Administration of Afghanistan, Hamid Karzai in 2002. This decree is interpreted to end with the conclusion of the transitional government when parliamentary elections are held.

¹⁹ In October 1991, the Centre for Human Rights, the predecessor to the United Nations Office of the High Commissioner for Human Rights (OHCHR), held an international workshop to discuss existing human rights institutions and drew up a series of recommendations on national human rights bodies. “Principles relating to the status and functioning of national institutions for the protection and promotion of human rights”, known as the Paris Principles were drawn up and endorsed by the Commission on Human Rights in 1992 (resolution 1992/54) followed by the United Nations General Assembly of 20 December 1993.

the last 25 years and continue to be exposed to gender-based violence in addition to being affected by high levels of general violence. Furthermore, the level of discrimination against women within the criminal justice system is high, which includes the failure of the state to investigate incidents of violence against women; inadequate legal provisions to protect the rights of women; under representation of female judges and lawyers; and very few men being prosecuted for crimes against women, including rape and violence in the family. Access to justice continues to be difficult to obtain, especially for the large majority of women; wider participation in local government structures remains largely absent and female engagement in policy making on a national level is confined to a few individuals.

An important part of addressing past crimes and fighting impunity is the investigation and prosecution of those responsible for crimes relating to sexual and other forms of violence against Afghan women and girls during the conflict periods in Afghanistan. Amnesty International is conducting a global campaign to stop violence against women, highlighting, among other things, that women all over the world are targets in conflict and post-conflict situations, that they lack the same protection as men and often remain absent from peace negotiations and agreements. The Afghan government must consider gender dimensions in the planning and implementation of a long-term, comprehensive justice strategy and incorporate the provisions of UN Security Council Resolution 1325 in order to provide both reparations and future equality in a gender responsive manner.²⁰

Steps must be taken to ensure that there is a gender balance in the Afghan justice system noting Articles 36 (8) (a) (iii) and 42 (2) of the Rome Statute to this effect, as well as the requirements to appoint experts in addressing crimes of sexual violence in Articles 43 (6) and 42 (9) of the Rome Statute.

2. Supplementary approaches to ensuring justice

Afghanistan has the primary responsibility to investigate and prosecute crimes under international law, establish the truth about these crimes and to provide reparations. As indicated above in the previous section, there are a number of important steps that

²⁰ The UN Security Council has expressed its commitment to giving gender equality a central place in post-conflict reconstruction and peace operations through UN Security Council Resolution 1325 on "Women Peace and Security" adopted on 31/10/2000.

Afghanistan must take to fulfil these responsibilities. However, these crimes are crimes against the entire international community, not just against the victims or against Afghanistan itself. Therefore, the international community must fully support effective steps by Afghanistan that are consistent with international law and standards to address these crimes as part of a long-term comprehensive action plan developed in consultation with civil society to end impunity. In addition to providing assistance directly to the justice system to implement such a plan, the international community can consider a number of supplemental methods to implement this plan. These steps would include exercising universal jurisdiction, setting up an *ad hoc* international criminal tribunal by a Security Council resolution, establishing an internationalized court or internationalized special chamber or panel within the Afghanistan justice system or invoking the jurisdiction of the International Criminal Court.

2.1 Universal jurisdiction

As outlined in section 1.1. “Fundamental principles to ensure justice”, under international law states are permitted, and in some cases required, to investigate and prosecute alleged perpetrators of crimes under international law. Universal jurisdiction can be exercised over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and “disappearances” as the most serious crimes under international law, as well as over crimes under national law such as murder, abduction, assault and rape.²¹

There are several ways in which universal jurisdiction could contribute to ending impunity in Afghanistan. They include:

- Individual foreign prosecutors and investigating judges exercising universal jurisdiction in anticipation of the presence of a suspect in the state;
- Individual foreign prosecutors and investigating judges exercising universal jurisdiction, as envisaged by the Geneva Conventions and used by some states, by investigating crimes when a suspect is not present, based on victims’

²¹ See Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 – 018/2001, September 2001. In October 2004, the United Kingdom (UK) government began the trial of 41- year-old Afghan, Faryadi Sarwar Zardad on conspiracy to commit torture and hostage taking in the 1990s in the Kabul area. He will be retried in 2005 following the failure of the jury to reach a verdict. This is the first instance of the UK prosecuting a person based on universal jurisdiction in the UK pursuant to legislation enacted to implement the Convention against Torture.

complaints, and requesting the suspect's extradition for trial in the state where the national court is located;

- States agreeing to share responsibility for exercising universal jurisdiction.

2.2 *Ad hoc* international criminal tribunal

It has been suggested that an *ad hoc* international criminal tribunal for Afghanistan could be established by the United Nations Security Council, as in the case of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

Should an *ad hoc* international criminal tribunal for Afghanistan be established, it must be part of a comprehensive program to rebuild the national judicial system, particularly since it would only be able to investigate and prosecute a handful of those responsible for crimes under international law in the past decades. Such a tribunal would require adequate resources and full cooperation by the international community, two requirements that have not been fully met in the case of the existing tribunals. Furthermore, there is a risk that political pressures may lead to a tribunal with a mandate restricted only to abuses committed by a narrow range of perpetrators, or to narrowly defined crimes or to crimes committed within a limited period of time. In addition, there is a risk that the Security Council, a political body, could interfere with prosecutorial discretion or terminate the mandate of the tribunal at any time, even if the tribunal had not been able to complete its work and if there was no adequate alternative to bring persons responsible for these crimes to justice. Both problems have arisen with the ICTY and ICTR.

2.3 Internationalized court, special chamber or panel

There are a number of precedents that have been cited for establishing an internationalized court, special chamber or panel to bring to justice those responsible for crimes under international law. Such bodies, including both Afghan and international judges, prosecutors, lawyers for the defence and victims and court staff could be established in a number of ways, including by the Security Council, on the basis of a treaty or through national legislation or in a combination of these methods. For example, the Special Court for Sierra Leone was established as an internationalized court independent of the Sierra Leone judicial system by a treaty between Sierra Leone and the UN in 2000. However, that court is funded by voluntary contributions, making financing uncertain and enabling it to investigate and prosecute

only a small number of individuals. A special chamber or panel within the national criminal justice system could be established, as has occurred with the Special Panels of the District Court of Dili, East Timor (Timor Leste), the War Crimes Chamber in Bosnia-Herzegovina, the internationalized panels in Kosovo and the Extraordinary Chambers in Cambodia, and has recently been proposed for Burundi. If such a body were to be established in Afghanistan, commitments to provide adequate funding must be obtained from the UN and the international community.

Concerns similar to those listed above about an *ad hoc* international criminal tribunal would also apply to an internationalized court or panel. The AIHRC's report indicates a strong desire for a criminal justice mechanism which is Afghan developed and led but with sustained commitment and support from the international community. One recommendation by the AIHRC is the creation of a specialized Chamber to hear cases of war crimes, modelled along the lines of the War Crimes Chamber of the State Court in Bosnia. They believe it should have a limited period of time in which to function as well as a narrow mandate. Amnesty International is concerned that these limits would mean that a large number of perpetrators of human rights abuses would escape being held accountable for their crimes. However, even with a mandate that was not so limited, a special chamber would simply be unable to try more than a handful of those responsible, so its establishment would have to be integrated into a long-term reconstruction of the Afghan judicial system designed to enable it gradually to investigate and prosecute those that would escape the jurisdiction of a special chamber.

Amnesty International is also deeply concerned that if such a tribunal followed current Afghan law, it would apply the death penalty as a sentence.

In addition, if such an internationalized court, special chamber or panel were to be established, Afghan judges and prosecutors would have to meet international criteria of independence and impartiality and be willing to serve on such a body. They and all others participating in the judicial system would also require effective professional training in international law and standards.

Amnesty International considers that if the above criteria were met, and if proper steps were taken to address concerns about funding, limitations on mandate and the lifespan of the body and the application of the death penalty, such an internationalized body in Afghanistan could contribute to ensuring justice and create Afghan ownership of the process. In addition, it could allow for national capacity building within relevant sectors.

3. Recommendations

To date, national, regional and local prosecutors have lacked the capacity and political will to investigate and prosecute comprehensively crimes under international law, both past and present, in Afghanistan. The AIHRC's consultation has reinforced calls from within Afghanistan that the crimes of the past must be addressed in order to find durable peace and build the rule of law. Amnesty International believes that ending impunity, establishing the truth about past abuses and providing full reparations to victims, survivors and their relatives must be priorities as a part of the Afghanistan government and the international community's initiatives for post-conflict reconstruction and the restoration of lasting peace and stability in the country.

It is vital that the Afghan government and the international community cooperate to develop a long-term, comprehensive action plan to end impunity, which is governed by the fundamental principles outlined in this document and the recommendations below. One of the crucial components of durable peace with full respect for human rights of men and women is a functioning judicial system that is fair and effective. Afghanistan cannot make the necessary strides to address those violations committed in the past and build respect for the rule of law in the present and the future without the long-term support and commitment of the international community. The international community as a whole has a shared responsibility to ensure that justice is achieved for crimes under international law, which are crimes against the international community as a whole.

3.1 Recommendations to the Afghan government

The government of Afghanistan should:

- In a broad and transparent consultation with civil society, begin developing and then implementing a long-term comprehensive action plan to end impunity, establish the truth about what occurred and award full reparations to victims and their families.
- Ensure that crimes under international law are included in Afghan law: Afghanistan must ensure that it enacts legislation that both implements the Rome Statute of the ICC and allows the state to cooperate fully with the ICC

itself.²² Genocide, war crimes and crimes against humanity must be clearly defined as criminal offences in order to ensure that the Afghan courts have jurisdiction to prosecute such crimes effectively on the national level. However, as crimes under international law they must be subject to international principles of criminal responsibility, such as a single strict standard of command and superior responsibility, improper defences such as superior orders must be prohibited in all cases and other obstacles eliminated, such as official immunities, statutes of limitation and amnesties. Implementing legislation must also include provisions allowing the Afghan courts and authorities to fully cooperate with any order issued by the ICC, including the provision of documents, records and physical evidence, the location of victims and witnesses, the facilitation of searches by the ICC and the execution of international arrest warrants.

- Effective extradition and mutual legal assistance agreements need to be reached with all other states, with safeguards against the death penalty, torture and ill-treatment, unfair trials and other human rights violations.
- Ensure that fundamental principles to ensure justice are incorporated into any long-term comprehensive action plan to end impunity. Under no circumstances should amnesties, pardons or similar measures be given for genocide, war crimes and crimes against humanity; there should be no impunity for perpetrators of crimes under international law; any mechanism established to prosecute such crimes must be independent and impartial; anyone suspected of having committed crimes should be brought to justice in a fair trial; grave abuses of human rights must be addressed without limitations on the timeframe in which they occurred, especially where crimes under international law were committed; suspects must be ensured a fair trial at all times.
- The right to reparations should be guaranteed in national law and there should be effective procedures for victims and their families to obtain such reparations.
- The Afghan government must involve women in all levels of planning and implementation of a national transitional justice strategy and provide redress in a gender responsive manner.
- The Afghan law enforcement agencies and the judiciary must continue to be reformed to ensure that they operate in line with international human rights

²² See Amnesty International, *The International Criminal Court: Checklist for Effective Implementation*, AI Index IOR 40/011/2000 1 August 2000

law and standards. Police recruitment policies and practices must meet strict criteria, including that all potential officers have a clean human rights record, better training in professional investigation procedures and training in gender related issues. Women must be recruited for all posts at all levels. The establishment of an effective, adequately resourced and independent oversight mechanism is also vital. This body must be empowered to investigate complaints against police, including complaints of human rights violations perpetrated by the police and complaints of police failure to investigate other human rights abuses or to initiate criminal procedures. This is a long-term process but must be given continued priority.

- The competence of informal justice systems has not been clearly set out in law and a review of their legal basis, powers and practices must be part of the criminal justice strategy. This review must assess whether these systems apply procedures and laws that are in conformity with human rights law and standards, including the right to a fair trial and the prohibitions against torture, ill-treatment and discrimination. Particular attention must be paid to the rights of women and girls under international and national law.
- The death penalty should be abolished in Afghanistan.

3.2 Recommendations to other states, including donors to Afghanistan

All States should:

- Ensure that those responsible for crimes under international law and other grave human rights abuses are brought to justice in procedures that meet international standards of fairness. In order to achieve this goal, the reform of the criminal justice system is a priority and the states should commit to long-term assistance and support for the government of Afghanistan in developing national capacity to end impunity and re-establish the rule of law.
- In cooperation with each other and in coordination with the UN and Afghan authorities and civil society, develop teams composed of experienced and trained criminal justice experts, (investigators, experts on issues relating to sexual violence, informal justice systems, crimes against children, prosecutors, judges, defence lawyers), able and willing to assist the Afghan government in ending impunity.

- Investigate and, where there is sufficient admissible evidence, prosecute, in fair trials without the possibility of the death penalty, persons found in their territories suspected of crimes under international law, and conduct proceedings for reparations. If states are not able or willing to investigate or prosecute such persons, they must instead extradite suspects to states that are able and willing to do so or surrender such persons to international criminal courts. All states must cooperate with states conducting such investigations and prosecutions, subject to these qualifications.

3.3 Recommendations to the UN

The UN should:

- In a transparent manner, in full consultation with the Afghan government and civil society, assist in the development and implementation of a comprehensive, long-term plan to end impunity for suspected perpetrators of war crimes, crimes against humanity and other crimes under international law that have been committed in all parts of Afghanistan. Donor states should also provide sufficient financial, material and human resources to permit effective implementation of such a plan.
- As a provisional step, create a dedicated United Nations or support the creation of a civil society led mechanism to coordinate and strengthen the documentation and investigation of human rights abuses committed during the conflict in order to facilitate the eventual investigation and prosecution of those responsible. Effective measures must be put in place to protect vital evidence and information.