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Afghanistan

Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation

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Assessment Report

UNODC Project: Prison System Reform in Afghanistan—
Extension to Provinces (AFG/R87)

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List of acronyms and abbreviations

AIHRC	Afghanistan Independent Human Rights Commission
ANDS	Afghanistan National Development Strategy
AWEC	Afghan Women's Educational Centre
AWJA	Afghan Women Judges Association
CANADEM	Canadian International Development Agency
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CG	Consultative Group
CNL	Counter Narcotics Law
CPC	Criminal Procedure Code
CPD	Central Prison Department
CRC	Convention on the Rights of the Child
CSSP	United States Corrections System Support Program
ICCPR	International Covenant on Civil and Political Rights
ICPC	Interim Criminal Procedure Code
ILF	International Legal Foundation
MoE	Ministry of Education
Mol	Ministry of Interior
MoJ	Ministry of Justice
MoLSAMD	Ministry of Labour, Social Affairs, Martyrs and Disabled
MoPH	Ministry of Public Health
MoWA	Ministry of Women's Affairs
NJSP	National Justice Sector Programme
NJSS	National Justice Sector Strategy
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office of Project Services
WHO	World Health Organization

Executive summary

1. The current assessment forms part of UNODC's programme to extend penitentiary reform to the provinces of Afghanistan (AFG/R87), building on the UNODC penitentiary reform project ongoing in Afghanistan since 2003 (AFG/R41). The project includes the introduction of initiatives to increase the use of alternatives to prison, in line with the recommendations of international standards, to complement a range of other activities focusing on the infrastructural, normative and operational priorities in the penitentiary system.

2. The assessment provides a review of existing legislation, in terms of their provisions for non-custodial measures and sanctions, with particular focus on the provisions for offenders with mental healthcare needs, drug users, women, juveniles and first time non-violent offenders. It analyses information gathered in Kabul, as regards offences committed by some of these groups and sentences received, with a view to assessing the application of existing provisions for alternatives and potential for expanding the use of non-custodial sanctions and measures. It reviews the capacity of criminal justice institutions and services in the community, provided by the State and NGOs, to implement and support non-custodial measures and sanctions. It comments on the current discussion on forming links with the informal justice structures for diversion from the criminal justice system. Finally, it puts forward a series of recommendations to increase the implementation in practice of existing alternatives to prison, to expand non-custodial measures and sanctions in legislation, and to initiate practical steps to ensure that legislation is applied, and applied to enhance the social reintegration prospects of offenders. The assessment and recommendations are guided by international instruments, including: the International Covenant on Civil and Political Rights; United Nations Standards Minimum Rules for the Treatment of Prisoners; United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); United Nations Principles for the protection of persons with mental illness and the improvement of mental healthcare (Mental Illness Principles) and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The assessment has been prepared in the context of priorities and goals set by the Afghanistan Compact, within the overall framework of the Afghanistan National Development Strategy (ANDS), and decisions taken at the Justice and Rule of Law Conference held in Rome in July 2007.

3. This study should be regarded as an introductory assessment as regards practice in the implementation of non-custodial measures and sanctions in particular, as interviews were limited to Kabul and to a relatively small number of practitioners. In addition, some essential information, such as crime and sentence statistics nationwide (with the exception of juveniles) was not available. Therefore thorough and comprehensive research is included as one of the key recommendations of this document in section 10, in order to form a clear picture of the composition of the current prison population and obstacles to the implementation of alternative measures and sanctions in practice, prior to the development of a strategy and programme to introduce alternatives to prison in Afghanistan.

4. The UNODC initiative to increase the use of non-custodial sanctions and measures comes at a time when the prison population in Afghanistan is increasing at an alarming rate. In 2001, there were only 600 prisoners countrywide. By January 2006 the total number of prisoners was estimated to be over 6,000, representing a 10-fold increase in five years. By October 2007, the figure had reached 10,604, a 77 per cent increase over 22 months. Of these 10,604 prisoners, 304 were women, many imprisoned together with dependent children. The most recent unofficial figure provided for December was 12,400. As of October 2006 the prison capacity was calculated at 7,421. While the prison population continues to grow, focus on the application of existing alternatives or the introduction of new non-custodial measures and sanctions in Afghanistan's statutory law has been minimal. Thus, the current assessment represents a step towards expanding the focus of current criminal justice activities in Afghanistan, beyond incarceration, to include initiatives to increase the application of alternatives to imprisonment, taking into account the safety and security requirements of the community.

5. **Criminal procedure:** the Interim Criminal Procedure Code (ICPC) of 2004 supersedes the Criminal Procedure Code CPC of 1965 (amended in 1974), but the CPC still applies where it does not contradict the provisions of ICPC. As a result both need to be consulted to determine steps that may be taken during criminal procedure, which has apparently created confusion and inconsistencies. The Counter Narcotics Law (CNL) has introduced new procedures for drug offences, which adds to the uncertainties. Although the ICPC and the CPC provide for limited pre-trial alternatives, they are said to be rarely applied. The police have no authority to divert suspects from the criminal justice system. Prosecutors may discharge a case, but diversion measures, for example, to treatment or restorative justice programmes, do not exist, and diversion as such is not referred to in the CPC or ICPC (see sections 3.2.1 and 3.2.2).

6. **Penal Code:** the assessment has determined that, while the Penal Code of Afghanistan provides for fines, suspended sentences and limited alternatives for offenders with mental illness and drug

addicts, these measures and sanctions are rarely applied. Fines are usually applied as an additional sentence, rather than an alternative to imprisonment. The application of suspended sentences appears to be driven by corrupt and illegal practices, when used at all (see section 3.2.3). Increasing the use of fines and suspended sentences, to replace short prison terms, is one of the recommendations of this report, outlined in section 10.11.

7. **The Counter Narcotics Law (CNL):** CNL, which supersedes the Penal Code in relation to provisions relating to drug offences is punitive in approach, removes the fine alternative that used to be provided in the Penal Code, introduces large fines in addition to imprisonment, and only provides for drug treatment for addicts, although offenders may be sent to prison after treatment, where drugs are widely available and relapse is almost certain. The sentences are mandatory, with no discretion allowed to judges, based on the circumstances of the offences, the background or vulnerability of the offender. There is lack of clarity as to if and how CNL applies to juveniles (see section 4.2). In the view of the authors, the provisions of CNL contradict the spirit of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and represents a prescription to ensure an ever increasing prison population and an ever increasing number of drug addicts. The direct and indirect implications of this law include the further impoverishment of an already impoverished people and the increased likelihood of HIV and TB epidemics in prisons, which constitute a very significant cause for concern (see paras. 26 and 27 below). A review of the counter-narcotics policy and of CNL in particular is one of key recommendations of this report in section 10.13, with detailed suggestions on relevant articles of the CNL, set out in appendix 1.

8. **Post-sentencing alternatives:** in terms of post-sentencing alternatives, conditional release is included in the Law on Prisons and Detention Centres, without providing any detail on the criteria for eligibility or making any reference to the ICPC, where such criteria is provided. The draft prison regulations make no reference to early conditional release at all. The conditions which an offender may be required to fulfil following release are not set out in

legislation. The decision is made by courts, which have the authority to determine the conditions that must be adhered to, according to ICPC (see section 3.2.4). This report has put forward recommendations to increase the use of early conditional release in section 10.12.

9. **Offenders with mental healthcare needs:** a person who is insane at the time of committing a crime should not be punished according to Afghanistan's Penal Code. The court will apply extenuating circumstances in the cases of offenders who suffer from lesser mental health problems at the time of committing an offence, if the offence is a felony or misdemeanour. In the case of minor infractions of law (referred to as obscenities), such offenders will not be punished. Those who become mentally insane during court proceedings or after the sentence has been passed, may be transferred to a mental health institution for treatment, where they will remain until recovery, and then transferred back to prison, to serve the rest of their sentence, the term in hospital having been deducted from their prison term, according to ICPC (see section 4.1).

10. There are serious practical obstacles to applying the existing provisions of the Penal Code relating to offenders with mental illness, such as the inaccessibility of specialists to make a diagnosis and recommendations regarding offenders' mental condition, lack of mental healthcare facilities in the community and the reluctance of criminal justice actors to take any initiative, unless such action is pushed by lawyers, which the vast majority of offenders or suspects, do not have (see sections 4.1 and 8.1). The assessment provides recommendations to reduce the imprisonment of offenders with mental healthcare needs in section 10.14, though these recommendations depend on investment in mental health services in the community, in addition to policy and legislative initiatives.

11. **Juveniles:** the Juvenile Code adopted in 2005 represents a key step in reforming the legal system and provides a framework for the protection of the rights of children and introduces many of the principles and rights contained in the Convention on the Rights of the Child. It provides a series of alternative measures and sanctions, though limited in terms of

diversion from the criminal justice system and pre-trial alternatives. The main challenge however is the application of the Juvenile Code in the absence of functioning juvenile justice institutions, with the exception of Kabul, and the virtually complete lack of social services in the community that are necessary to implement the non-custodial provisions of the Juvenile Code. These practical obstacles are coupled with the inadequate training of judges and prosecutors on the application of the juvenile code and the absence of juvenile judges and prosecutors outside Kabul. Consequently, the Juvenile Code's provisions for alternatives are not being applied; children in conflict with the law are being detained for months and sometimes years in pre-trial detention. Imprisonment is still the main sentence used, in contravention of all international standards, good practice and despite a list of alternatives provided in the Juvenile Code. The provisions relating to children in need of protection are not being applied in cases where children are victims of sexual exploitation, who are treated as perpetrators rather than victims. The only semi-alternative to imprisonment to juveniles which can be provided in practice is the open juvenile rehabilitation centre constructed by UNICEF in Kabul, which had been completed at the time of writing, though was not yet being used (see sections 4.4.1 to 4.4.7). Recommendations to increase the use of non-custodial sanctions and measures for juveniles have been set out in section 10.17.

12. **Juvenile prisoner statistics:** an analysis of statistics relating to all 455 juveniles imprisoned in Afghanistan at the time of writing found that 96 per cent of cases were pre-trial or under-trial detainees, with only 4 per cent of sentences having been confirmed by the Supreme Court. Of the 104 cases where a sentence had been passed by the Appeals or Supreme Court, 48 per cent were eligible for non-custodial sanctions according to the Juvenile Code and another 9 per cent were eligible for the suspension of their sentences. These figures show the potential to reduce by half the juvenile prison population, if the Juvenile Code were to be applied (see sections 4.4.8, 4.4.9).

13. **Female juveniles:** the figures further revealed that 85 per cent of girls were charged with moral crimes, including running away from home (22 per

cent), which is not a recognizable crime according to the Penal Code of Afghanistan, unless it is accompanied by *zina*.¹ Given the age of the offenders, the majority of these cases are likely to involve escape from domestic violence, forced marriages and nonconsensual sex. Their cases would need to be examined to determine their protection needs under articles 52-57 of the Juvenile Code, rather than their being imprisoned and re-victimized (see section 4.4.9).

14. **Women:** over 50 per cent of women in Afghanistan are convicted of moral crimes and are usually subject to medium or long prison sentences. Both the length of their sentences and the protection needs of most, render it difficult to suggest any alternatives in their cases, although they have not committed a violent offence and are not a danger to the public. In addition, according to previous research carried out by UNODC, many may be victims of exploitation and discrimination in legislation and practice, particularly in relation to child marriages and the unequal application of divorce laws, among others.² Imprisonment for petty-offences among women is virtually non-existent. It seems clear that the particularly vulnerable situation of women in Afghanistan, calls for the development of a strategy to ensure that women are treated fairly in the criminal justice system and that their circumstances are taken into account in sentencing, including and especially when the offences constitute so called “moral crimes”. Thus access to legal and paralegal aid is the key to preventing the increase in their imprisonment. Diversion of women who have run away from their homes to shelters via the Ministry of Women’s Affairs (MoWA) and AIHRC, and the newly emerging referral centres established by MoWA and UNIFEM, which started in Jalalabad, are promising in terms of their potential to increase the diversion of certain cases, before the women come in contact with the criminal justice system, and hence detained and imprisoned, even if for a short period of time. The Family Response Units, which started in Kabul District 10 and have since reportedly expanded to five more police stations, also have potential to

prevent women being detained unnecessarily and unjustly. Recommendations to reduce the imprisonment of women are put forward in section 10.15.

15. **Pregnant women and nursing mothers:** according to ICPC, the prosecutor has discretion to suspend the sentence of a woman who is six months pregnant until four months after the delivery of the baby. This provision does not therefore comprise an alternative to imprisonment, but is a recognition of the pre- and post-natal support needs of pregnant women and nursing mothers. Nevertheless even this modest provision is rarely applied. The fact that many children are born in prison and that large numbers live with their mothers for years in the prison environment, is an area of concern, especially when considered in light of the poor facilities in prisons for pregnant women, nursing mothers and children outlined in section 6.2.2. This assessment puts forward recommendations to provide a genuine alternative to pregnant women and women with small children, who have not committed felonies, in section 10.16, although their protection needs and the capacity of community services to provide for these needs, will need to be taken into account.

16. **First time offenders:** a pilot analysis of the cases of 27 first-time offenders (all but one of them charged with or convicted of theft or drug-related offences) in Pul-e Charki prison revealed that 93 per cent were poor or very poor, close to one third of them having been employed as daily wage earners prior to imprisonment. 81 per cent of these prisoners did not have any legal counsel. Of the sentences passed, but most still not confirmed by the Supreme Court, 32 per cent would be eligible for the suspension of their sentences if the provisions of the Penal Code were applied and the CNL did not prohibit the application of suspension for drug offences. Sentences of one year and below comprised 16 per cent of the cases. If a policy of targeting first time offenders with short prison terms for alternative sanctions were to be introduced, according to this very small pilot study a 16 per cent reduction in the prison population could be achieved. The statistics further showed that the majority of sentences passed for drug trafficking offences were over three years and many included fines of the equivalent of \$US 2,000, which these prisoners clearly cannot

¹The term *zina* refers to sex outside a valid marriage, which is an offence according to the Penal Code of Afghanistan.

²UNODC, Afghanistan: Female Prisoners and their Social Reintegration. March 2007

afford, without falling into debt, and perhaps being forced into conflict with the law following prison to pay that debt (see section 4.5). Indeed many prisoners are held in prison beyond the terms of their sentence due to their inability to pay fines, although this practice is illegal. Undertaking thorough research into crime trends and sentences countrywide is one of the recommendations of this assessment, to determine criteria for targeting specific offences and prison terms for alternatives to prison (see section 10.4)

17. **Informal justice system:** this assessment was undertaken at a time when much discussion was taking place on the feasibility of establishing formal links between the informal and formal justice systems, to improve Afghan citizens' access to justice in rural areas in particular and to provide an alternative forum for resolving mostly civil conflicts, but also minor criminal cases, according to some recommendations. This document acknowledges the potentials of such propositions. If the actors in the informal justice system were to be trained, their awareness of human rights, especially women's rights, were to be increased, if women's access to *jirgas* were to be improved and if the decisions of *jirgas* could be monitored and human rights violations prevented. However, it also expresses concern at the potential of injustices and human rights violations, the practicability of monitoring *jirga* decisions, the disadvantaged position of the vulnerable and particularly women, and the additional costs involved in investing in training and structures to enable the informal justice system to function to some extent in line with human rights standards (though this can never be completely achieved, as long as women do not have decision making power in *jirgas*). It therefore recommends that any further investment in the informal justice system should be based on the results of research and the evaluation of pilot projects currently planned by some stakeholders. The assessors feel that, given the scarcity of resources and the immense needs for capacity-building in the formal justice system, the priority should be developing the formal system to ensure that all Afghan citizens have access to fair and efficient formal justice institutions, as a priority (see sections 5 and 10.18).

18. **Criminal procedure and legal aid:** diversion from the penal system, the effective implementation

of appropriate sentences and the conditions of detention and imprisonment are inextricably linked to the criminal justice system processes. The increase in imprisonment is related to the quality of work and approaches of the police, prosecutor and courts, as well as to the lack of fair and timely trial procedures. At the current time there are very serious shortcomings in the number and professionalism of judges and lawyers in Afghanistan, which hinders Afghan citizens to enjoy their right to a fair criminal justice process which has led to the imprisonment of large numbers, following unfair and unclear procedures (see section 6.1). Increasing the professional capacity of judges in Afghanistan, including alternatives to imprisonment in their training and encouraging them to use non-custodial measures and sanctions via training, advocacy and sentencing guidelines are key components of a strategy to introduce and improve the implementation of alternatives to prison (see recommendations set out in section 10.5).

19. The Constitution and the Interim Criminal Procedure Code provide for legal assistance to indigent defendants, but there are huge gaps in the provision of legal defence. The total number of lawyers registered with the Ministry of Justice is around 250, and not all provide legal aid. The Supreme Court has a legal aid office but it has been extremely inadequate. Legal aid provided by NGOs has been crucial in improving indigent offenders' and particularly women's access to legal counsel, and demonstrates the potential of further civil society involvement in this area, particularly in the short term, while the capacity of state institutions to provide this service is improved (see section 6.1). Defendants' access to legal counsel is one of the key requirements to ensure that their rights to a fair trial, and to non-custodial measures and sanctions are respected during the criminal justice process, and recommendations in this area have been included in section 10.5.

20. **Prison capacity and conditions:** the continuing critical security situation in the country has meant that much of international funding is spent on security, with the Afghan National Army representing the largest security expenditure at 60 per cent, the National Police and Law Enforcement at 28 per cent, compared to a Ministry of Justice (MoJ) expenditure

(including prisons) of 3 per cent of the security expenditure. MoJ appears to spend around \$US 708 per year per prisoner for recurrent costs, including around \$US 365 for food, incarcerating large swathes of the poorest people in Afghanistan, many of them held in pre-trial detention, therefore innocent. This compares to \$US 75 spent per student per year and \$US 5-6 spent on a basic package of health services per capita per year. Although the range of figures and the different interpretation on budgeting make accurate comparisons difficult, they give an indication of the cost of imprisonment (see section 6.2). Despite this comparatively high expenditure, the expenditure per prisoner is low in terms of their needs; prison conditions are far below international standards and the provisions of the Law on Prisons and Detention Centres are not applied in many cases, though according to AIHRC the situation is improving slightly in some areas.

21. A prison construction programme, with separate budgeting, is ongoing. A women's prison in Kabul, constructed by UNODC will provide much better accommodation for women and children; a prison being built in Gardez by UNODC, will improve the conditions in which over 200 prisoners, including men, women and women with children are held.³ The Canadian government is also undertaking infrastructure and rehabilitation work in Kandahar and ICRC has carried out infrastructure repair and maintenance activities. CSSP plans to build a prison in Wardak. But the prison building programme is unlikely to achieve the goal of having functioning prisons in all 34 provinces of Afghanistan with separate facilities for women and children by 2010, as per the Afghanistan Compact benchmarks (see section 6.2).

22. Mental healthcare in prisons is virtually non-existent, except for some input from NGOs in the women's facility in Pul-e Charki, Kabul. Prisoners are rarely transferred to be treated in the community, as provided by ICPC, where in any case State services are extremely poor or in private clinics far beyond the means of all but the wealthiest (see sections 6.2.1 and 8.1). Drug use in prisons is extremely high,

³The future of another prison planned to be built in Mazar-e Sharif was uncertain at the time of writing, due to the lack of a water source in the designated area.

with limited drug treatment programmes provided in Kabul and five other provinces, by the Drug Demand Reduction Action Team (DRAT) of the Ministry of Public Health (MoPH), which has been supported and trained by UNODC. The drug treatment facility being established by UNODC, and which was almost complete in December 2007, is a positive step forward. But DRAT team specialists listed the challenges involved in providing adequate drug treatment in prisons, despite these initiatives, due to the high number of drug addicts, limited medical staff, poor coordination between Kabul DRAT and prison authorities, poor coordination between MoPH transport department and Kabul DRAT, and lack of drug demand and harm reduction activities at the current time⁴ (see section 6.2.1).

23. **Corruption:** corruption in the criminal justice system, including in prisons, is prevalent and represents a very serious obstacle to fair trials, legal detention and imprisonment, human rights in prisons and the fair and effective implementation of non-custodial sanctions. Measures to reduce and eradicate corruption in the criminal justice system comprise one of the determinants of the level of success of this report's recommendations, though specific steps to reduce corruption have not been outlined, as the topic needs different expertise and is beyond the scope of this assessment. The authors are aware that anti-corruption measures are recognized as a cross-cutting issue for the justice sector, by ANDS, and anti-corruption measures are included in the draft National Justice Sector Strategy and Programme developed following the Justice and Rule of Law Conference in Rome. UNODC launched a major anti-corruption project in October 2007, which aims to ensure the development of effective measures to fight corruption in Afghanistan's justice sector and the monitoring of the implementation of the United Nations Convention against Corruption (UNCAC) (see sections 1 and 10.1).

24. **Services in the community:** services in the community for mental healthcare, drug treatment, support for women and social protection services for

⁴UNODC's project, Prison System Reform in Afghanistan—Extension to Provinces (AFG/R87), includes an assessment of drug abuse in prisons, being prepared at the time of writing, following which rehabilitative and educational programmes for drug users in selected prisons will be established.

juveniles, are extremely inadequate, which is another major obstacle to the implementation of rehabilitative non-custodial sanctions and measures in the case of these vulnerable groups. There is a mental health hospital in Kabul with only 60 beds, including 20 beds for drug addicts and 40 for psychiatric patients. The conditions and treatment are reported to be extremely poor. There is a mental health clinic in Herat and a state run mental health hospital in Mazar-e Sharif, the latter reportedly with worse services than in Kabul. There are approximately 1 million drug addicts in Afghanistan, but less than 0.25 per cent of drug users can be treated with the current drug treatment facilities. Injecting drug use (IDU) is on the rise. Services for women include a total of six shelters, four of them in Kabul, one referral centre established in Jalalabad, with another being planned in Parwan and 5-6 family response units in police stations. These may be used to divert women from the criminal justice system for acts such as running away from home, which may be treated as a criminal offence in Afghanistan. Recommendations to invest in a range of community services and to form partnerships with NGOs which are able to provide such services in the short term, are among recommendations included in section 10.3.

25. **The social consequences of prison:** there is a clear link between the effects of imprisonment and poverty. Young, disenfranchised, unemployed, poor men with low educational attainment are vastly over-represented in prisons across the world. When released, often with no skills, money or prospects for employment, they are generally subject to socio-economic exclusion and are thus vulnerable to an endless cycle of poverty, marginalization, criminality and imprisonment. The impact of imprisonment falls not simply on the prisoner but also on the prisoner's family. The removal of a wage provider can have a devastating effect on the family. The profiles of prisoners interviewed in Kabul in December 2007, correspond to these findings (see section 4.5). Moreover, there is an intensified problem in Afghanistan for families to be in a position to take care of themselves without the male income provider, as women have very limited opportunities for employment, and especially employment that is adequately paid. Thus there is potential for increased poverty and coping strategies that bring the poor in conflict with the law

in Afghanistan, as a result of the rapid growth of the prison population (see section 7).

26. **Health consequences of prison:** one of the key risks associated with the increasing prison population is the potential for HIV/AIDS and TB epidemics in Afghanistan's prisons. Research worldwide has shown that HIV and TB rates are much higher among prisoners compared to the general population in many countries, and particularly when prisons are overcrowded, conditions are poor and drug use and other risk behaviour in prisons are prevalent. WHO reports that there may be between 1,000 and 2,000 Afghans living with HIV in the community and predict that Afghanistan's emerging HIV epidemic will likely be fuelled through a combination of injecting drug use and unsafe sex. The sharing of needles is widespread among injecting drug users (IDUs) in Afghanistan. Currently only 14 per cent of the country's drug users are IDUs and injecting drug use is not common in prisons, but the risk is growing and visible. Afghanistan ranks seventeenth out of 22 countries with the highest TB levels, with the current prevalence of TB estimated at 228 cases per 100,000 of the population. Although the rate of TB among prisoners is unknown, prisons are known to be reservoirs for TB infection (see section 7).

27. The potentially catastrophic combination for Afghanistan of a population at high risk of HIV and AIDS and an already high TB prevalence, increasing number of IDUs, the rapidly increasing prison population, the dire prison conditions, and the vulnerability of the prison population before and during imprisonment demands a social and criminal justice framework that reduces the use of imprisonment, through criminal justice policy and sentencing reform and increases the use of targeted health and education programmes.

28. **A comprehensive strategy:** the reform process in Afghanistan is based on a sector-based strategy within the I-ANDS framework. Inadequate cooperation among justice institutions has been identified as a key obstacle to the efficient and effective delivery of justice. Also key to the success of the implementation of alternatives to prison is coordination between justice institutions and services in the community (state and non-governmental), and therefore

coordination between the justice sector and other sectors responsible, for example, for health and social protection in particular. The authors are not aware of any systematic coordination mechanism across sectors, which poses a key challenge to the application of non-custodial measures and sanctions, which aim to be rehabilitative and reduce recidivism (see section 9). Systemized cooperation across sectors and the formation of a working group on alternatives to include decision makers from a range of justice, health, social welfare and education institutions are among the key policy and strategy recommendations of this assessment, in sections 10.1 and 10.2.

29. **Conclusions and recommendations:** as this assessment outlines, there are immense challenges to implementing non-custodial measures and sanctions in Afghanistan, though at the same time there is an urgent need to reduce the numbers of people entering the criminal justice system. If the prison population continues to increase at the current rate, the social and health consequences of imprisonment, and the costs involved, will place a very heavy burden on the Afghan authorities and the international community. Action needs to be taken without delay to reverse the trend. Amending legislation to increase the use of alternatives is relatively simple. However, law reform must be accompanied by adequate investment in the infrastructure to ensure that alternatives can be implemented, and the services to ensure that the rehabilitative aims of non-custodial sanctions can be effective. This must be accompanied with civic education and advocacy concerning rights and justice, with focus on the purpose and effectiveness of a criminal justice system that includes non-custodial measures. There is also an urgent need for a comprehensive strategy which includes cooperation between all sectors that should be involved in the implementation of alternatives to prison. Finally, the strategy must not only be accepted, but also led by the Afghan authorities, if it is to be sustainable.

30. Section 10 outlines a series of recommendations including amendments to legislation, practical measures and investment in services, in order to introduce and increase the use of alternatives to prison in Afghanistan. The recommendations are based on the recognition that in Afghanistan, with its limited resources and the need for prioritization among a myriad of fields that need investment, measures suggested should be relevant, applicable and cost-effective. Therefore the assessment does not propose a long list of new and complicated alternatives to prison nor another department or bureaucracy for the supervision of non-custodial sanctions and measures. The priority in Afghanistan is to invest in the establishment of the rule of law, and in the context of this document, to prevent illegal detention and unfair trials to reduce the prison population, to rationalize sentencing policy and to prioritize the implementation of existing alternatives, rather than setting up a new machinery that will not be used, and possibly provide another instrument for corruption and other forms of abuse. Alternatives to prison need also to take account of the needs and expectations of the victims, which is a key component of the notion of justice in Afghanistan and recommendations have taken account of this factor.

31. Significant achievements can be made within this framework if there is sufficient will and coordination, if a strategic and step-by-step approach is taken, based on further research in some areas, adequate and targeted investment is made, the capacity of the criminal justice system improved and the needs of offenders are taken into account in health and social welfare policies and expenditure. It must be acknowledged, however, that the success of such a strategy requires long-term sustained commitment by Afghan authorities and the international community.

Introduction

The criminal justice reform programme of the United Nations Office on Drugs and Crime (UNODC) has been ongoing in Afghanistan since 2003. The programme consists of three interrelated components which address the long-term normative and operational aspects of criminal justice:

- Penitentiary Reform Project, which includes the reform of laws and regulations relating to prisons, rehabilitation of the prison infrastructure and training of penitentiary staff;
- Criminal Justice Capacity-Building, which aims to strengthen the capacity of key justice institutions, law reform, training of judges and prosecutors, and development of a legal aid programme; and
- Reform of the Juvenile Justice System, which aims to strengthen juvenile justice administration in Afghanistan.

Also very relevant to this assessment and its recommendations is a new project launched by UNODC in October 2007 (AFG/R86), the overall objectives of which are to strengthen the capacity of the Supreme Court and the Attorney General's Office, as well as the General and Independent Administration for Anti-Corruption (GIAAC) of the Government of Afghanistan, to ensure the development of effective measures to fight corruption in Afghanistan and the monitoring of the implementation of the United Nations Convention against Corruption (UNCAC). More specifically, the project aims: (a) to strengthen the operational capacity and effectiveness of the GIAAC as a monitoring body of the implementation of UNCAC provisions; (b) to provide legislative assistance in order to amend key legislative documents in accordance with the provisions of the UNCAC; (c) to strengthen the operational capacity of the members of the justice sector in Kabul and selected provinces, as well as establishing a monitoring mechanism on the implementation of the UNCAC; (d) to build the National Assembly's awareness and capacity to work on the implementation of the principles and provisions of the UNCAC, at both the central and provincial levels; and (e) to support the adoption of a multi-sector National Anti-Corruption Action Plan aimed at effective implementation of the UNCAC, including vulnerability to corruption assessment, prevention, and education. The project will be implemented by the UNODC Country Office for Afghanistan in collaboration with the Supreme Court, the Attorney General's Office, and the GIAAC, in partnership with the major international partners engaged in anti-corruption.

The Penitentiary Reform Project, referred to above, was launched in May 2003 with the signing of an agreement between UNODC and the Ministry of Justice of Afghanistan. It is funded by Italy, Austria, Canada and the United Kingdom. In 2005, UNODC launched a follow up project, Prison System Reform in Afghanistan—Extension to provinces (AFG R87), which builds on UNODC's work on reforming Afghanistan's penitentiary system (AFG/R41). Under the 2005 project, which is funded by the Italian government, UNODC aims to further upgrade the

penitentiary system of the country and extend penitentiary reform to selected provinces. The focus of the project is on infrastructural, normative and operational priorities in a mutually supportive manner. Its objectives include: the revision of rules and regulations on penitentiary matters and the expansion of the authority and policies of the Central Prison Department to the provinces; the rehabilitation of selected prison facilities and the establishment of rehabilitative programmes; the enhancement of the operational capacities and professionalism of penitentiary staff and the improvement of coordination within the criminal justice system; training programmes for prison staff and social workers, introduction of vocational and education programmes for detainees in selected prison facilities; the development of programmes addressing the needs of detained women, especially those with children, as well as those of drug users and the introduction of alternatives to imprisonment programmes.

Thus, the current assessment forms part of UNODC's programme to extend penitentiary reform to the provinces of Afghanistan, which includes the introduction of initiatives to increase the use of alternatives to prison, in line with the recommendations of international standards. It focuses particularly, though not exclusively, on vulnerable groups, such as juveniles, women, offenders with mental illness and offenders with drug dependencies.

More specifically, the assessment:

- Provides a review of existing criminal legislation, regulations and judicial policies applied at various stages of the justice system, and assesses the adequacy of existing laws providing alternatives to prosecution, pre-trial detention and sentences of imprisonment and of the implementation of non-custodial sanctions and measures in practice.
- Reviews available statistical data on crimes and sentences, in terms of their relevance to the application of non-custodial sanctions and measures; and provides a pilot review of information with respect to the profiles of a selected group of prisoners in Kabul.
- Provides information on State and criminal justice capacities to respond to the increasing

rate of imprisonment, including the implementation of alternatives to prison, and related challenges.

- Sets out recommendations with respect to legislative reform and practical initiatives to increase the possibilities for the implementation of non-custodial sanctions and measures in Afghanistan, in line with international standards and national legislation.

The UNODC initiative to increase the use of non-custodial sanctions and measures comes at a time when the prison population in Afghanistan is increasing at an alarming rate. In 2001, there were only 600 prisoners countrywide.⁵ By January 2006 the total number of prisoners was estimated to be over 6,000, representing a 10-fold increase in five years.⁶ By October 2007, the figure had reached 10,604,⁷ a 77 per cent increase over 22 months. Of these 10,604 prisoners, 304 were women, many imprisoned together with dependent children. The figure for female prisoners was 250 in December 2006, and the female prison population had doubled over the three years between 2004 and 2006.⁸ Thus a smaller, but steady increase in the number of female prisoners is also ongoing. With the pressure of punitive policies, and in the absence of alternative measures to imprisonment, many offenders are simply imprisoned when they could be dealt with in more appropriate and less harmful ways. For example many petty offenders, who do not pose a risk to society, have found themselves behind bars. Others, such as offenders with mental healthcare needs and those who are drug dependent and therefore in need of treatment are also imprisoned, rather than being treated in the community. Thousands of people are, hence, packed into prisons that are overcrowded, dilapidated, unsanitary, inhumane and ineffective for prisoners' rehabilitation and crime prevention.

To date there has been hardly any focus on the application of existing alternatives to imprisonment or the introduction of new non-custodial measures and

⁵UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op.cit., p. 8.

⁶Ibid.

⁷Official figure obtained from CPD, by UNODC.

⁸UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op. cit. p. 34.

sanctions in Afghanistan's statutory law, with the exception of their introduction in a new Juvenile Code, approved in March 2005. Recently discussion amongst Afghan stakeholders and the international community has been taking place on ways in which formal links with the informal justice system may contribute to the reduction of cases being processed through the courts, though this area of activity is relatively new and so far concerns mainly civil cases, though minor criminal offences are also considered by some recommendations. Other areas of penal reform, including the rehabilitation of prison facilities and training of prison staff, have received relatively more attention, though there is also an immense amount of work yet to be undertaken to ensure that the prison system in Afghanistan is managed in line with the requirements of international standards, and in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners, of which UNODC is the guardian. In this context, there is a need to recognize that the

successful application of human rights standards in prisons is dependent on the number of people who are held in these facilities and the capacity of the State to provide for acceptable conditions for living and the social reintegration requirements of prisoners. Therefore it is generally recognized that penal reform strategies need to be comprehensive in approach, including the introduction of policies which aim to eliminate/reduce the incidence of unnecessary/unjustified imprisonment, the long-term impact of which is likely to be increased criminality and other related problems, rather than the prevention of crime and rehabilitation of offenders.

In line with this approach, the current assessment represents a step towards expanding the focus of current criminal justice activities in Afghanistan to include initiatives to increase the application of alternatives to imprisonment, taking into account the safety and security requirements of the community.

Context

The Afghanistan Compact, endorsed in London in January 2006, established the framework for continued international engagement with Afghanistan over the next five years (2006-2010). The Afghan Compact document identifies three interdependent areas of activity that need to be tackled in that period: (a) security; (b) governance, rule of law and human rights; (c) economic and social development. The Compact states that reforming the justice system will be a key issue for the Afghan Government and the international community, and that priority will be given to the coordinated establishment in each province of functional institutions—including civil administrations, police, prisons and judiciary.

Noting the immense challenges faced in Afghanistan in reforming the criminal justice system, the Justice and Rule of Law Conference in held in Rome, in July 2007, provided an opportunity for the Afghanistan Government and the international community to agree on measures to improve coordination and set realistic and achievable goals for justice sector reform. The key goals and actions, which form the basis of the Rome Conference conclusions, included the following:⁹

Key goals

Recalling the framework for rule of law and justice reform provided by the Afghanistan Compact and its benchmarks, based on the vision of “Justice for All” and within the overall framework of the Afghanistan National Development Strategy (ANDS):

The Government of the Islamic Republic of Afghanistan

Commits itself to finalize a national justice sector strategy and to implement comprehensive rule of law reform with the assistance of the International Community through a national justice programme.

The donors and the international community

Pledge significantly to increase coordinated support for rule of law reform in Afghanistan, based on the national justice programme put forward by the Government of the Islamic Republic of Afghanistan.

⁹Conference on the Rule of Law in Afghanistan website, final documents: http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/La_rete_consolare/

Key actions

As concrete steps towards the achievement of the above mentioned key goals, the Government of the Islamic Republic of Afghanistan and the International Community, agreed to take the following key actions, among others.

- To agree on the priorities for the Justice Sector reform as defined by the Afghan Justice Institutions and presented in Rome in the Government's Justice Sector Priorities.
- To establish a comprehensive National Justice Programme under the leadership of the Supreme Court, the Ministry of Justice and the Attorney General's Office on the basis of the strategies presented at the Conference. The National Justice Programme shall be comprehensive and credible, including specific plans for short-, mid- and long-term implementation and a mechanism for review.
- Launch a process to assist the Government of Afghanistan to effectively link coordinated donor support to the National Justice Programme. [. . .]

At the time of writing the National Justice Sector Strategy (NJSS) and Programme (NJSP), referred to above, were in draft form, close to finalization.

Under the goal of improving quality of justice, the NJSS outlines the challenges that remain in establishing a just and effective justice system in Afghanistan, and sets out a series of expected results to be achieved within five years of the implementation of the strategy.¹⁰

Among them are included the following two expected results, which are particularly relevant to the current document:¹¹

- Juvenile Justice Code implementation will have resulted in regulations being promulgated and applied, juvenile justice professionals being trained in all justice institutions and juvenile justice facilities in at least eight major provinces;

- A comprehensive review of sentencing laws and policies will have been completed and recommendations for improving penal and sentencing system prioritized.

In order to reach these objectives a number of key initiatives are set out, including in the area of non-custodial sentencing and penal reform.¹² Under this heading the NJSS states that "[t]he justice institutions as coordinated by MOJ with other stakeholders will examine options for longer term penal reform alternatives to detention and imprisonment. In the interim, existing alternatives to prison will be enhanced as follows:

- Establish simplified sentencing guidelines for minor offences;
- Develop new options and improve existing mechanism for enforcement of non-custodial sentences. These include systematic collection of fines, confiscation of assets, forms of non-custodial confinement [. . .]
- Consider ways to improve performance on collecting financial penalties, seizure, confiscation and disposition of assets, and the destruction of contraband. The Government will seek ways to enhance the collection of fines and sale of assets to help finance justice operations (particularly courts and legal aid), and create a victim's compensation scheme."¹³

The current assessment aims to contribute to the implementation of the NJSS, with respect to improving the penal and sentencing policies, with a view to increasing the use of non-custodial sanctions and measures. The primary focus of the assessment is the effective implementation of existing alternatives in the short term, in line with the strategy included in NJSS, with recommendations for expanding the use of alternatives to prison in the long term.

There are many issues and priorities that need to be addressed in parallel to establishing and expanding the use of alternatives to prison. Indeed, the successful introduction of non-custodial sanctions and measures into law and practice relies on the

¹⁰Draft NJSS, (3 December 2007), p. 12.

¹¹Ibid., p. 13.

¹²Ibid., p. 17.

¹³Ibid., p. 17.

availability of a functioning, efficient and fair criminal justice system. Institutionalized corruption, the continued political and military influence of warlords, the lack of security outside a few key urban centres (especially for judges, judicial personnel, and prosecutors), lack of professional capacity within the justice sector and the inadequacy of tools and physical infrastructure to administer justice, pose serious challenges to the establishment of the rule of law in Afghanistan,¹⁴ including to the introduction and implementation of alternatives to prison, in line

with international standards. As this assessment underlines, the successful introduction of alternatives to prison in Afghanistan is also dependent on development in areas which are currently regarded as outside the justice sector, such as social welfare and health services in particular. Thus a comprehensive strategy needs to be developed, if non-custodial measures and sanctions are to be implemented successfully and for the purpose of the social reintegration of offenders in Afghanistan, while being sustainable in the long term.

¹⁴Afghanistan Human Development Report, 2007, Centre for Policy and Human Development, Kabul University and UNDP, p. 82; UNAMA, Afghanistan Justice Sector Overview, April 2007, p. 1.

Legislative framework: law and practice

3.1 Overview: legislation

Afghanistan has ratified a number of key international conventions which aim to protect the human rights of offenders and vulnerable groups, such as children and women. These include the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention of the Rights of the Child (CRC).

Extensive work is ongoing to put in place implementing legislation, by reforming existing laws in line with the Constitution, Afghanistan's international human rights obligations and Islamic law. The Technical Law Reform Working Group, of the Rule of Law Working Group, chaired by the Ministry of Justice (MoJ), with the United Nations Assistance Mission in Afghanistan (UNAMA) as lead international support, is currently reviewing, revising and drafting legislation, in line with the strategy set out in "Justice for All: A Ten-Year Strategy for Justice Reform in Afghanistan" (2005).

Current laws relating to criminal cases, relevant to the subject of this assessment, are set out below. Due to ongoing work on law reform, in some cases there are layers of legislation which need to be referred to in order to decide the lawful course of action in a particular case.¹⁵ In practice, due to the insufficient training of judges and prosecutors on new legislation, as well as the difficulty in accessing written copies of new laws in provinces, the application of legislation is inconsistent, with old laws still being applied in large parts of the country. Enforcement and implementation of laws and the application of international standards incorporated in new legislation remains a critical problem.¹⁶

Penal law

Categories of crimes and penalties are set out in the Penal Code of 1976 and the Counter Narcotics Law of 2005 (CNL). The latter supersedes the Penal Code in relation to drug offences, according to article 56 of the CNL, which states that "where existing laws and regulations conflict with this law, this law shall prevail". Article 35 provides that in the case that CNL lacks the required provisions to decide on a penalty, the provisions of the Penal Code should apply. Thus, in the discussion of legislation relating to drug offences, both need to be taken into account.

¹⁵ For the immense amount of work that is ongoing in the area of law reform and the challenges faced, see Afghanistan Human Development Report 2007, op. cit., pp. 76, 117-118.

¹⁶ UNAMA, op.cit., p. 6.

Criminal procedure

The Interim Criminal Procedure Code of 2004 (ICPC), supersedes the Criminal Procedure Code of 1965 (CPC), amended in 1974. But since the ICPC was drafted to be applied to an immediate post conflict environment, it is not a comprehensive criminal procedure code. It does not replace entirely the 1965 (with amendments in 1974) Criminal Procedure Code or any of the other laws since 1974 that amended or created criminal procedures. Under article 98(3) the ICPC only superseded those laws contrary to the provisions of the ICPC. Thus some Afghan prosecutors and judges continue to apply provisions of the 1965 CPC (e.g. bail). Since 2004, there have been new laws that have superseded or amended provisions of the ICPC, such as the 2005 Police Law (changing allowable police custody of an arrestee from 24 to 72 hours before a prosecutor takes over control) and the 2005 Counter Narcotics Law that introduces new provisions for search, seizure and covert surveillance provisions, and increases the 30 day arrest-to-indictment limit. These changes and the lack of a harmonized and more comprehensive criminal procedure code have created conflict and confusion.¹⁷

A new Criminal Procedure Code had been drafted by the Legislative Department of the Ministry of Justice and was under review at the time of writing by the Technical Working Group for Law Reform, of the Rule of Law Working Group.

Law on Prisons and Detention Centres

The Law on Prisons and Detention Centres, adopted in May 2005, and prison regulations, currently in draft form, are relevant in terms of provisions for early conditional release (parole), within the context of this assessment. Although early conditional release is not always considered to be an alternative to prison, it is included in the Tokyo Rules post-sentencing dispositions. Taking into account the limited opportunities for genuine alternatives to imprisonment in current legislation,

this assessment has included early conditional release within its scope.

3.2 Analysis: legislation and practice

This section summarizes the possibilities for the application of non-custodial sanctions and measures within the current criminal legislation of Afghanistan and comments on the implementation of such legislation in practice. The discussion and commentary is guided by relevant international standards, in particular the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

The Tokyo Rules encourage member States to “develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.” (rule 1.5). Rule 2.3, states that, “[i]n order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions.” Rule 2.5 recommends that States give consideration to dealing with offenders in the community, avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law. They also urge States to develop new non-custodial measures and to closely monitor and systematically evaluate their use (rule 2.4). It is important to note that the Tokyo Rules underline that the use of non-custodial measures should be part of the movement towards depenalization and decriminalization, rather than delaying efforts in that direction (rule 2.7). In other words, reducing the scope of criminal sanctions should form part of strategies to reduce the growth of the prison population, taking into account the need to ensure the safety and security of the public and the social reintegration of the offender.

¹⁷UNAMA, op. cit. pp. 6,7.

3.2.1 Diversion from prosecution

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

*Adopted by General Assembly resolution 45/110 of 14 December 1990.

The Tokyo Rules emphasize the need to reduce criminal prosecution, when not strictly necessary for the protection of society, while taking into account the rights of the victims. Indeed, the number of complaints received by the police and prosecutors would overload the criminal justice system if they were all prosecuted in the courts. In many countries, in practice, the police and prosecutors divert offenders from the criminal justice system, as a matter of course, using their own discretion. In order for discharge or diversion to be possible, members of the police force and prosecutors need to have clear guidelines as to the extent of their discretionary powers and a set of established criteria to take a decision of discharge. Based on such criteria and guidelines, police and prosecutors may themselves issue a formal caution and take no further action, divert suitable cases to an alternative programme, without referring the case to courts.¹⁸ The options available to the police and prosecutors may include:¹⁹

- Absolute or conditional discharge
- Verbal sanctions
- An arbitrated settlement
- Restitution to the victim or a compensation order
- Community service order
- Victim offender mediation
- Family group conference
- Another restorative process

According to Afghanistan's criminal legislation, the police have no power to divert cases away from

¹⁸UNODC, Handbook of basic principles and promising practices on Alternatives to Imprisonment, Dirk van Zyl Smit, 2007, p. 14.

¹⁹UNODC, Criminal Justice Assessment Toolkit, Custodial and Non-custodial measures, Alternatives to incarceration, 2006, p. 9.

prosecution or to issue warnings and discharge a suspect, if the suspected offences fall within the scope of criminal law (obscenities, misdemeanours and felonies).²⁰ The primary prosecutor is obliged to initiate criminal proceedings in relation to all crimes known or reported to him/her, committed in the territory of the District for which he or she is responsible, unless otherwise stated by law (ICPC, article 22.1). The prosecutor cannot dismiss a case except when provided by law. (ICPC, article 22.2). Limited scope for the dismissal of a case is provided in article 117 of the CPC, which states that a case can be dismissed by the prosecutor if "the actor's fault and the consequences of the deed are so trivial that the public does not seem interested in its legal pursuit." Further research, including in provinces, is needed to determine how often prosecutors implement this article of the CPC and for what types of cases.

There are no programmes linked to the formal justice system—e.g. restorative justice programmes—to which police and prosecutors could divert appropriate cases. However, many interviews and reports indicate that cases (mostly civil, but also criminal) are being diverted to the informal justice system by prosecutors and courts, for settlement on an informal basis.²¹ (For information and comment on the informal justice system, see section 5).

²⁰Mr. Sayed Yousaf Halim, Deputy General, Legislative Department, Ministry of Justice, 8 December 2007.

²¹See for example Briefing Paper, Conference on the Relationship between State and Non-state Justice Systems in Afghanistan, December 10-14 2006, Kabul Afghanistan, p. 5; Barfield, T. Nojumi, N and Their, Alexander J., "The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan", p. 22; USAID, Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies, Checchi and Company Consulting Inc., USAID, Afghanistan Rule of Law Project, June 2005, pp. 30-34.

3.2.2 Alternatives to pre-trial detention

International Covenant on Civil and Political Rights

Article 9 (3)

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment

Principle 36

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

According to international law, the general rule is that a person must be afforded his or her personal liberty and not be held in detention pending trial. Possible alternatives include releasing an accused person and ordering such a person to do one or more of the following:²²

- to appear in court on a specified day;
- not to
 - engage in particular conduct,
 - leave or enter specified places or districts,
 - or
 - meet specified persons;

- to remain at a specific address;
- to report on a daily or periodic basis to a court, the police or other authority;
- to surrender passports or other identification papers;
- to accept supervision by an agency appointed by the court;
- to submit to electronic monitoring; or
- to provide or secure financial or other forms of security as to attendance at trial or conduct pending trial (bail).

²²UNODC, Criminal Justice Assessment Toolkit, Custodial and Non-custodial Measures, Alternatives to Incarceration, 2006, p. 8.

The ICPC of Afghanistan does provide for the release of the suspect, by the prosecutor, whenever the latter

deems it unnecessary to deprive the suspect of his or her liberty (article 34.2). This release can take place following the interrogation of the suspect by the prosecutor, for a period of maximum 48 hours (article 34.1). No reference is made in the ICPC to the requirement to provide financial or other forms of security in order to be released.

The Criminal Procedure Code contains more detailed provisions relating to detention and bail.²³ The conditions of release from detention, with or without the provision of bail, are set out in articles 97 to 105 of the CPC. Article 98 provides that the money required for bail shall be fixed by the judge of the competent court or the President of the Provincial Court. The agreed sum of money or securities (valuable documents) need to be placed in the bank or state treasury (article 101). If the accused fails to fulfil any of his or her lawful commitments without reasonable excuse, the first part of the bail will be transferred to the government's account automatically. The accused will be refunded the remaining part of the bail amount, if the case is dismissed or the accused acquitted (article 102). If the prosecutor is convinced that the accused cannot afford bail, he can instead require the accused to regularly report to the police office at designated times. In which case guarantee for appearance and other similar obligations are imposed on the suspect and he/she needs to provide surety that he/she will not escape (article 103).

An annexed table to chapter 8 of the CPC, sets out all the offences for which bail cannot be applied. This table contains a long list of offences, including petty offences, such as theft committed by a house employee, theft of official records, theft from sealed and locked places, recidivist pickpocketing, concealment of stolen property and fraud. In effect, this list excludes many offenders from eligibility for bail.

Despite the provisions included both in the ICPC and the CPC for release during pre-trial detention, in practice, it appears that bail is applied so rarely, that during interviews in Kabul, the authors were

told by lawyers either that there was no provision for bail in legislation²⁴ or that the law on bail was never applied.²⁵ This information related not only to Kabul, as the lawyers interviewed were senior members of NGOs providing legal aid in Kabul and provinces. Lawyers also stated that reporting to the police station as a pre-trial alternative was taking place in practice, although such an alternative was not provided for in legislation, which would appear to contradict the facts, as the CPC does specifically provide for this course of action (article 103), which does not contradict any of the provisions of ICPC, and therefore must still be in force.

According to some, release from pre-trial detention was said to be possible with the payment of bribes rather than bail. Indeed, there was a constant confusion as to whether bribes or monetary or other securities were referred to in the discussion of bail.

There is a need to include clear provisions relating to release during the pre-trial period (including with monetary bail and other alternatives) in the new CPC, to reflect article 25 of the Constitution which emphasizes the presumption of innocence of individuals until convicted by an authorized court, article 24, which provides that the State has responsibility to respect and protect a person's liberty, and article 9 (3) of ICCPR, which limits the use of pre-trial detention. It would also be beneficial to issue guidelines to prosecutors and judges encouraging the use of pre-trial alternatives, to be applied as early as possible during the criminal proceedings, in line with international standards cited above.²⁶ It would be useful to conduct further research as to the reasons why the existing provisions for bail, and especially provisions of article 103, are applied so rarely, to devise strategies to reduce obstacles to the application of bail (e.g. awareness raising, training, anti-corruption measures etc.).

²³As the provisions for bail included in the 1965 CPC do not contradict any of the provisions of ICPC, these provisions still apply.

²⁴Interview, Ms Frishta Karimi, Director and Mr Najibullah Azizi, Deputy Director, Da Qanoon Ghush-tonky, 9 December 2007. (Da Qanoon Ghush-tonky provides legal and paralegal aid in 14 provinces).

²⁵Interview, Ms Massouda Nawabi, Legal Aid Fund, Project Coordinator, Medica Mondiale, 10 December 2007. (Medica Mondiale provide legal aid for women in four provinces.)

²⁶Such guidelines may be issued by the Supreme Court and Attorney General's Office, as relevant.

3.2.3 Alternatives to imprisonment and other measures applied to convicted offenders

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

8. Sentencing dispositions

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 Sentencing authorities may dispose of cases in the following ways:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.

The key guiding principle to be used, if imprisonment is to be reduced, is the imposition of imprisonment as sparingly as possible, both less often and for shorter periods.²⁷ A careful examination of each case is necessary to determine whether a prison sentence is required and, where imprisonment is considered to be necessary, to impose the minimum period of imprisonment that meets the objectives of sentencing.²⁸ Where offenders pose no risk to the safety of the public and the offence committed was not violent, consideration should be given to the imposition of non-custodial sanctions, instead of imprisonment. In order for this principle to be put into practice the first rule is for sentencing authorities to have a range of alternatives available to them in legislation, as recommended by the Tokyo Rules, rule 8.1.

²⁷UNODC, Handbook of basic principles and promising practices on Alternatives to Imprisonment, op. cit., p. 25.

²⁸Ibid.

Article 97 of the Penal Code of Afghanistan lists the principal punishments available to courts. It includes six types of punishment: the death penalty, various terms of imprisonment and fines.

Limited scope for alternatives is provided for offenders with mental illness and drug addicts, although they are not listed under principal punishments in article 97 (see section 4.1).

In addition, there are provisions for the suspension of enforcement in chapter 8 of the Penal Code, articles 161-166.

Fines

Articles 25 and 26 of the Penal Code describe offences of misdemeanour and obscenity,²⁹ with

²⁹The *Dari* for the offence mentioned in this article is *kabāhat*, which is usually translated as obscenity, which appears to refer to minor infractions of law and order.

reference to the punishments which can be applied. Article 25 includes a cash fine payment of over 3,000 Afghani (Af) (equivalent to \$US 60) or a prison term of between three months and five years for crimes of misdemeanour. Article 26 provides for a cash fine of up to Af 3,000 or a prison term of between 24 hours and three months for obscenities. Thus, although these provisions do not mean that cash fine alternatives may be used in all cases, they do indicate that cash fine alternatives for offences categorized as obscenities or misdemeanours are possible. Articles 104-111 describe the determination of the amount and application of cash fines, which include a provision allowing courts to take into account the personal, social and economic conditions of the offender (article 108 (2)).

However, all interviews in Kabul, without exception, revealed that cash fines are rarely applied as an alternative, judges most often preferring to impose a term of imprisonment, even when a cash fine alternative is available in legislation. In fact, fines are apparently more often imposed as an additional sentence to imprisonment, which is possible for some offences in the Penal Code and for many offences covered by the Counter Narcotics Law. But this has led to many prisoners being held beyond the terms of their prison sentence, apparently contrary to the provisions of the law³⁰ (see section 4.2 for discussion on sentences covered by the Counter Narcotics Law).

According to the Interim Criminal Procedure Code, the police is responsible for supervising the execution of alternatives to imprisonment. (ICPC, article 86). The Ministry of Justice directly or in collaboration with financial institutions, collects fines (ICPC, article 87). The Ministry of Finance was said to have a special office to collect fines in each province, and the cash needed to be deposited into a special bank account.³¹ The fines apparently contribute to the national budget managed by the Ministry of Finance.

³⁰Interviews in Kabul suggested that legally, even when a prisoner has been sentenced to a prison term plus a fine, he or she should not be held in prison beyond the term of imprisonment, if he or she has not yet been able to pay the fine.

³¹Interview, Ms Marzia Basel, former judge and Director of Afghan Women's Judges Association, 16 December 2007.

Suspension of enforcement

In the Penal Code of Afghanistan, the terms relating to the suspension of the enforcement of punishments are set out in articles 161 to 166.

For crimes for which the punishment is imprisonment of up to two years or Af 24,000, the court can order suspension for three years, from the time of the pronouncement of the verdict (article 161 (1)).

Suspension is based on the court's assurance of the offender's moral characteristics, background and age and may be accompanied by complementary punishments or security measures (article 161 (1)). In a meeting in Kabul, Mr Sayed Yousaf Halim, Deputy General of the Legislative Department of the Ministry of Justice, suggested that suspension of sentences was usually considered in the case of a first offence. The information relating to the background and moral conduct of the offender would be obtained from state officials, if the person were a state employee, or from elders and members of the offender's community, in the case of an ordinary citizen.³²

Article 166 stipulates that if the offender does not commit another offence during the period of suspension, the verdict is cancelled.

The conditions for cancellation of suspension are set out in articles 163-165. Article 165 stipulates that cancellation of the suspension of punishment "requires the restitution of the punishment of the offender, including consequential and complementary punishments and security measures". One of the grounds for cancellation is the commission of a felony or misdemeanour, for which the punishment is longer than three months. According to articles 163(3) and 164, the offender receives a new punishment for the new offence committed. According to article 159 of the Penal Code, the second sentence term is added on to the original sentence term, the total prison term running consecutively, even if the period exceeds 20 years. The time the offender already spent in prison awaiting the original decision for suspension is taken into account in the prison sentence, according to article 89 (1) of the ICPC.

³²Mr Sayed Yousaf Halim, Deputy General, Legislative Department, Ministry of Justice.

Other provisions for suspension are included in the ICPC, although none of them constitute an alternative to imprisonment, the suspension being possible for a specific period, following which the offender is imprisoned.

- The prosecutor has discretion to suspend the sentence of a woman who is six months pregnant until four months after the delivery of the baby (article 89 (2)).
- The ICPC provides for the suspension of the sentence of an offender with serious physical illness, based on a doctor's report. The suspension is valid until the physical illness is cured (article 89 (4)).
- If a husband and wife are sentenced to prison not exceeding one year, the prosecutor can suspend the sentence of one of them if not a recidivist and is supporting a child of less than 15 years. The execution starts when the child reaches the age of 15 (article 89 (5)).

Interviews suggested that suspension of sentences is not applied in accordance with the law, and is usually used as a tool for receiving bribes. It also appears that suspension is often applied in cases involving corruption, where it may perhaps be assumed that a payment of bribes is the norm. More comprehensive research would be useful to determine whether the rules that apply to suspension are clear to judges, lawyers and other legal practitioners and what the main reasons for the apparently rare application of suspension of sentences are, in order to resolve challenges—e.g. whether this is purely an issue related to corruption, whether there is a lack of training and awareness or whether judges are reluctant to take risks.

Complementary punishments

Other types of punishments are available in the Penal Code, but they are not defined as principal punishments. They are complementary punishments, set out in article 117 which can only be applied in addition to a principal punishment.

They include: deprivation of some rights and privileges; confiscation and publication of verdict.

Conditions for their application are set out in articles 118 to 120.

Security measures

Article 122 of the Penal Code sets out four security measures that can be applied when a convicted offender is considered to be a danger to public security. The measures listed include: deprivation of liberty; limitation of liberty; deprivation of rights and financial measures. It appears that these measures can be imposed during the suspension of a sentence (article 161 (1)) or in addition to a principal punishment, which may be imprisonment. In general terms there was a lack of clarity during a number of interviews that were conducted as part of this assessment, as to the application of security measures, giving the impression that they are not applied very often.

Further research in Kabul and the provinces is needed to determine how often security measures are applied, for which types of crimes and how the application of security measures is supervised, as well as their success rate. Such data would be useful to ensure the effective implementation of one of the recommendations of this report, which is to use suspended sentences more frequently (see section 10.11).

For the application of security measures in the case of convicted offenders with mental illness, see section 4.1, below.

3.2.4 Post-sentencing alternatives

The Tokyo Rules, rule 9.1 provide “[t]he competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society”. Rule 9.2 refers to furlough or half-way houses, work or educational release, various forms of parole, remission and pardon, in this context. Among these, parole and remission, could be considered as the main alternatives to prison, to be applied at post-sentencing stage.³³

³³Parole or early conditional release refers to the release of a prisoner under individualized post-release conditions. It can be discretionary, when the decision has to be made to release a prisoner conditionally, after a certain period of the sentence has been served, or it can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served. Remission is a form of unconditional release, usually awarded automatically after a fixed proportion of a sentence has been served.

The Tokyo Rules do not specify the conditions that may be set for the release of sentenced prisoners, and, therefore, provide no guidance on the institutional arrangements necessary to facilitate this alternative to imprisonment.³⁴ The Council of Europe's 2003 recommendation on conditional release (parole) offers some assistance. It suggests the inclusion, in addition to the standard requirement that the offender does not re-offend during the remainder of the sentence, of individualized conditions such as:³⁵

- the payment of compensation or the making of reparation to victims;
- entering into treatment for drug or alcohol misuse or any other treatable condition associated with the commission of crime;
- working or following some other approved occupational activity, for instance, education or vocational training;
- participation in personal development programmes;
- a prohibition on residing in, or visiting, certain places.³⁶

Afghanistan's Law on Prisons and Detention Centres, article 50, (a), 4, provides for conditional release, but there is no explanation in the law as to the timing and criteria that apply. These are included in the ICPC, chapter 13, articles 90 to 93. According to article 91, conditional release is granted only to those prisoners who behaved in such a way in prison to demonstrate their social rehabilitation. Conditional release can be granted only if the person has served three quarters of the term and at least nine months of imprisonment. In the case of life sentences, conditional release can be granted only after 15 years of imprisonment. The conditions for release (i.e. what conditions the offender must fulfil following release) are pronounced by the court, and supervised by the police, who are responsible for reporting to the prosecutor periodically.

³⁴UNODC, Handbook of basic principles and promising practices on Alternatives to Imprisonment, Criminal Justice Handbook Series, 2007, p. 54.

³⁵Ibid.

³⁶Recommendation Rec(2003)22 of the Committee of Ministers of the Council of Europe on conditional release (parole), adopted on 24 September 2003, para. 8.

The prison regulations, in draft form at the time of writing, make no reference whatsoever to conditional release, which is surprising, given that prison regulations should bring further clarification to articles included in the Law on Prisons and Detention Centres. (The release of a prisoner is explained in articles 31 and 32 of the draft regulations.) It might have been expected as a minimum that a reference be made in the regulations and law to the provisions in the ICPC.

At the time of writing the authors do not have information as to whether and how often conditional release is applied, but it would be surprising if it were being applied often or even at all, since even the release of those who have completed their prison terms is problematic at the current time, due to demands for fines, guarantees or bribes—a concern that was expressed in most interviews conducted in Kabul in the course of the assessment.

More attention to the effective implementation of early conditional release would be beneficial, as parole is considered to be one of the most effective ways of contributing to the social reintegration of prisoners by enabling a planned, gradual return to society,³⁷ while reducing the prison population. However, in order for parole to fulfill its goal of reintegration and reduce re-offending, it must be accompanied by adequate support by institutions responsible for the post-release care of ex-prisoners, other social agencies, the family of the offender and the community,³⁸ the application of all of which is presently difficult. In the short term in Afghanistan, possible conditions for release may need to be limited to a few of those listed above and cooperation with NGOs which can provide some of these services is vital. Security measures covered in the current Penal Code of Afghanistan may also be applied. Investment will need to be made in the long term to ensure that conditional release can be implemented more effectively to enhance the social reintegration prospects of former prisoners.

³⁷UNODC, Criminal Justice Assessment Toolkit, Custodial and Non-custodial Measures, Social Reintegration, 2006, p. 25.

³⁸Ibid.

Special categories

4.1 Offenders with mental healthcare needs

United Nations principles for the protection of persons with mental illness and the improvement of mental healthcare (Mental Illness Principles) make clear that persons with mental illness should have the right to be treated and cared for, as far as possible, in the community in which they live.³⁹ WHO recommends that mental health services be based in the community and integrated as far as possible with general health services, in accordance with the vital principle of the least restrictive environment.⁴⁰ The United Nations Standard Minimum Rules for the Treatment of Prisoners, rule 82(1) stipulates that “[p]ersons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible. Rule 82 (2) states that “[p]risoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialised institutions under medical arrangements”.

These rules recognize that imprisonment has a particularly harmful effect on mental health, because: (a) isolation from society in overcrowded, unsanitary conditions, where prisoner differentiation is not applied and violence may be prevalent—characteristics of many prison systems worldwide—exacerbates existing mental health problems and generates new ones; (b) treatment for mental health problems is usually non-existent or extremely inadequate in prisons. Thus, the objective of social reintegration and the prevention of re-offending can be better achieved with treatment and care, rather than punitive measures in the case of most offenders with mental healthcare needs, and especially those who have committed non-violent offences.

According to article 67 (1) of Afghanistan’s Penal Code, a person who “while committing a crime lacks his senses and intelligence due to insanity or other mental disease has no penal responsibility and shall not be punished”. According to paragraph 2 of the same article, the court shall observe the provisions of the law with respect to extenuating conditions, if a person suffers from a defect in his senses and intelligence while committing an offence of felony or misdemeanour. (These conditions are set out in chapter 5, articles 141 to 147). If such persons commit an obscenity, they shall not be punished (article 67 (3)).

Other provisions relating to offenders with mental illness are set out in articles 44 and 89.3 of the ICPC, as well as articles 305 to 309 of the CPC (1965), which do not contradict the ICPC and therefore remain in force.

³⁹Principles for the protection of persons with mental illness and the improvement of mental healthcare, principle 7.1.

⁴⁰Referred to in Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, United Nations Doc. E/CN.4/2005/51, para. 14.

According to article 44 of ICPC, if during the trial it appears that a suspect suffers from mental illness, which prevents him from the possibility of defence, the court, either on its own initiative or at the request of the primary prosecutor, will suspend proceedings and order a medical examination of the suspect. If the medical examination confirms that the person suffers from mental illness, the proceedings will be postponed until the suspect recovers. If the defendant is later sentenced to imprisonment, the time spent in a closed institution for mental examination will be deducted from his prison term.

The ICPC additionally gives the prosecutor the power to suspend the sentence of an offender who “results to be” mentally insane. The prosecutor can order the offender to be transferred to a mental health institution until his recovery, after which he will be transferred to prison. The time spent in the mental health institution will be deducted from his sentence (article 89.3).

Thus, a person who is insane at the time of committing a crime should not be punished according to Afghanistan’s Penal Code. Those who develop mental illness during court proceedings or after the sentence has been passed may be transferred to a mental health institution for treatment, where they will remain until recovery, and then transferred back to prison, to serve the rest of their sentence, the term in hospital having been deducted from their prison term. Taken together, the Penal Code article 67 and ICPC articles 44 and 89.3 comply, to a large extent, with the requirements rule 82 (1) and (2) of the Standard Minimum Rules and principle 20.3 of the Mental Illness Principles⁴¹ though concerns mentioned below regarding the apparent lack of safeguards against arbitrary decisions as to the diagnosis of mental illness and treatment remain. In addition, the Law on Prisons and Detention Centres fails to provide rules for the care and supervision of

⁴¹Principle 20 of the Mental Illness Principles apply to persons serving sentences of imprisonment for criminal offences or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness (principle 20.1). Principle 20.3 provides that “domestic law may authorise a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility”.

prisoners with mental illness by a qualified medical specialist, and the lack of medical care for prisoners with mental healthcare needs in practice means that the implementation of Standard Minimum Rules, rule 82 (3) and (4) is not taking place in Afghanistan⁴² (see section 6.2.1).

The CPC provides more detail as to procedures for diagnosis, in that medical examinations of defendants are undertaken by an “official organ” and “experts” on one or several occasions (article 305), implying that the diagnosis cannot be made by one expert alone. The fact that more than one expert has to be involved in the diagnosis complies with good practice, however, the independence of the “official organ” is not guaranteed in CPC, which contravenes provisions of the Mental Illness Principles, principle 20.3, which requires that courts must act on the basis of competent and independent medical advice. CPC’s failure to guarantee the independence of the authority making the diagnosis entails a risk of abuse and may lead to the contravention of Mental Illness Principles, principle 4, paragraphs 2 and 3 in particular, which provide that “a determination of mental illness shall never be made on the basis of political, economic or social status or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status” or “family or professional conflict or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in the person’s community”. If such persons are detained—whether in a mental health facility or prison—as a consequence of a medical diagnosis which was not made by an independent authority, article 9.1 of ICCPR may be contravened, which provides that no one shall be subjected to arbitrary arrest or detention.

Article 306 of the CPC which covers the treatment of defendants with mental illness, who develop mental health problems after committing the crime, but before any sentence has been passed, in principle complies with good practice, but again does not provide safeguards against arbitrary decisions of treatment, including involuntary treatment—e.g. decision to be taken by an independent body,

⁴²Rule 82 (3) and (4) cover the placement of prisoners with mental health problems under the supervision of a medical officer and the provision of psychiatric treatment for all prisoners in need.

regular reviews by an independent body, right of defendant to appeal the decision, etc.

Article 309 of CPC gives courts the authority to place defendants charged with a misdemeanour or felony, diagnosed as insane and acquitted, in a mental institution for treatment or to release him, depending on the advice of authorities.

Again safeguards need to be in place, in law and practice, to prevent placement of all individuals (including offenders) in psychiatric institutions arbitrarily, and regular reviews of the decision need to be undertaken by independent medical specialists.

It should be noted that at the time of writing there was no separate mental health legislation, which might have provided the safeguards referred to above, though regulations on mental health issued during the Taliban era were still in force. The authors have not seen these regulations, though they are aware that a new mental health policy is being developed (see below) and feel that separate legislation on mental health, safeguarding the rights of all persons with mental illness, including defendants, detainees and prisoners, is necessary, and that a new CPC should either include explicit safeguards for persons with mental illness or make reference to mental health legislation that provides such safeguards (see section 10.14 for recommendations).

An additional measure that can be applied to offenders with mental illness is provided in article 123 of the Penal Code in chapter 4, relating to security measures. According to this article the court can order the quarantine of a convicted offender in a State mental health hospital for treatment. The quarantine period cannot be less than six months. The hospital administration and other health centres are obliged to send the court a report on the mental health condition of the offender once every six months. Based on these reports the court can order the dismissal of the offender or extend the quarantine period, at the request of the prosecutor or other concerned person, with the agreement of the relevant doctor. In interviews in Kabul, it was suggested that security measures in general apply to offenders who have received suspended sentences and possibly also to those whose term of imprisonment has been served, when the offender is considered a danger to

public safety for various reasons (see articles 121 and 161 (1)). Therefore, this article does not appear to comprise an alternative to imprisonment on its own. However, since there is no mention in the article itself that this is an additional measure to the principal punishment, as do most of the articles relating to security measures, there is some lack of clarity. In any case, there need to be stricter safeguards in place to prevent the quarantine of a convicted person in a mental health institution for treatment arbitrarily. Also in this case diagnosis by an independent, competent body of medical experts and regular reviews by an independent authority must be guaranteed in legislation.

In practical terms, in order to apply any of the provisions listed in Afghanistan's legislation, an initiative needs to be taken and request made for the medical examination of the offender concerned, in order to determine his or her mental health condition. In practice, this is likely to mean that offenders without any legal counsel would be unaware of such a right and would have nobody with legal knowledge to make an application for a medical examination on their behalf. Medical specialists need to be available who are willing to undertake the requisite examination and certify whether or not the offender suffers from mental health problems. Interviews in Kabul suggested that this process is extremely difficult. It appears that there is a commission in Kabul consisting of two or three psychiatrists, one psychologist and one doctor, which has the responsibility to examine offenders suspected of having mental health problems and to make a diagnosis.⁴³ Specialists were said to work on this commission in three monthly cycles.⁴⁴ Two case examples were cited, where the application made to the commission resulted in the release of the two female offenders concerned, based on their mental illness.⁴⁵ One related to a murder case the other a case involving violence. After their release, the women were obliged to attend the mental health hospital for four months.⁴⁶

⁴³Interview Ms Humaira Ameer Rasuli, Medica Mondiale, Coordinator of psychosocial programme, 14 December 2007.

⁴⁴Interview with Dr Najeebullah, psychiatrist in mental health hospital, Kabul and member of UNODC Drug Reduction Action Team, 15 December 2007.

⁴⁵Interview, Ms Humaira Ameer Rasuli, Medica Mondiale, 14 December 2007.

⁴⁶Interview with Ms Massouda Nawabi, Legal Aid Fund, Project Coordinator, Medical Mondiale, 10 December 2007.

It was emphasized that the advantage of the existence of a commission to take the decision was that no single person took responsibility for the release of an offender and indeed the requirement for a team of experts complies with internationally accepted standards of good practice. However, it appears that at the current time it is difficult to gain access to the commission to facilitate diagnosis, and individual specialists and prosecutors acting on their advice, are said to be extremely reluctant to provide recommendations for release due to the risks of the offender committing another offence following release and the person who had recommended the release being held responsible.

In practice, when assessments are undertaken at all, they apparently take place following long delays, which means that offenders with mental illness may spend a long period in prison before a medical examination is conducted.⁴⁷ In addition, such an examination is unlikely to be initiated, unless the prisoner has a lawyer who requests an examination. It is unclear whether the medical examination undertaken after the long period following the commission of the crime, would determine whether the person suffered from mental illness at the time of the offence and therefore render him or her eligible for release according to article 67 (1) of the Penal Code or whether such an examination, would merely enable to offender to receive treatment and then be returned to prison, in accordance with article 89 (3) of the Interim Criminal Procedure Code. Most likely, it would be the latter, unless the offender suffered from serious mental illness and it could be proven that he or she had a history of such mental illness.

At the time of writing a mental health policy was being developed by a task force which includes members from NGOs working in cooperation with the Ministry of Public Health (MoPH). The policy will include the treatment of offenders with mental health conditions.⁴⁸ The paper was expected to be ready by mid-2008. This policy may address concerns

⁴⁷Interview with Dr Najeebullah, psychiatrist in mental health hospital, Kabul and member of UNODC Drug Reduction Action Team, 15 December 2007.

⁴⁸Interview Ms Humaira Ameer Rasuli, Medica Mondiale, 14 December 2007.

expressed above. The development of separate mental health legislation has been recommended by this assessment in section 10.14.

4.2 Drug users

Penalties pertaining to drug users are covered in the Penal Code and the Counter Narcotics Law of 17 December 2005. According to article 56 of the CNL, “where existing laws and regulations conflict with this law, this law shall prevail”. Article 35 provides that in the case that CNL lacks the required provisions to decide on a penalty, the provisions of the Penal Code should apply. In the consideration of offences that would fall within the scope of this assessment—such as drug use, addiction or low level drug trafficking offences—the CNL does not appear to lack any provisions which would require reference to the Penal Code. Nevertheless a comparison between how drug offences were dealt with in the Penal Code and CNL is useful to emphasize the new punitive approach towards all drug offences.

Article 349 of the Penal Code stipulates that persons who use alcohol or narcotic substances shall be sentenced to imprisonment of 3-6 months or cash fine of Af 3,000 to Af 6,000 (\$US 60 to \$US 120), or both punishments. The type and quantity of the drug are not defined.

Article 352 (1) provides for short imprisonment of not less than three months or a cash fine between Af 3,000 and Af 12,000 for those convicted of acting in an extremely intoxicated⁴⁹ manner in public, causing disturbance to others.

Article 352 (2) increases the prison term and cash fine alternative to a minimum of six months in prison or cash fine between Af 6,000 and Af 12,000 for those who repeat the offence within a year of the first court order.

However, according to article 352 (3), if it is proven that the repeat offender is addicted to alcohol or

⁴⁹The English version of the Penal Code uses the word “drunken”, but as the article relates both to drugs and alcohol, it is assumed that “intoxicated” is meant.

drugs, the court can impose hospitalization of up to one year, instead of the punishment stipulated in article 352(2). The court can release the offender prior to the expiry of the period subject to the report from the hospital and at the request of the prosecutor (Article 352 (4)).

Thus a cash fine alternative was provided for drug users in the Penal Code. Compulsory drug treatment for a period of up to one year, instead of imprisonment, was also provided for repeat offenders who were diagnosed as drug addicts.

These provisions of the Penal Code are superseded by CNL which brings in much harsher penalties for drug offences, including for drug use. There appears to be a misconception that CNL applies only to cases of medium and high level drug offenders.⁵⁰ As the analysis below demonstrates, CNL applies also to low level drug offenders, including users and possessors of small quantities of drugs, including hashish and cannabis.

The CNL removes fines as an alternative for drug use in all cases, including for the possession of cannabis and hashish for personal use. Cash fines now appear as an additional sentence rather than an alternative for drug offences.

Article 27 of CNL which pertains to possession of drugs for personal consumption, differentiates between the various types of drugs and the penalties that apply for possession in each case.

According to article 27.1 (b), persons who possess, for personal consumption, opium or any mixture containing that substance, will be sentenced to a three to six months prison term, as well as a cash fine of between Af 10,000 and Af 25,000 (\$US 200 to \$US 500). According to article 27.1 (c), persons who possess any of the substances listed in tables 1 to 4⁵¹ (which include all drugs including cannabis and cannabis resin⁵²), could be sentenced to a prison term of 1 to 3 months as well as a fine of between

5,000 and Af 10,000 (\$US 100 to \$US 200). These articles do not define the quantity required to receive such sentences, but the following article 27.1 (d) provides for penalties which apply for drug traffickers (set out in articles 16) for those who are in possession of more than 1 gram of heroin, morphine or cocaine or 10 grams of opium or hashish. Thus it can be assumed that article 27.1 (b) refers to cases involving less than 10 grams of opium, and article 27.1 (c) covers less than 10 grams of hashish (cannabis is not mentioned in article 27.1 (d)). The lower limits are not defined. Thus, in principle, a person with, for example, 1 gram or less of hashish or opium in his or her possession may be imprisoned on charges of possession for personal use (or indeed drug trafficking, depending on which article is applied—see paragraph below) and subjected to payment of a large fine, beyond the means of a large majority of Afghan citizens.⁵³

Article 15 of CNL, which covers “drug trafficking” offences, includes “possession” and “purchasing” of drugs (including cannabis and cannabis resin) as a drug trafficking offence (article 15, para. 1, (a)). The wording is not made explicit to refer to possession and purchasing for the purpose of trafficking, in line with article 3, 1 (a), (iii) of the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances.

Penalties for drug trafficking offences are set out in article 16. Article 16, para 2, relates to drug trafficking offences involving opium and according to (i), drug trafficking in opium (which includes possession), of less than 10 grams, will result in imprisonment for up to three months and a fine of between Af 5,000 and Af 10,000 (\$US 100 to \$US 200). There is no lower limit mentioned. According to para. 3 of article 16, a person can receive the same sentence as above for drug trafficking (which includes possession) of less than 250 grams of various drugs, including cannabis and cannabis resin. Again there is no lower limit mentioned. Thus, in principle, a person

⁵⁰See for example Afghanistan Human Development Report 2007, p. 70.

⁵¹With the exception of drugs included in the previous two clauses.

⁵²Cannabis resin refers to hashish (UNODC Drug Survey 2005, Glossary).

⁵³For example, the World Bank has reported the daily wage of an Afghan man engaged in farming as \$US 1.63, of that of a shepherd around \$US 1.43 and that of a construction worker, around \$US 2.1. (Afghanistan, National Reconstruction and Poverty Reduction—the Role of Women in Afghanistan’s Future, March 2005, pp. 64, 65). If the latter were to work 20 days a month, he would earn around \$US 42 per month. The salaries of prison staff, prison directors and judges are not much higher.

can be imprisoned and subjected to a fine, for being in the possession of a small amount of opium or hashish, under articles relating to drug trafficking.

It is worth noting that article 16, para. 2 (i), which relates to “drug trafficking” offences, provides for a lesser sentence than that provided for personal possession, for the same quantity of opium (article 27.1 (b)), contrary to usual practice where personal possession would receive a lesser sentence.

An alternative is provided, though depending on the decision of the court, in article 27.2, according to which, a person addicted to an illegal drug may be exempted from imprisonment and a cash fine and in this case the court may require the drug addicted person to attend a detoxification or drug treatment centre. The said centres are required to report to the office of the prosecutor every 15 days the health of the person being treated. On the basis of the reports the court can stop or extend the period of treatment (article 27.3). If a person has been sentenced to a prison term for drug use, he or she shall receive credit for his/her period of detention and treatment in a drug treatment centre. The extent of the credit is not defined, i.e. it is not clear whether one day of treatment equals one day of imprisonment.

Thus, whereas the Penal Code did not make any mention of being sent to prison to serve a remaining sentence after treatment in hospital, the CNL does make reference to such a possibility, where the time spent in the treatment centre is to be taken into account in the calculation of the remaining sentence.

The CNL differs from the Penal Code very significantly in its provisions for drug addicts who are repeat offenders. Whereas the Penal Code provided for their treatment, which can be imposed instead of imprisonment, the CNL requires courts to impose the maximum penalty provided for the offence committed by repeat offenders.⁵⁴

A key feature of the penalties is that they are mandatory for drug trafficking offences. Provisions of other laws with regard to the suspension of

sentences, judicial leniency and probation do not apply to offenders convicted of drug trafficking offences (CNL, article 31). No differentiation is made here as to the type of drug trafficking offence, the quantities involved or the circumstances of the offence, which would appear to contradict articles 5 and 6 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

Many studies have found that mandatory sentences are not an effective sentencing tool: that is, they constrain judicial discretion without offering any increased crime prevention benefits. Although there is no specific international law that expressly prohibits mandatory sentencing, the Human Rights Committee of the United Nations has expressed concern that it can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the ICCPR.⁵⁵

To make things worse, those who are convicted for crimes described in CNL, and who have received a sentence of more than five years imprisonment are not eligible for home leave (article 30).

There is no mention as to how this law will apply in the cases of juvenile offenders. It would appear that no distinction is envisaged between juveniles and adults (see also section 4.4.5 below).

It is clear that the principle that underlies the CNL is punishment and law enforcement rather than rehabilitation. Even where the offender is drug dependent rather than being a trafficker, and the quantities involved are small, it is not certain whether the person will be treated for his or her addiction rather than being imprisoned. In addition, at the time of writing, there were no sentencing guidelines to guide or encourage courts to give preference to treatment, rather than punishment only, taking into account the social rehabilitation needs of the offender. In any case, offenders may be transferred to prison following treatment, where they will find themselves in an environment where drugs are

⁵⁴See Article 29, Repeat Offenders, which relates to all drugs offences, including possession for personal use.

⁵⁵Concluding observations of the Human Rights Committee : Australia. 24/07/2000. A/55/40, paras. 498-528. (Concluding Observations/Comments).

freely available and relapse is almost certain, since there is little reason or motivation to resist, given the harsh prison conditions and the lack of any aftercare for those who have undergone treatment, in prisons.⁵⁶

Repeat offenders, including drug users who are addicts, will receive the harshest penalties provided by law (article 29). So, for example, if a person who has been treated for his/her addiction, had a relapse following treatment (which is apparently a frequent occurrence, because there is no aftercare neither in the community nor in prisons⁵⁷), was arrested again for possessing drugs for personal use, he will receive the upper limit prescribed in the law, which will include a prison sentence and a fine. He or she may again receive treatment, depending on the decision of the court, but will certainly be imprisoned following treatment, if the maximum penalty is to be applied. As a result, he or she will almost certainly have another relapse in prison and will be further impoverished due to the fine that must be paid. It is difficult to understand what purpose such provisions serve, either in terms of the safety of the public, reducing drug offences or in terms of the social rehabilitation needs of the offenders.

There is no alternative provided at all for drug users who are not addicts.

The provisions of CNL contradict the spirit of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The Convention provides for States to make their own decisions as regards the application of alternatives in the cases of drug offences of a minor nature (article 3, paragraph 4 (c)). The offences referred to in article 3,4, (c) are minor drug trafficking and related offences, which are set out in paragraph 1 of article 3.

⁵⁶UNODC's project, Prison System Reform in Afghanistan—Extension to Provinces (AFGR87), includes an assessment of drug abuse in prisons, being prepared at the time of writing, following which rehabilitative and educational programmes for drug users in selected prisons will be established. The establishment of a treatment centre for drug abusers was in progress in Pul-e Charki Prison in Kabul, and treatment for drug abusers had been ongoing by the Drug Demand Reduction Action Team, trained by UNODC in this prison. As of September 2007, they had treated 189 addicts. 148 cases were successful, though in the absence of aftercare, the team was not certain about ultimate results.

⁵⁷Interview with Dr Najeebullah, psychiatrist in mental health hospital, Kabul and member of Kabul DRAT, 15 December 2007.

The Convention also proposes alternatives to imprisonment for offenders convicted of possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption (see article 3, paragraph 4 (d) and article 3, paragraph 2, to which the former refers). Non-custodial sanctions suggested include education, rehabilitation and social reintegration for those who are not addicts themselves, treatment, aftercare rehabilitation and social reintegration in the case of those who are drug abusers.

CNL makes no mention of education, aftercare and social reintegration. The hospital treatment provided by article 27.2 is unlikely to lead to any sustainable results, without any aftercare or social reintegration measures being provided, and especially if the offender who has undergone treatment is then imprisoned. (For more specific recommendations relating to individual articles of the CNL, see appendix 1, Recommendations on amendments to the Counter Narcotics Law).

These provisions need to be considered in light of the reality that drugs are widely available in prisons in Afghanistan and that many people become addicted to drugs in prisons, rather than before their imprisonment. As a member of the Drug Demand Reduction Action Team told the assessors “most of the drug addicts (over 50 per cent) started their addiction in prison”⁵⁸ (see sections 6.2.1 and 8.2 for drug use and treatment in prisons and the community).

In the view of the authors the CNL represents a prescription to ensure an ever increasing prison population and an ever increasing number of drug addicts. These concerns are informed by international experience in efforts to reduce drug use and trafficking.

In the United States, for example, the so called “war on drugs”, which focused primarily on strict law enforcement and punitive policies to reduce drug use has been largely unsuccessful, while the rate of incarceration for drug offences has led to an alarming

⁵⁸Dr Najeebullah, psychiatrist, Kabul Mental Health Hospital, Kabul DRAT, 15 December 2007.

increase in the United States prison population.⁵⁹ The tragedy of mass incarceration of drug law violators in the United States has been compounded by the lack of progress in reducing access to and use of drugs, especially the use of “hard” drugs by young persons.⁶⁰ Meanwhile, law enforcement agencies across the United States continue to report that illegal drugs are “readily available” in urban, suburban and rural areas. The failure of the United States drugs policy has led to calls for fundamental reform stressing research, education, prevention and treatment.⁶¹

Such a strategy has successfully been implemented in Thailand, which had a similar problem in the growth rate of its prison population prior to comprehensive reforms undertaken in 2002. Prior to this date, Thailand also relied heavily on imprisonment as a means of criminal sanction for drug offences. By May 2002, some 260,000 inmates, more than double the total capacity, were housed in Thai prisons. Of these, two thirds had been convicted of drug charges and the majority of these inmates were also drug addicts. With the implementation of successful drug addicts’ pre-trial diversion and early release programmes involving strong community participation; the increasing and innovative uses of community-based treatment programmes; and restorative justice initiatives, the prison population has been reduced dramatically. As of August 2005, there were approximately 160,000 prisoners, with the population continuing to decline.⁶² Other South-East

Asian states have been adopting similar policies due to the failure of the previous punitive policies.⁶³

A recent discussion paper published by UNODC and WHO, *Principles of Drug Dependence Treatment*, also emphasizes that:⁶⁴

In general, drug use should be seen as a health care condition and drug users should be treated in the health care system rather than in the criminal justice system where possible.

Interventions for drug dependent people in the criminal justice system should address treatment as an alternative to incarceration, and also provide drug dependence treatment while in prison and after release. Effective coordination between the health/drug dependence treatment system and the criminal justice system is necessary to address the twin problems of drug use related crime and the treatment and care needs of drug dependent people.

Research results indicate that drug dependence treatment is highly effective in reducing crime. Treatment and care as alternative to imprisonment or commenced in prison followed by support and social reintegration after release decrease the risk of relapse in drug use, of HIV transmission and of re-incidence in crime, with significant benefits for the individual health, as well as public security and social savings.

Offering treatment as an alternative to incarceration is a highly cost-effective measure for society.

See appendix 2, for an extract from the UNODC, WHO Discussion Paper, principle 6: *Addiction Treatment and the Criminal Justice System*.

⁵⁹See, Goodman, R., “War on Drugs Puts Justice in Jeopardy”, p. 2, which states “The legacy of the recent federal drug laws includes a five-fold increase in federal drug convictions since the 1970s and over 67,000 sentenced drug offenders in federal prison in 2001, up from only 3,400 in 1970, where drug offenders now comprise over 55 per cent of the federal prison population. In the states, the number behind bars for violating the drug laws has increased eleven-fold since 1980, from fewer than 42,000 at that time to almost 500,000 today. As the “War on Drugs” has intensified in the past 25 years, the number of incarcerated drug offenders has grown by over 1,000 percent, nearly 40 times greater than the growth rate of the United States population overall.” (www.isrcl.org: Paper submitted at the 20th Anniversary Conference of the International Society for the Reform of Criminal Law held in Vancouver, Canada from June 22—June 26, 2007.)

⁶⁰Ibid., p. 2.

⁶¹Ibid., pp. 2,3.

⁶²For more information, see, e.g., Kittipong Kittayarak, *Diversions Programs for Drug Addicts, Restorative Justice and New Community-based Treatment Measures in Thailand*, a paper submitted to the nineteenth International Conference of the International Society for the Reform of Criminal Law held at Edinburgh, Scotland, 26-30 June 2005 (<http://www.isrcl.org>). See also the website of the Department of Corrections at www.correction.go.th.

⁶³Research on the Trends in Drug Abuse and Effective Measures for the Treatment of Drug Users in Asian Countries, UNAFEI, 2005, p.28.

⁶⁴UNODC, WHO, *Principles of Drug Dependence Treatment*, Discussion Paper, March 2008, p. 14 (<http://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf>).

4.3 Women

There is increasing recognition worldwide that imprisonment has a particularly harmful impact on women. There is also increasing awareness of the detrimental impact of women's imprisonment on

their families and in particular on their children. In addition, women in the criminal justice system are often victims themselves (of domestic violence, sexual abuse and exploitation) and are in need of psychosocial support, rather than being subjected to the harsh environment of prisons.

Women and alternatives: recommendations by international and regional bodies

The increasing requirement to address the situation of female offenders has been emphasized by the United Nations in various contexts. For example, the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended that women offenders should be: "treated fairly and equally during arrest, trial, sentence and imprisonment, particular attention being paid to the special problems which women offenders encounter, such as pregnancy and child care. . .", noting that "deinstitutionalization is an appropriate disposition for most women offenders to enable them to discharge their family responsibilities."^a

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders determined that "the use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories."^b

The Council of Europe has recommended its member states to:^c

- to develop and use community-based penalties for mothers of young children and to avoid the use of prison custody;
- to recognize that custody for pregnant women and mothers of young children should only ever be used as a last resort for those women convicted of the most serious offences and who represent a danger to the community;
- to develop appropriate guidelines for courts whereby they would only consider custodial sentences for pregnant women and nursing mothers when the offence was serious and violent and the woman represented a continuing danger;

The African Charter on the Rights and Welfare of the Child (1999) obliges States parties to "undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular: (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers; (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers; (c) establish special alternative institutions for holding such mothers", among others.^d

^aSixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, resolution 9, Specific needs of women prisoners, A/CONF.87/14/Rev.1.

^bEighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, resolution 19 "Management of criminal justice and development of sentencing policies", Report of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1990, United Nations Doc. A/Conf.144/28/Rev. 1.

^cCouncil of Europe, Parliamentary Assembly Recommendation 1469 (2000), on Mothers and babies in prison, adopted on 30 June 2000, 5. i, iv and viii.

^dAfrican Charter on the Rights and Welfare of the Child, 1999, article 30: Children of Imprisoned Mothers, 1, (a), (b) and (c).

The Penal Code of Afghanistan does not include any special provision for women, women with small children or pregnant women. Nor are there any

sentencing guidelines encouraging courts to consider, at least, suspension of sentences, in the case of female offenders who are pregnant or with small children.

As mentioned earlier, according to the Interim Criminal Procedure Code, the prosecutor has discretion to suspend the sentence of a woman who is six months pregnant until four months after the delivery of the baby (article 89 (2)). This provision does not therefore provide an alternative to imprisonment. In any case, the provision is rarely applied. For example, according to the study conducted by UNODC in December 2006, 12 of the 43 children living with their mothers in prison, were born in prison.⁶⁵ The continued lack of application of this provision was confirmed in interviews in Kabul.⁶⁶

The fact that even this very modest provision is not implemented represents a significant shortcoming, when considered in light of the lack of adequate provision for healthcare in prisons, especially for pregnant and nursing mothers (see sections 6.2.1 and 6.2.2).

4.3.1 Sentences received by female offenders

According to a comprehensive study conducted by UNODC in December 2006,⁶⁷ which analysed the crimes and sentences of 56 female offenders held in Pul-e Charki Prison in Kabul, at the time (representing one fifth of the female prisoner population), the breakdown of sentences received by women were as follows:

- Prisoners sentenced to 5 months to 3 years, inclusive: 14

⁶⁵UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op. cit, p. 38.

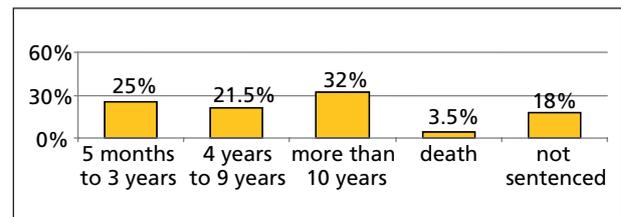
⁶⁶Interview, Dr Soraya "Sobhrang" and Ms Hangama Anwari, AIHRC, 16 December 2007 and Dr Anou Borrey, Gender and Justice Consultant, UNIFEM and Ms Kamala Janakiram, Human Rights Officer, UNAMA, 18 December 2007.

⁶⁷UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op. cit, p. 40. The study was conducted within the framework of the project "Developing post-release opportunities for women and girl prisoners, (AFG/S47) funded by the Austrian government. It was followed by a needs assessment of the capacity-building requirements of female prison staff and the development of a handbook for Afghan women prison staff, taking account of the findings of both documents. A strategy, based on the recommendations of the initial study, aiming to address the social reintegration needs of female prisoners, was agreed with the Ministry of Justice; vocational training and education activities were undertaken in Kabul and provinces targeting women prisoners and a handbook for women prisoners developed in cooperation with UNIFEM, during 2007. The handbook for female staff will be used by UNODC to train female prison staff in Afghanistan to improve the protection of women's human rights in prisons and to increase their chances of social reintegration on release, in the second phase of the project in 2008.

- Prisoners sentenced to between 4 and 9 years inclusive: 12
- Prisoners sentenced to 10 years and over: 18
- Prisoners sentenced to death: 2⁶⁸

Ten prisoners had not received any sentences at the time of writing.

Figure 1: Sentences (n=56)



Source: UNODC, Afghanistan Female Prisoners and their Social Reintegration, March 2007

This information shows that women are sentenced to relatively long prison terms in Afghanistan, with only 25 per cent of them having received a sentence less than 3 years. This situation is largely due to the fact that 50 per cent of women in Kabul had been charged with or convicted of moral crimes, for which the sentences are usually relatively long (see section 4.3.2, below). None of the women had been charged with or convicted of petty offences, such as theft, in December 2006 and the situation had been similar in previous years.⁶⁹ Although no new statistics were gathered as to the sentences of women prisoners in Afghanistan during the mission in December 2007, interviews confirmed that the crimes for which women are convicted remain similar and sentencing for petty offences such as theft and fraud continues to be very rare.⁷⁰ In other words, petty offences with short prison terms, for which offenders could potentially be sentenced to alternative sanctions, are not common among women prisoners.

Of the 56 women, only five had received a sentence of less than two years, confirmed by the appeals

⁶⁸Almost certain to be reduced to life imprisonment or long prison terms, according to lawyers consulted. (Medica Mondiale, e-mail, 2 January 2007).

⁶⁹UNODC, Female Prisoners and their Social Reintegration, op. cit. p. 41.

⁷⁰Meeting with Dr Anou Borrey, Gender and Justice Consultant, UNIFEM and Ms Kamala Janakiram, Human Rights Officer, UNAMA, 18 December 2007.

court. They were all awaiting the decision of the Supreme Court in December 2006. In principle, these women would be eligible for the suspension of their sentences for three years, according to article 161 of the Penal Code and if they did not commit a new offence within that period their original sentence would be cancelled (see section 3.2.3). Information as to whether a decision of suspension was taken in their cases is not available, though based on information as to the rare application of suspension, it seems unlikely that the Supreme Court would have taken such a decision. Nevertheless, whether applied or not, the percentage eligible for suspension is quite low.

4.3.2 Offences committed by women

The breakdown of crimes with which the 56 prisoners interviewed in 2006 were charged is as follows:⁷¹

Moral crimes: 28 (50 per cent), including:

- Running away: 1
- Running away and adultery: 8
- Adultery: 12
- Facilitating/supporting adultery: 4
- Attempted adultery: 1
- Moral crime (undefined): 1
- Running away and theft: 1

Murder: 16 (28.5 per cent)

Murder /adultery: 1

Murder charge revised as child neglect: 1

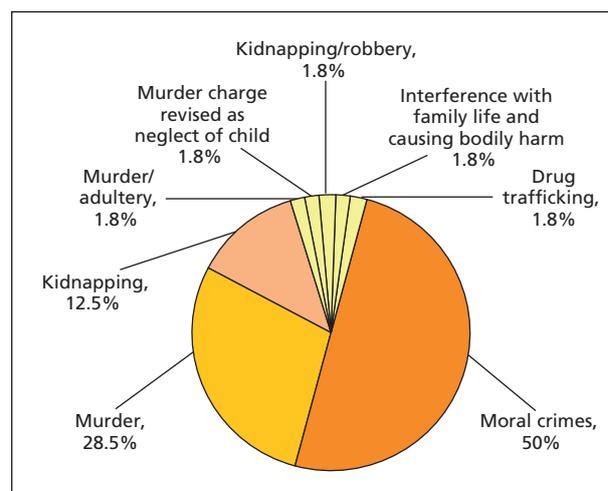
Kidnapping: 7 (12.5 per cent)

Kidnapping/robbery: 1

Interference with family life and causing bodily harm: 1

Drug trafficking: 1

Figure 2. Offences committed by women (n=56)



Source: UNODC, *Female offenders and their social reintegration*, March 2007

Both the length of sentences and the protection requirements of women who have committed “moral” offences render it extremely difficult to put forward any recommendations relating to alternatives for such offenders, although paradoxically, these are the very women who are often victims of exploitation or unfair treatment in the criminal justice system and therefore include those who should not be in prison at all.⁷² Indeed women as a whole represent a group of offenders whose imprisonment should be prevented, due to the harmful impact of imprisonment on themselves and their children, as well as the stigma associated with imprisonment, which makes their resettlement following release very difficult.

The study referred to above, which provided an analysis of many case examples, concluded that “[i]n the long term, there is a need to develop a policy covering the treatment of female offenders in Afghanistan from the moment they come in contact with the criminal justice system. The aim should be to prevent women being imprisoned unnecessarily and unfairly. Measures should be put in place to divert non-violent offenders from prosecution, to provide a range of alternatives to pre-trial detention,

⁷¹UNODC, *Female Prisoners and their Social Reintegration*, op. cit., p. 41

⁷²For example, child and forced marriages, the discriminatory application of divorce procedures according to the Civil Law of Afghanistan, which has led to the imprisonment of women on charges of adultery, as they could not prove divorce from the first husband, and being used as scapegoats by husbands and other male relatives for various reasons, such as to cover up own crimes, to gain access to property, etc. (See UNODC, *Female Prisoners and their Social Reintegration*, March 2007).

to refer victims of violence to appropriate support agencies, relevant NGOs, MoWA and safe houses, in order to prevent re-victimization, and to provide legal aid to those in need, in order to ensure fair trials . . . In parallel, mechanisms to implement alternative sanctions may be put in place to deal with those who have committed non-violent offences. However, the current priority appears to be the prevention of wrongful imprisonment of women, according to existing laws, rather than more sophisticated measures . . . In any event, if alternatives are introduced they will need to take into account the protection requirements of women who have committed moral offences and may be at risk of retaliation by their family members.”

The conclusion of this assessment remains the same. It seems clear that the particularly vulnerable situation of women in Afghanistan, calls for the development of a strategy to ensure that women are treated fairly in the criminal justice system and that their circumstances are taken into account in sentencing, including and especially when the offences constitute so called “moral crimes”. There is a need to put in place safeguards that prevent victims of rape and sexual abuse from imprisonment on charges of *zina* (which would require a clear definition of rape in the Penal Code and sentencing guidelines to underline the need to differentiate between the two acts). As an AIHRC Commissioner said “alternatives for moral crimes (*zina*) would be even more risky than imprisonment. The most important thing to do, to reduce women being imprisoned for *zina*, is to ensure a fair trial process. There is a need for awareness raising among judges and prosecutors so that they look at the circumstances of the crime and do not treat all moral offences in a similar harsh fashion.”⁷³

In parallel, those who run away from home should be diverted to appropriate services, as early as possible, if they are apprehended by law enforcement agencies, where they will need to be provided with appropriate legal and psychosocial assistance. As mentioned in sections 3.2.1 and 8.3, initiatives have been taken to provide assistance to women in need of assistance, including those who have escaped

⁷³Meeting with Ms Hangama Anwari, Commissioner, AIHRC, Kabul, 16 December.

from their homes. Such initiatives should be encouraged and expanded, to prevent the unnecessary and illegal imprisonment of women and young girls who try to escape forced marriages and domestic violence.

4.4 Juveniles

The United Nations Convention on the Rights of the Child underlines the urgency for finding alternatives to the imprisonment of children by providing that: “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” [(article 37 (b)]. The Convention, together with other instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), give indications about how this can be achieved. The fundamental principles that underlie the Beijing Rules are the fair and humane treatment of juveniles in conflict with the law.⁷⁴ The Rules underline in particular, that the aims of juvenile justice should be two-fold: the promotion of the well-being of the juvenile and a proportionate reaction by the authorities to the nature of the offender as well as to the offence. They encourage the use of diversion from formal hearings to appropriate community programmes. Where diversion is not appropriate, they rule that the detention of the juvenile should be used as a measure of last resort, for the shortest period of time possible and separate from adult detention. They underline that deprivation of liberty should only be imposed after careful consideration for a minimum period and only for serious offences and that the institutionalization of juveniles should only be resorted to after consideration of alternative disposition measures. Criminal justice officials dealing with juvenile cases should benefit from continued specialized training. The release of juveniles from detention should be considered both on apprehension and at the earliest possible occasion thereafter.

⁷⁴Introduction to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rule) by Defence for Children International, Geraldine Van Bueren and Anne-Marie Tootell, Faculty of Laws, Queen Mary and Westfield College, University of London, p. 2.

The Juvenile Code of Afghanistan was adopted by the Afghan Cabinet in February 2005 and signed on the 9 March 2005 by the President. It was in force at the time of writing. The adoption of the Juvenile Code represents a key step in reforming the legal system and provides a framework for the protection of the rights of children and introduces many of the principles and rights contained in the Convention on the Rights of the Child (CRC). The objectives of the Code include rehabilitating and re-educating children in conflict with the law and encouraging and supervising public welfare institutions and social services with the intention of preventing juvenile offences (article 2 (1) and (6)). Article 8 of the Juvenile Code emphasizes that imprisonment of a child should be considered as a last resort and its purpose is the rehabilitation and re-education of the child. It requires that offences committed by children in conflict with the law to be dealt with by juvenile police, juvenile prosecutors and juvenile courts. It includes a list of alternative measures and sanctions, as well as protection measures to be applied towards children in conflict with the law and those in need of protection.

4.4.1 Diversion from the criminal justice process

The Beijing Rules, rule 11.1 underlines that “[c]onsideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. . .” According to rule 11.2 “[t]he police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.” Rule 11.3, emphasizes the need for the consent of the juvenile or his or her parents or guardian and that decisions should be subject to review by a competent authority. Rule 11.4 states that “[i]n order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims”.

The Juvenile Code of Afghanistan authorizes prosecutors to encourage reconciliation between the child’s legal representative and the person who has incurred losses, with the assistance of directors of juvenile rehabilitation centres and social services, provided that a child has not committed a misdemeanour or felony (article 21.1). If reconciliation is successful, the prosecutor can cease proceedings (article 21.2). No other diversion measures and programmes are included in the juvenile code, and there are no such programmes in existence in practice.

It is difficult to know how often reconciliation in line with the provisions of the Juvenile Code takes place in practice and how practice varies in different regions of Afghanistan. A juvenile prosecutor interviewed in Kabul suggested that prosecutors did try to encourage reconciliation, prior to any trial, by talking to the family of the victim and accused, in many cases with successful results. Sometimes compensation for any damages incurred was agreed.⁷⁵ An assessment of the juvenile justice system was undertaken by UNODC in 2006/2007, which included interviews with police officers, prosecutors, judges, penitentiary staff, lawyers, human rights workers and professionals working with juveniles in conflict with the law, conducted in seven provinces of Afghanistan. According to this assessment, 45 per cent of interviewees stated that prosecutors would try to prevent formal court process, by facilitating reconciliation between the victim and the accused.⁷⁶ 43 per cent stated that no measures were taken to divert cases by the prosecutors.

When examined in light of the Beijing Rules and their underlying principle of trying to prevent juveniles from entering the criminal justice process, the provisions of the Juvenile Code of Afghanistan appear to be insufficient. Although at the time of writing expanding the scope of diversion may not bring any short-term results, due to the lack of programmes to which juveniles may be diverted and the acute shortage of social services to take care of the rehabilitative needs of juveniles, increasing the

⁷⁵Interview with juvenile prosecutor, 12 December 2007.

⁷⁶UNODC Assessment Report on the Implementation of the Juvenile Code, May 2007, p. 39.

possibilities for diversion should be considered for implementation in the long term.

4.4.2 Pre-trial detention

The Beijing Rules, rule 13.1 provides that “[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.” They rule that “[w]henver possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home” (rule 13.2).

The Juvenile Code of Afghanistan, article 10 gives courts the authority to consider alternatives to pre-trial detention. The legal representative of the child can demand immediately after the child’s arrest, his or her release on bail. The police and prosecutor are duty bound to declare their decision on the release request within 24 hours. If the decision is not taken in the given time, the legal representative can complain to the higher prosecutor (article 11.2). Article 11.3 authorizes the prosecutor and judge to release a child on bail without monetary deposit.

Additionally article 20 (1) stipulates that if a child who has not completed the age of 12 commits a misdemeanour or felony, he or she shall not be detained for the completion of investigations. However the prosecutor must obtain a guarantee from them. (What this guarantee may be is not defined, but in light of article 11.3, it apparently does not have to be cash. See also below). Children between the ages of 12 and 18 may also be surrendered to their parents, executors or legal representatives, instead of being detained, upon the request of the prosecutor and after permission of the authorized court (article 20 (2)). The requirement of a guarantee is not mentioned in this article.

According to interviews conducted in Kabul, although most juveniles were eligible for release during pre-trial period, they were not released, either because they did not have families, or because they did not have any guarantee to provide, or because their legal representatives did not apply for bail.⁷⁷ It was stated

that guarantees could include a person or a property. In general there appeared to be considerable confusion surrounding the need to provide guarantees.

4.4.3 Alternatives to imprisonment

The Beijing Rules, rule 18.1, provide that “a large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible . . .”

The measures listed include:

- (a) Care, guidance and supervision orders;
- (b) Probation;
- (c) Community service orders;
- (d) Financial penalties, compensation and restitution;
- (e) Intermediate treatment and other treatment orders;
- (f) Orders to participate in group counselling and similar activities;
- (g) Orders concerning foster care, living communities or other educational settings;
- (h) Other relevant orders.

Rule 18.2 underlines that no juvenile should be removed from parental supervision, unless the circumstances of her or his case make this necessary.

Article 35 of the Juvenile Code of Afghanistan sets out the measures and sanctions that may be imposed for children in conflict with the law, including a number of alternatives to prison. They include: performing social services; sending the child to special social services institutions; issuing warnings, postponing the trial, conditional suspension of punishment, home confinement, surrender of the child to his or her parents or legal guardians. If the child is given to his or her legal guardian the latter is responsible for monitoring the development and progress of the child and the prosecutor receives a written guarantee in this regard (article 37.1). In the case that the legal representative does not perform these duties properly, as per the guarantee, the court has the authority to appoint another guardian for the

⁷⁷Interview with Judge A. Rasuli, 12 December 2007.

child on a temporary basis (article 37.2). In taking a decision the court shall take into consideration not only the type of crime, but also the circumstances, personality and social background of the juvenile at the time of committing the offence (article 36).

Data received in Kabul in December 2007 shows that 57 per cent of juveniles currently held in Afghanistan's prisons, and whose sentences have been confirmed either by the Appeals Court or the Supreme Court are eligible for alternative sanctions, including suspension of sentences (see section 4.4.8). Thus, even though otherwise stipulated in the Juvenile Code, judges are not using alternative sentencing options.

According to the UNODC assessment referred to above, only 4 out of 60 interviewees stated that they were aware of the existence of different programmes or institutions which juveniles could attend as part of a non-custodial sanction. One prosecutor from Jalalabad stated that sometimes the Afghan Red Cross would take care of juveniles in conflict with the law or that juveniles were sent to orphanages by the court. Personnel of the juvenile rehabilitation centre in Kabul stated that in the past, juveniles had been handed over to "Aishiana", an organization working with street children. Personnel from the juvenile rehabilitation centre in Herat stated that some female juveniles were sent to the shelter of directorate of women affairs and male juveniles were sent to the kindergarten of social affairs directorate.⁷⁸ Indeed judges are very restricted in using non-custodial sanctions, even if they so wished, given the severe shortages of any social service institutions responsible for juveniles (and adults) in Afghanistan (see section 8).

The only semi-alternative to prison at the current time is the open prison for juveniles constructed by UNICEF, where children will be able to spend their days in the prison and return to their homes at night (see section 6.2.3).

4.4.4 Juveniles with mental healthcare needs

Article 38 of the juvenile code provides that if a child appears to be suffering from a mental health

problem during court proceedings, the prosecutor's office and the court can issue an order to refer the child to a mental health institution for a diagnosis and treatment. It is not explicit in this article as to what happens after the treatment, i.e. whether the child is exempted from any punishment or not. Thus this article needs to be made clearer, excluding imprisonment for juveniles with mental illness. It should however be noted that there are no specialized juvenile mental healthcare facilities in Afghanistan. The one State-run mental health hospital in Kabul—one of the only two State mental health facilities in Afghanistan—treats adults and children alike (see section 8.1 for further information).

4.4.5 Juveniles with drug dependency

The Juvenile Code does not include any special provisions for juveniles charged with drug-related offences, and especially those who are themselves drug dependent. Thus, it appears that the Counter Narcotics Law applies to juveniles as well as adults, with no special provisions made in the case of juveniles. In principle according to article 39 of the Juvenile Code, juveniles should receive reduced prison terms for all offences, with different criteria applying depending on the age of the offender, but this provision mentions the Penal Code only. Therefore there is a need for clarification in this article of the juvenile code.

Indeed, during interviews in Kabul, the authors were told that the Counter Narcotics Law had created a problem in terms deciding sentences for juveniles charged with drug offences.⁷⁹ At a seminar organized by the Supreme Court with the support of USAID Rule of Law Project, where the situation of juveniles charged with drug offences was discussed, it was suggested that an article be added to the CNL, stating that juvenile drug offenders would be tried according to the Juvenile Code and that article 31 of CNL would not be applied or applied to a limited extent in the case of juveniles. It was also proposed that cash fines should not be applied to juveniles. The CNL had been sent back to the parliament with

⁷⁸UNODC Assessment Report on the Implementation of the Juvenile Code, p. 47.

⁷⁹Interviews with Judge Anisa Rasuli 12 December 2007 and Mr M. O. Zabal, Head of Research and Study Department, Supreme Court, 9 December 2007

the suggested amendments.⁸⁰ The Head of the Research and Study Department of the Supreme Court suggested that an instruction to judges would be prepared on this basis.⁸¹

It seems crucial that clarification is brought to the way in which CNL applies to juveniles. They should not be subjected to the harsh penalties included in CNL, which would need to clearly state that the Juvenile Code should be applied in the case of juveniles, with emphasis on alternative measures and sanctions and treatment where necessary. If such action is not taken, the long-term risks of imprisoning large numbers of juveniles for drug-related offences, leading to the increased likelihood of their continued drug use and addiction in prison, while being excluded from their family environment and education, are enormous and need to be avoided (please see section 4.4.10, for drug use among 13 male juvenile prisoners interviewed in Kabul in December 2007, which found that 62 per cent had used drugs).

4.4.6 Pregnant girls

As mentioned earlier the ICPC stipulates that the prosecutor can suspend the sentence of a woman who is six months pregnant until four months after the delivery of the baby (article 89 (1)). Again, as mentioned earlier this provision is rarely applied in practice. Further, the ICPC makes clear that the prosecutor can release the arrested suspect whenever he deems that there is no need for his or her deprivation of liberty (article 34.2). Hence, the prosecutor may authorize the release of an accused pregnant woman at any time during the investigation, if continued incarceration does not further the interests of evidence-gathering. Of course in Afghanistan, the protection needs of such women, especially girls, need to be taken into account when taking such a decision.

In practice, women and girls are kept in confinement and only taken to a hospital for delivery and then sent back to the prison. Often women deliver their children in the prison itself. The assessment

conducted by UNODC on the application of the Juvenile Code in Afghanistan found that the same situation applied to pregnant girls. Additionally, interviews with custodial staff at juvenile rehabilitation centres revealed that girls who are pregnant or who are detained with their children pose a serious problem to the management of the facility and are therefore delivered for detention to the female adult prison.⁸² Although no explanation is made as to the elements of the problem, it can be assumed that they relate to the lack of any specialist medical care for pregnant girls and juvenile females with children in the juvenile rehabilitation centres. It may also be assumed that such girls, if not married, will be at particular risk of sexual abuse and stigma, due to the circumstances of their pregnancy and the perceived shame surrounding their situation. Pregnant girls and girls with children in prison comprise one of the most vulnerable groups of prisoners worldwide and are in need of protection and care.

4.4.7 Children in need of protection

Chapter 6 of the Juvenile Code outlines measures to be taken to protect children whose physical, psychological, emotional health and security are at risk, whose interests and education are jeopardized; who have been abused by elders or a person having authority over him or her, or who has been abandoned by their parents (article 52). Article 53.3 provides that the legal representative can request the court to obtain the views of professionals and experts about a child who is sexually, physically or psychologically abused. Current information available shows that these provisions are not being applied in the case of children who have apparently been abused by adults, either sexually or physically. Children are being held in prison charged with offences such as homosexuality, debauchery and running away from home. They are being punished, although most are almost certainly victims themselves and are in need of care and protection (see section 4.4.9 below, for further discussion). There is an urgent need for training and clarification on the application of these provisions to prevent the imprisonment of children and to provide alternative measures of protection outlined in article 55 of the

⁸⁰Interview with Judge Rasuli, 12 December 2007.

⁸¹Interview with Mr M.O. Zabal, Head of Research and Study Department, Supreme Court, 9 December 2007.

⁸²UNODC Assessment Report on the Implementation of the Juvenile Code, p. 19.

Juvenile Code, if permanent damage to such victims is to be avoided.

4.4.8 Practice: pre-trial detention and sentences received by juveniles

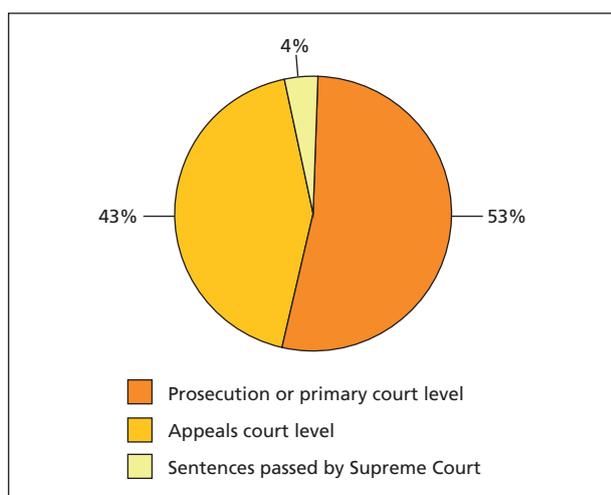
During the mission, data was received from the Director General of the Juvenile Justice Department of Afghanistan regarding all juvenile prisoners in Afghanistan. According to this information, as of October 2007, there were a total of 455 juveniles in prison in Afghanistan. 413 of these prisoners were male and 42 were female.

Pre-trial detainees

Only in 18 of these cases were the sentences confirmed by the Supreme Court, which means that 437 of them were still pre-trial or under-trial detainees. This figure comprises 96 per cent of all juveniles.

Two hundred and forty-three of the juvenile cases were under prosecution or at primary court level, comprising around 53 per cent of cases. Information available does not allow for a reliable differentiation between those who have been tried by the primary court and awaiting the court decision and those whose cases were still at investigation stage, therefore strictly pre-trial.

Figure 3. Juvenile prisoners: criminal procedure status (n=455)



Under the Juvenile Code the prosecutor has one week to investigate the case of a juvenile suspect.

The prosecutor can extend the investigation for a total of three weeks, but only with court approval.⁸³ The indictment must be filed within one week after the investigation. The court can grant a three-week extension, but only if the suspect is not in detention.⁸⁴ The juvenile court is obliged to issue its decision within ten days from the receipt of the file.⁸⁵ The judicial board or judges in the juvenile court are duty bound to report the pending cases every 15 days to the head of the court with the reasons for the delay. The head of the court is obliged to take necessary measures in this regard as soon as possible.⁸⁶

Despite these provisions, dates of arrest included in information gathered in December 2007 indicate that many cases have been under investigation or under trial for many months. Nine cases were still under prosecution or awaiting the decision of the primary court, after more than one year following dates of arrest. In one case the child had been in detention for over two years without any court hearing or sentence having been passed at the primary court level.

The assessment carried out by UNODC in 2006/2007 also found that juveniles were sometimes detained up to nine months without the case being processed.⁸⁷ It was also reported that prosecutors may expect a payment of up to \$US 200 to process a case.⁸⁸

Thus, data clearly indicates that pre-trial detention is not being used as a last resort, but as a rule, and further, juveniles are being held in pre-trial detention far beyond the legal time limits set out in the Juvenile Code.

The UNODC Assessment reports that: “[w]hen asked about the reason for delay of the adjudication process the answers were various and showed that the prolonged time juveniles spent in pre-trial detention is caused by a number of factors. Judges and

⁸³Article 14 Juvenile Code.

⁸⁴Article 15 Juvenile Code.

⁸⁵Article 30 Juvenile Code.

⁸⁶Article 31 Juvenile Code.

⁸⁷UNODC Assessment, p. 41.

⁸⁸Ibid.

prosecutors stated that it was due to their caseload, or due to administrative inefficiency that the adjudication process was prolonged. Further, lack of coordination between the different stakeholders, lack of funds for transporting juveniles to court, time consuming investigation, incomplete case files, carelessness of the different stakeholders, or the inability to pay money to the relevant authorities were given as reasons for the delay in the process.”⁸⁹

The resolution of challenges that hinder the adjudication of juvenile cases in line with the requirements of legislation, need urgent attention. The reality that the long period before any final decision is taken by courts, due to factors listed above, indicates that there is a particularly urgent need to ensure that alternatives to pre-trial detention are applied to prevent juveniles spending months and sometimes years in detention during the adjudication process.

Sentences

As of October 2007, of the 104 cases where a sentence had been passed by the Appeals Court or confirmed by the Supreme Court, 50 juveniles (48 per cent) had been sentenced to two years’ imprisonment or below. According to article 40 (1) of the Juvenile Code all of these offenders are eligible for non-custodial sanctions. In other words close to half of the children, whose sentences had been passed either by the Appeals Court or the Supreme Court could be sentenced to alternatives to prison, if such alternatives were available in practice and if judges were trained and willing to use non-custodial sentences.

Of these 50 cases, 21 had received sentences of one year or less, including one sentence of three months and one of three weeks for theft and one of 15 days for an undefined moral crime. In other words 20 per cent of the 104 children would almost certainly be sentenced to alternatives to prison, if such alternatives were applied in practice. Sentences of imprisonment of 3 months, 3 weeks and 15 days seem absolutely unnecessary and unacceptable, in themselves, but also in the fact that the criminal record that results, is likely to have a long-term negative

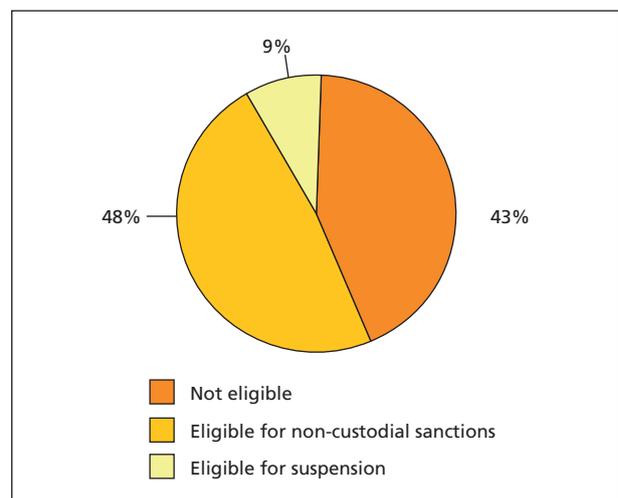
⁸⁹Ibid., p. 42.

impact on the future of the children concerned, with no “rehabilitative” outcomes.

Again, of the 104 cases, nine juvenile offenders had been sentenced to between two and three years of imprisonment. According to the Juvenile Code, article 40 (2) they are eligible to have their sentences suspended. All of these cases were at appeals court level at the time of writing. There was no information as to whether their sentences were being considered for suspension, but given the very rare application of suspension and confirmation of sentences by the Supreme Court of sentences of two years and less, without any suspension, as mentioned above, it is extremely unlikely that these nine cases will receive suspended sentences if their current sentences are confirmed.

Data reflected in figure 4 below shows that the potential for reducing the juvenile prison population is significant if legislation were to be applied and services and programmes were available in the community to enable the application of legislation.

Figure 4. Juvenile prisoners: eligible for alternatives (n=104)



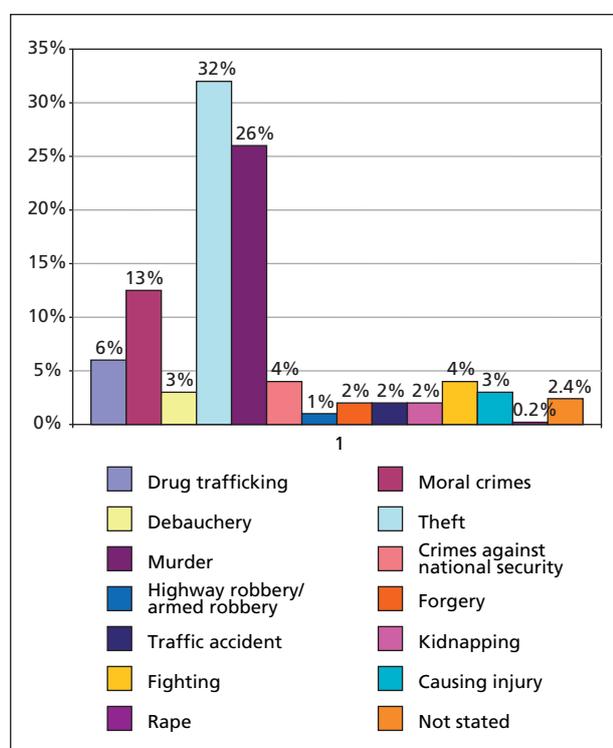
4.4.9 Offences committed by juveniles

Male juveniles

The highest proportion of crimes with which male juvenile offenders are charged or convicted of is theft, comprising around 32 per cent of cases

(131 cases). This is followed by murder, with 26 per cent (107 cases), and with moral crimes, comprising around 13 per cent (52 cases of which two are for “running away”). 6.2 per cent (26 cases) of juvenile males are charged with or convicted of drug trafficking offences. 4 per cent of juveniles are charged with crimes against national security. Around 3 per cent are charged with “debauchery and libertinism”. The rest of the cases involve armed and highway robbery, fighting, [causing] traffic accident, [causing] injury, forgery and kidnapping.

Figure 5. Juvenile male offenders: offences (n=413)



It is not clear what alleged acts the terms “moral crime” or “debauchery and libertinism” comprise, but as “running away” cases have been listed separately, it can be assumed that cases of moral crimes and debauchery and libertinism relate to adultery or pederasty (Penal Code, articles 426-429). These offences could, therefore, include sex outside marriage (*zina*) and what is viewed as homosexual acts, which may in fact involve rape rather than consensual sex, taking into account the age of the offenders.

Boys charged with offences relating to homosexual acts

The assessment conducted by UNODC in 2006/2007 found that 14 per cent of boys were charged with homosexual behaviour.⁹⁰ Some of them were very young, one being only eleven years’ old and under the age of criminal responsibility, another was 13 and one 14 years’ old.⁹¹

“Pederasty”, that is same sex relations between a man and a younger boy, is a crime according to article 427 of the Penal Code of Afghanistan. Article 427 (1) provides for a long prison sentence for those convicted of adultery or pederasty. Aggravating circumstances are listed in article 427 (2). According to clause (a) of that article, the commission of adultery or pederasty against a person who is not yet eighteen years old comprises an aggravating condition and the perpetrator should be sentenced to a long prison term, not exceeding seven years (article 429 (2). According to article 429 (1), “a person who through violence, threat, or deceit, violates the chastity of another (whether male or female) or initiates the act, shall be sentenced to long imprisonment, not exceeding seven years”.

It would appear that many of the boys who are held in prison for homosexual acts, are being held under charges of pederasty, although they themselves are almost certainly victims of rape or other forms of unconsensual sexual acts perpetrated by older men, similar to the way in which female rape victims may be held in detention and even imprisoned for *zina*. Indeed, interviews in Kabul suggested that this would be the case. AIHRC commissioners said, for example, that many children were arrested by the police, having been apprehended while having sex with an adult, and that both the adult and the child were treated the same, the latter not being perceived as a victim. Additionally AIHRC has found that the worst risk of abuse of children is during the period of detention by the police.⁹² The use of force by police against juveniles, often to force confessions

⁹⁰UNODC Assessment Report on the Implementation of the Juvenile Code, May 2007, p. 16.

⁹¹Ibid., p. 16.

⁹²Interview with Ms Hangama Anwari and Dr Soraya Sobhrang, Afghanistan Independent Human Rights Commission, 16 December 2007.

or in response to the failure to receive a bribe, was also identified as a significant problem in the assessment conducted by UNODC in 2006/2007.⁹³ Others also stated that many of the boys in prison were held for prostitution, although they were victims themselves, and that those who had committed sexual offences, male or female, were treated as adults and not regarded as victims.⁹⁴

Thus many of the boys referred to in this section are almost certainly victims themselves and in need of protection under articles 52-57 of the Juvenile Code. Although articles 52-57 do not, in fact, represent alternatives to imprisonment, since the children they refer to are not necessarily offenders, in Afghanistan, where victims of sexual offences are so often treated as offenders, these articles can be regarded as an alternative in practice, if applied, and until such time that criminal justice officials differentiate between victims and offenders in the case of sexual offences.

Boys charged with drug trafficking

Just over 6 per cent of cases relating to juvenile male offenders involve drug trafficking. Sentences passed for this offence range between nine months and five-years and six months' imprisonment. None of the drug trafficking cases had received a final verdict by the Supreme Court at the time of writing. One boy had had his sentence of five years and six months confirmed by the Appeals Court. A number of other cases were still under investigation. In view of the harsh sentences for drug trafficking contained in CNL, examined under section 4.2, and the lack of clarity relating to how CNL applies to juveniles, there appears to be a need to examine these cases further in order to determine the quantities involved, whether the offender was indeed a trafficker or a user, and whether any of them were referred to a medical examination to determine whether they were addicts themselves and therefore eligible for treatment, as per article 27.2 of CNL. As mentioned earlier, if juveniles are being treated as adults, in

contravention of the Juvenile Code and receiving harsh sentences for drug offences, irrespective of their age, then there is a high risk of increasing drug addiction among juveniles (in prisons, where drugs are widely available), without resolving the root cause of the offence, and thereby paving the way for a sharp increase in juvenile prisoners convicted of drug offences.

Female juveniles

Of the 42 female juvenile offenders, 63 per cent (26) are charged with or convicted of moral crimes and another 22 per cent (9) with running away from home. The remaining cases involve crimes against national security (one girl aged 15); two murder cases, one drug trafficking case, one case of kidnapping and one of causing injury. The charges in the cases of seven girls were not stated.

From information available, it is not clear if the running away cases involve charges of *zina* as well, or whether the girls are charged with running away only.⁹⁵ The sentences received vary between seven months and eight years imprisonment. The ages of the girls vary between 13 and 18. None of the sentences had yet been passed by the Supreme Court. If these cases involve running away from home only, the girls should not be in prison at all according to the Penal Code of Afghanistan. In the large majority of cases running away is a consequence of forced marriages or domestic violence, often resulting from the marriage of a young girl with an older man, without the consent of the girl. When such girls are aware of their rights and have access to an institution which can provide legal and psychosocial assistance to them, they can avoid illegal imprisonment. For example, if they apply to MoWA or AIHRC, they will usually be referred to shelters,⁹⁶ and as mentioned in section 8.3, the establishment of the referral centre in Jalalabad, by UNIFEM and MoWA, has reduced the imprisonment of women and girls who run away from home significantly.

⁹³UNODC, Afghanistan, Assessment Report on the Implementation of the Juvenile Code, May 2007, pp. 29-30.

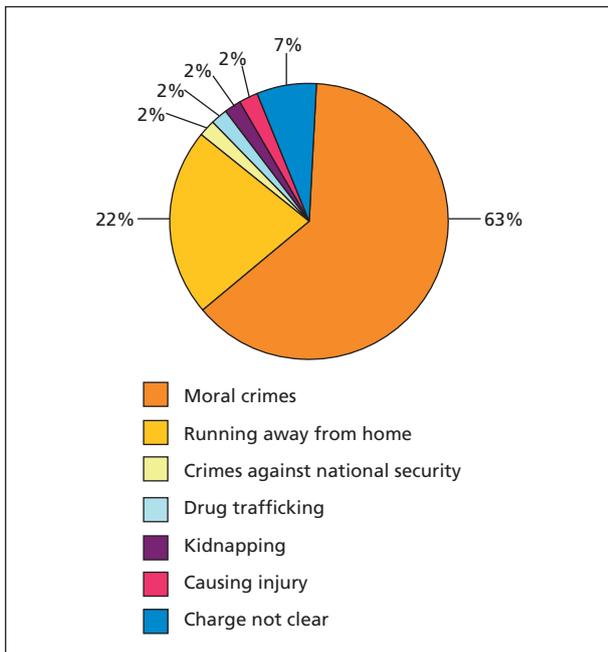
⁹⁴Interview with Dr Anou Borrey, Gender and Justice Consultant, UNIFEM and Kamala Janakiram, Human Rights Officer, UNAMA, Jalalabad, 18 December 2007.

⁹⁵The official list received from the Juvenile Justice Department lists "running away" only as the offence committed and "moral crimes" are listed separately, which would indicate that these cases do indeed relate to running away only, although further clarification may be required. See UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op. cit., p. 25 for a discussion of imprisonment on charges of running away.

⁹⁶Ibid., p. 26.

There have also been encouraging reports of police referring such girls to MoWA, which in turn has diverted them to shelters.⁹⁷ It is clear that awareness building and the provision of assistance before such girls come in contact with the criminal justice system, as well as increasing diversion to appropriate institutions by the police, when such girls are arrested, are areas that need attention.

Figure 6. Juvenile female offenders: offences (n=42)



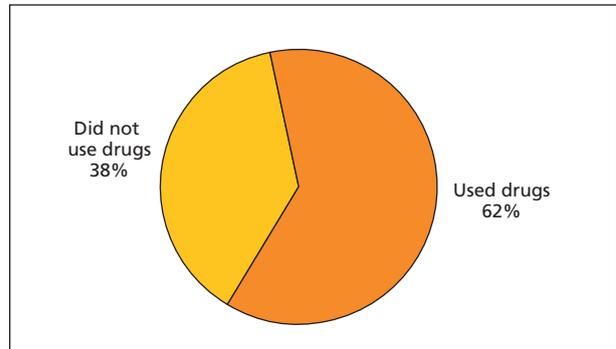
Additionally, the high proportion of moral crimes indicate that there is a need for prosecutors and judges to examine the circumstances and reasons for the commission of the crime, and whether the alleged act was consensual or not, particularly when they involve girls below the age of 18. A careful examination of the cases is likely to reveal that many of such girls are in need of protection under articles 52-57 of the Juvenile Code. Such young girls require legal and psychosocial support, rather than being further stigmatized by a criminal record and harmed by the prison environment.

Training, sensitization and guidelines to bring clarification to the way in which articles relating to protection should be applied are urgently required to reduce the imprisonment of victims of crime.

⁹⁷Ibid., p. 26.

4.4.10 Drug use among juvenile boys

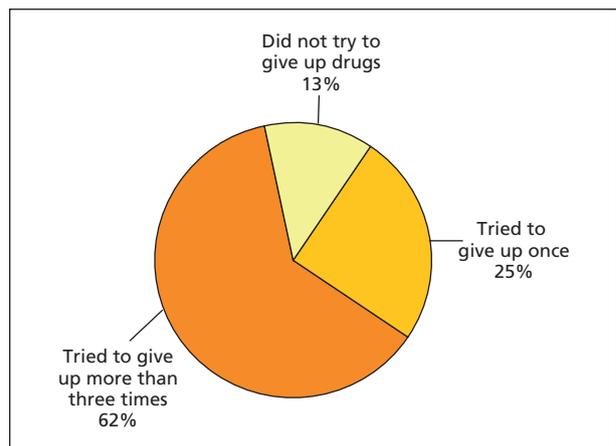
Figure 7. Drug use among juvenile male prisoners (n=13)



Interviews were conducted with 13 boys in Kabul rehabilitation centre in December 2007, based on questionnaires prepared by the authors in coordination with UNODC.

Of the 13 boys interviewed in Kabul, 8 had used drugs. All said that they had started prior to imprisonment. Three took heroin, one used opium and cannabis, one used opium, another used cannabis only and one used other drugs.

Figure 8. Juvenile male prisoners: efforts to give up drugs (n=13)



Seven of these boys had tried to give up drugs in the past. Two of them had tried once, the other five had tried over three times.

Although the sample interviewed is too small to reach any general conclusions about drug use among

boys in prison, the high percentage of drug use among boys and their efforts to give up drugs gives some indication of the need for accessible drug treatment centres based in the community. Although all of these boys said that they were not using drugs in prison, it is clear that admitting drug use in prison carries certain risks and therefore there is a need for further thorough research into drug use among juvenile prisoners to develop appropriate strategies and treatment programmes targeting young drug users.

4.5 First time offenders: pilot review of adult male prisoners in Pul-e Charki Prison, Kabul

Throughout the mission to Kabul, the authors endeavoured to receive statistics as to the breakdown of crimes and sentences for adult male prisoners in Kabul (which would include around 3,000 prisoners) in order to analyse the information with a view to determining the percentage of those who had received short prison terms, first time offenders and proportion of petty and non-violent offences. This would have helped estimate the percentage of prisoners who were eligible for alternatives, such as suspension of sentences, under the current Penal Code, as well as those who may potentially be eligible, if for example, first time non-violent offenders and those who had received short prison terms would be targeted for non-custodial sanctions. This in turn would have given some indication of the impact some of the recommendations included in this assessment would have on the size of the prison population in Afghanistan (see section 10). Surprisingly this information was said not to be available at the Supreme Court or at the Attorney General's Office. The CPD promised to provide the figures on a number of occasions, but the information was not forthcoming.

Interviews were conducted with a small group of 27 adult male prisoners in Pul-e Charki Prison, Kabul,

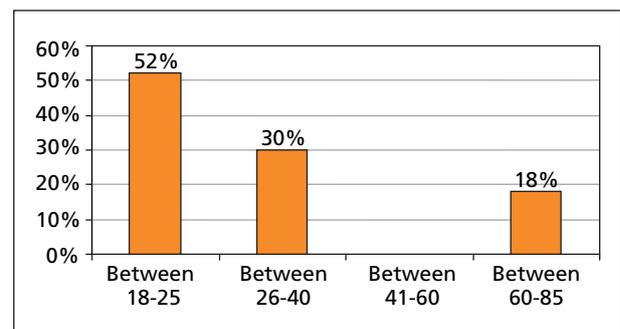
in December 2007, to gather information about their status and background. The prisoners selected were all first time offenders. With the exception of one, charged with murder, all were charged with or convicted of petty offences or drug trafficking, some of whom could potentially be candidates for alternative sanctions and measures. The interviews were conducted on an anonymous basis, using short questionnaires, prepared by the authors in coordination with UNODC. Prisoners were interviewed by UNODC staff and one of the authors in the prison yard. The prison administration was not involved in the interviewing, except for supervising the process and they were not given copies of the completed questionnaires (see appendix 2 for a sample questionnaire).

The sample was very small, therefore does not provide data that may shed reliable light on the situation of all prisoners charged with similar offences in Afghanistan. Further research, as suggested above, is needed for representative data to be gathered, though this information is useful in providing some insight and determining some areas where more research and input appear to be crucial.

Age of prisoners

Over 50 per cent were under 25. A surprisingly high percentage was over 60 and all first time offenders. If the sample were larger, it could have been an indication of more poverty among the elderly, the disruption of traditional family support toward older people or simply improved law enforcement.

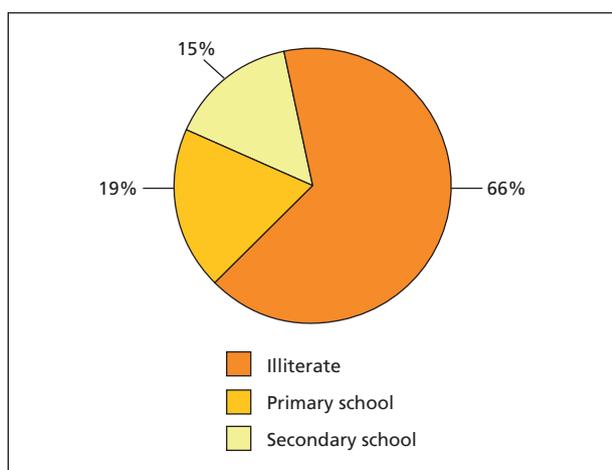
Figure 9. Adult male prisoners: age (n=27)



Literacy and education levels

The literacy level among the sample group was 34 per cent, which is low compared to the estimated literacy level among men in Afghanistan, at 43 per cent⁹⁸. More than half of them had finished primary school, and the remaining, secondary school.

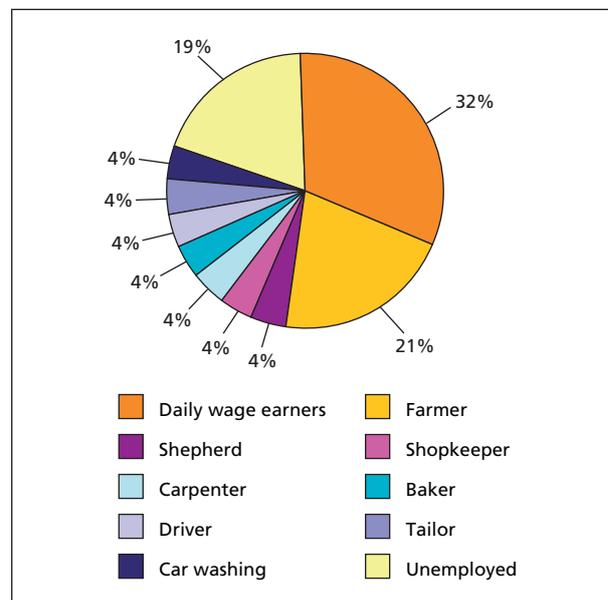
Figure 10. Adult male prisoners: literacy and education levels (n=27)



Employment at the time of arrest

Of the 27 prisoners interviewed, 22 were working at the time of arrest, comprising 81 per cent of all interviewed. Two of those who were unemployed were students. The largest proportion of those who were employed were made up of daily wage earners with 32 per cent, followed by farmers with 21 per cent. The rest included one shepherd, one shopkeeper, one carpenter, one baker (a former police officer), one driver, one tailor and one person who was washing cars to earn a living. The percentage of employment is surprisingly high, though the large majority being in low paid jobs and consequently poor (see below).

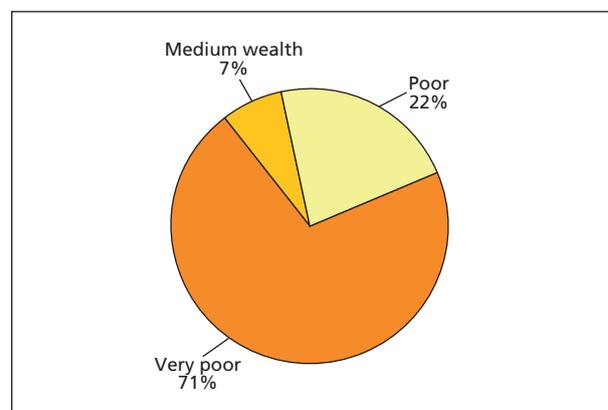
Figure 11. Adult male prisoners: employment at time of arrest (n=27)



Economic status

A large majority, comprising 71 per cent of prisoners described themselves as very poor. Twenty two per cent were poor and 7 per cent of medium wealth. Thus, taking the economic status of most of these prisoners and the types of jobs that they were employed in prior to imprisonment into account (with, as already mentioned in section 4.2, daily wages of around \$US 2.1 for a construction worker, \$US 1.86 for a farmer and \$US 1.43 for a shepherd), it is difficult to imagine how these prisoners will ever be able to pay fines as high as Af 75,000 or Af 100,000 (\$US 1,500-\$US 2,000)—see figure 14—without falling into debt.

Figure 12. Adult male prisoners: economic status (n=27)

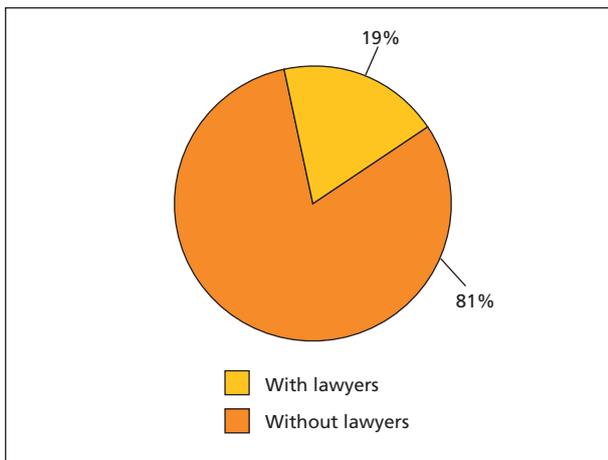


⁹⁸United Nations Doc. E/CN.6/2006/5, p. 13.

Legal representation

Of the 27 prisoners only five had lawyers. Four of the lawyers had been provided free-of-charge. One received fees. Prisoners’ lack of access to legal counsel is a major obstacle, in their access to justice, including to argue for eligibility to non-custodial sanctions and measures.

Figure 13. Adult male prisoners: legal representation (n=27)



When compared with the findings of the study undertaken on female prisoners in December 2006, access to legal counsel is lower for men than women, of whom 68 per cent had legal representation.⁹⁹ The male sample is much smaller both in numbers (27 men compared to 56 women) and in terms of its proportion of the total prison population (10,300 men compared to 304 women in October 2007), so it is not an entirely sound comparison. However, based on interviews conducted for the purposes of this assessment and information about programmes of legal aid, it is well known that women are being targeted more for legal aid, than are men. This targeting is partly donor driven and is based on the particular vulnerability of women in the criminal justice system and their intense need for assistance. Nevertheless, currently men appear to be in a particularly disadvantaged position in terms of their access to legal counsel. Given that there are currently at least 10,300 men in prisons and detention centres and the alarming rate of increase, there is a

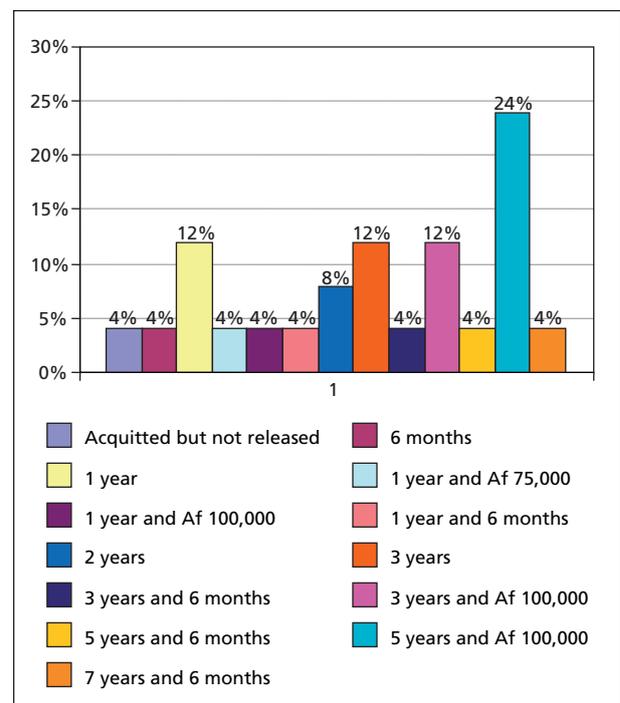
⁹⁹UNODC, *Female Prisoners and their Social Reintegration*, op. cit. p. 44.

great need to ensure that indigent men have much better access to legal counsel than they currently do.

Offences relating to drugs and theft: sentences

Of the sentences passed (but most of them still not confirmed by the Supreme Court), 32 per cent are sentences of two years or below. Thus, if article 161 of the Penal Code, relating to suspension of sentences were to be applied in practice, these offenders, all being first time offenders, could have their sentences suspended, subject to satisfactory information about their character and background (see section 3.2.3, above). However, since article 31 (2) of the CNL, prohibits suspension of sentences to be applied to drug traffickers, this provision of the Penal Code cannot be applied in their cases.

Figure 14. Drugs and theft offences: sentences (n=25)



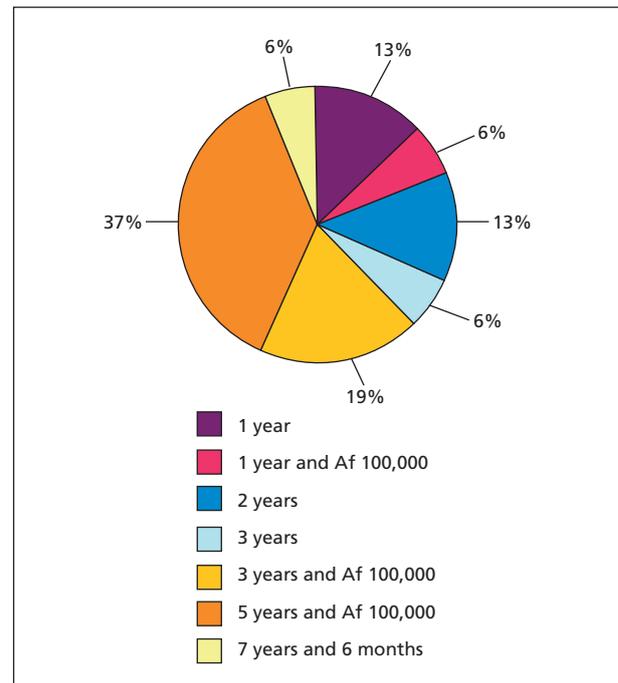
Sentences of one year or below comprise 16 per cent of sentences. If a policy of targeting first time offenders with short prison terms for alternative sanctions

were to be introduced, and low-level drug offences could be included, according to this small pilot study, a 16 per cent reduction could be achieved, if the term was set as one year or below (see above and section 10.4, on targeting). Obviously a much larger and comprehensive study is needed to determine the upper limit, which would be most effective, while protecting public safety in Afghanistan. This exercise is a small demonstration of what may be achieved.

Drug offences: sentences

Sentences received comply more or less with the provisions of CNL, in terms of sentence length including for the two who were sentenced for possession. (Although the quantities of drugs involved were not asked, the length of sentence for drug offences are shorter in the Penal Code and the Penal Code does not provide sentences for drug trafficking). The majority of the prison terms appear to be quite long, with 68 per cent of sentences being a term of three years or longer. Admittedly, it is difficult to determine whether the sentences are disproportionate as the quantities involved and the circumstances of the crime are not known,¹⁰⁰ but bearing in mind that all of those interviewed were first time offenders, the impression is that the sentences may be unnecessarily long.

Figure 15. Sentences received for drug offences: (n=16)



Additionally, if suspension could be applied to drug traffickers, then 32 per cent of the prisoners convicted of drug trafficking offences would be eligible to have their sentences suspended according to article 161 of the Penal Code, similar to the proportion identified above for offenders convicted of drugs and theft offences.

¹⁰⁰The circumstances of the offences were briefly described by the prisoners, almost all of whom claim that they were not aware that there were drugs in the car in which they were travelling, or other items that were given to them, or the place where they were living, but since the information cannot be verified, they are not being taken into account, in terms of reaching any conclusions. One prisoner said he was selling drugs because he needed money for medical treatment, the other said he had a small quantity of heroin on him for personal use, another admitted that he had travelled to Kabul to sell drugs, with his friend, with no specific excuse.

Informal justice system and dispute resolution

Despite progress towards establishing a functioning formal legal system in Afghanistan, currently the central government has limited authority in many parts of the country. The lives of the vast majority of Afghans are ruled by customary law, which has survived for centuries, under a variety of governments and regimes. In all regions of Afghanistan many disputes and crimes are tried and resolved by a council of elders (*jirgas or shuras*), ad hoc councils, who gather to resolve specific disputes between individuals, families, villages or tribes. A recent report¹⁰¹ has suggested that the informal justice system is responsible for resolving around 80 per cent of legal cases in Afghanistan, though this figure is disputed by the Supreme Court and others, such as the AIHRC,¹⁰² which estimate that the percentage would be closer to 50-60 per cent.

The customary laws of Afghanistan vary among different regions and sometimes among different tribes in each region. Generally speaking they consist of a blend of custom, practice and Islamic laws; the latter interpreted in various ways. They are based on the notion of restorative justice rather than retribution, although retribution does also have a role, for example, in the practice of *Qissas*.¹⁰³ According to most customary law in Afghanistan, the right to seek justice lies with the victim or the family of the victim. Justice for a wrong can be pursued through a blood feud, which can be averted by payment of blood money (*Diyat*)¹⁰⁴. Blood money typically comprises valuable commodities or cash. According to recent studies, most cases that are currently resolved within the informal justice system relate to civil cases, and especially land disputes, though criminal cases are also referred to the informal system which can include cases of murder, theft and assault.¹⁰⁵ In addition practices vary extremely in different regions, and there is insufficient information from the mainly Pashtun-dominated southern and eastern regions, in terms of current practice.

An assessment of the feasibility of expanding the use of non-custodial measures and sanctions in Afghanistan inevitably includes the consideration of the existing informal justice system in this country, in terms of the opportunities it provides for the informal settlement of disputes, to some extent in line with restorative justice principles currently used in some other parts of Asia and increasingly in western societies as an alternative to formal proceedings. Indeed

¹⁰¹Afghanistan Human Development Report 2007, Centre for Policy and Human Development, Kabul University and UNDP.

¹⁰²Meeting with Dr Soraya Sobhrang and Ms Hangama Anwari, AIHRC, 16 December 2007.

¹⁰³*Qissas* refers to retribution and is applicable to physical injury, manslaughter and murder.

¹⁰⁴*Diyat* refers to compensation and together with *qissas* is applicable to cases of physical injury, manslaughter and murder. The law of *qissas* and *diyat* provides that the punishment must be commensurate with the offence committed. (Amnesty International, Afghanistan, Women still under attack—a systematic failure to protect, AI Index: ASA 11/007/2005, p. 31, note 101).

¹⁰⁵Barfield, T. Nojumi, N and Their, Alexander J., “The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan”, p. 25.

this assessment was undertaken at a time when much discussion was taking place on the feasibility of establishing formal links between the informal and formal justice systems, to improve Afghan citizens' access to justice in rural areas in particular and to provide an alternative forum for resolving mostly civil conflicts, but also minor criminal cases, according to some recommendations.¹⁰⁶

ANDS includes statements which recognize the need to engage with the informal justice sector, with an emphasis on supervision of the informal justice system and enhancing its legitimacy and protection of human rights, especially of vulnerable groups:

"The justice system will be reformed, and Government will invest in its capacity and infrastructure, including prisons and corrections services, with the aim of assuring Afghans in all parts of the country of access to formal justice and judicial supervision of informal dispute resolution mechanisms. We will strengthen protection of human rights for all, especially women and children, and assure redress for violations."¹⁰⁷

"The MoJ will formalize the role of formal and informal justice mechanisms and their respective roles, enhancing the legitimacy and efficiency of both. Permanent justice institutions shall provide services required in a minimally acceptable state justice sector, with an emphasis on strengthening protections for vulnerable and geographically remote people."¹⁰⁸

The "Justice for All" strategy of the Government of Afghanistan, "sees positive elements in traditional mechanisms, including their role in community

cohesion and locally accessible dispute resolution", while underlining serious concerns about their impact on the authority of the State and human rights.¹⁰⁹

The National Justice Sector Strategy (NJSS), in the process of development following the decisions of the Rome Conference and in draft form at the time of writing, outlines a strategy for engagement with the informal justice system. The NJSS appears to exclude criminal cases from referral to the informal justice system, though it does put forward engagement with the informal system in civil cases, following an assessment of traditional dispute resolution mechanisms, an investigation of policy options and determination of priorities for engaging with the informal sector. It suggests that priority areas may include: a review of decisions of *jirgas* and *shuras* in civil cases; training to members of *jirgas* and *shuras* on fair trial standards, constitutional principles, Islamic Law and international human rights; analysis of access to *jirgas* and *shuras* disaggregated by gender to determine the participation, processes and decisions of the traditional dispute resolution mechanisms and the determination of priority geographical areas in conjunction with the continued expansion of formal justice system.¹¹⁰

A number of stakeholders have recently recommended the establishment of pilot projects to test different models of communication and cooperation between the informal and formal justice systems, including especially a hybrid model, suggested in the Afghanistan Human Development Report 2007. The United States Institute of Peace has recently received a grant from USAID to develop pilot projects to investigate the possibilities of establishing a hybrid system in five selected districts, to be implemented in partnership with local partners. The outcome of the pilot project is expected to be the elaboration of recommendations on the future relationship between formal and informal systems.

The hybrid model put forward in the Afghanistan Human Development Report 2007, proposes a model for justice in Afghanistan in which alternative dispute

¹⁰⁶See for example, Barfield, T. Nojumi, N and Their, Alexander J., "The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan", United States Institute for Peace, Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies, Checchi and Company Consulting Inc., USAID, Afghanistan Rule of Law Project, June 2005, Afghanistan Human Development Report 2007, Centre for Policy and Human Development, Kabul University and UNDP, Norwegian Refugee Council, Position Paper: The Relationship between the Formal and Informal Justice System in Afghanistan, November 2007.

¹⁰⁷Islamic Republic of Afghanistan (2006), Afghan National Development Strategy, p. 71.

¹⁰⁸Ibid., p. 125.

¹⁰⁹Briefing Paper, Conference on the Relationship between State and Non-State Justice Systems in Afghanistan, p. 2.

¹¹⁰Draft National Justice Sector Strategy, p. 25.

resolution mechanisms of the informal justice system remain important in providing justice, but under the regulation of state institutions. The model proposes the creation of Alternative Dispute Resolution (ADR) and Human Rights Units alongside existing state judicial institutions. The ADR Unit would be responsible for identifying appropriate mechanisms to settle disputes outside the courtroom, which would include *jirgas/shuras*, as well as others, such as Community Development Councils (CDCs), civil society organizations (CSOs) and private arbitration (PA). While the ADR Unit could address minor criminal incidents and all types of civil disputes (property, commercial complaints, etc.), disputants would have the choice to process these cases either through an alternative dispute resolution institution or the nearest state court. However, all serious criminal cases (*jenayat*) would be dealt with mainly by the state justice system. Those cases where alternative dispute settlement bodies failed to reach a conclusion satisfactory to the disputants would be taken back to the formal justice system—with minor criminal cases taken to the police and civil cases to the *huqooq* department.^{111, 112} A further key feature of the model is the establishment of a Human Rights Unit mandated to monitor decisions made by ADR institutions to ensure compliance with human right principles, Afghan and international law.¹¹³

The suggested and planned projects include activities such as training of those involved in informal dispute resolution in formal laws and Sharia, participation of legal representatives, in informal justice system meetings, to monitor proceedings and to provide a link between the formal and informal systems, the recording of decisions made by the informal justice system and increasing awareness about human rights and women's rights in particular.

There appear to be many advantages in using and strengthening an existing informal structure for alternative dispute resolution, instead of resorting to formal court procedures, which are currently not being applied efficiently, fairly or consistently in

most parts of Afghanistan, as well as being inaccessible to many Afghan citizens. Indeed the main argument used by the supporters of the use of informal justice system mechanisms is that the formal justice system in Afghanistan is corrupt and dysfunctional and that it will take many years for rule of law to be established in Afghanistan.¹¹⁴ The second key argument is that most Afghans living in rural areas are unable to access the formal justice system. The third argument is that most Afghans trust the informal system more than they do the formal,¹¹⁵ and that they are more satisfied with the outcome of informal dispute resolution than they are with court decisions.

An important characteristic of the informal dispute mechanism, underlined by many is that whereas the statutory law seeks the punishment of the perpetrator of a crime, the customary system seeks to compensate for the wrong done and social reconciliation, which results in the satisfaction of both victim and offender. One report draws attention to the fact that “[c]ourts do not concern themselves with reconciliation, which means that even where the state system does intervene, non-state practices are needed in addition to reconcile parties and prevent further conflict. A person convicted in a state court and sentenced to prison remains a target for retribution even after serving time. The non-state legal system reaches reconciliation as a result of complex processes of public condemnation, forgiveness, and acceptance.”¹¹⁶ This is an important point, which was highlighted in various interviews conducted in Afghanistan as being in keeping with societal customs and which needs to be taken into account also in the development of formal alternative measures.

Many concerns have also been raised in particular with respect to the history of human rights violations resulting from decisions of informal justice mechanisms, especially towards women. Indeed, although the restorative aspect of the informal dispute resolution system in use in Afghanistan, is a positive concept in itself, the way crimes and disputes are settled can have an extremely harmful impact on the lives

¹¹¹The *huqooq* department is within the Ministry of Justice and undertakes mediation in civil cases.

¹¹²Afghanistan Human Development Report 2007, pp. 129-130.

¹¹³Ibid. p. 130.

¹¹⁴Ibid., p. 127.

¹¹⁵Ibid., p. 70.

¹¹⁶Barfield, T., et. al, p. 16.

of women. Women, who are regarded as the property of men, are used as “valuable commodities” in the settlement of crimes and disputes; while the traditional concept of “honour” puts immense restrictions on women’s sexuality, leading to severe punishments for acts such as extra-marital sex. In addition, *jirgas* are made up exclusively of men, and women are unable to approach the informal justice mechanisms, without the assistance of a male relative, which severely limits their ability to raise issues with the local *jirgas*, even if they would so wish, given that decision makers are all male with their patriarchal attitudes. Thus, in effect, the informal justice system as it currently operates cannot be regarded as meeting the needs of half of Afghanistan’s population, who may be using it nevertheless. Even in civil cases or petty crimes that involve women as offenders or victims, the assertion of having reached a fair outcome would be highly arguable, even when the women themselves may claim to be satisfied with the result.

Other concerns relate to the inability of a weak party to demand settlement from a much stronger one¹¹⁷ and the influence of militia commanders or other powerful figures on the decisions of *jirgas* and *shuras*, which put at risk the human rights of the vulnerable. A further concern relates to the enforcement of the decisions of *jirgas*, though most recent reports suggest that the voluntary principles that underlie the functioning of the system, participation in the process and negotiation, as well as societal pressure play an important role in ensuring that decisions of *jirgas* are adhered to.¹¹⁸

As this assessment concerns itself only with criminal law, procedure and practice, the relevance of the informal justice system to this document is the question of whether it may be advantageous to propose the diversion of criminal cases relating to petty offences to the informal justice system or not, as an alternative to formal criminal procedures, resulting possibly in imprisonment.

The risks of human rights violations would appear to be minimal in cases relating to minor criminal

offences, but nevertheless, concerns remain and it seems far too early to put forward a recommendation for or against such a position, before the results of pilot projects are evaluated, the research and assessment suggested by the NISS are carried out. It is also impossible to say what level of impact such a strategy would have on the size of the prison population, since, as mentioned earlier, efforts to receive a breakdown of sentences and crimes, of prisoners currently held in Afghan prisons during the assessment mission undertaken to Afghanistan in December 2007, proved to be unsuccessful. Therefore, it is not possible to determine what percentage of the adult male prison population (which forms the vast part of the prison population in Afghanistan) comprises offenders who have been convicted of or are charged with petty offences, though it can be assumed to be a reasonably large proportion.

As regards, women prisoners, sections 4.3.1 and 4.3.2 outline the sentences and crimes based on a study conducted in December 2006. According to that information, none of the women would be potential candidates for informal dispute resolution, since not one of them were imprisoned for petty offences. Additionally, due to the concerns already expressed above, the referral of women to informal dispute mechanisms would be a high-risk strategy in any case, certainly at the current time. This would include female juveniles in particular.

Male juveniles, highly vulnerable and weak, are in a relatively similar situation, though there may be potential in their cases, depending on whether they are supported by their families or not.

Additionally the authors of this report have a number of other concerns relating to any further investment in developing the informal justice system for alternative dispute resolution especially in criminal cases.

The priority in Afghanistan at the current time is the establishment of the rule of law, based on the authority of the formal justice system. To propose any further investment in the informal justice system, other than for research and evaluation of currently planned pilot projects, when so much yet needs to be done to ensure that the formal system is fair and efficient, appears to represent a channeling of scarce resources into an area where many

¹¹⁷Barfield, T, et. al., op. cit., p. 17.

¹¹⁸See for example, Norwegian Refugee Council, Position Paper, op. cit. p. 7.

concerns and uncertainties exist. It is felt that the lack of development of the formal justice system should not be used as an argument to give more attention to the informal, but on the contrary to focus on ensuring that all Afghan citizens have access to a just and efficient formal justice system, in accordance with the benchmarks set out in ANDS. It is true that alternative dispute mechanisms are used by many western societies and they are becoming increasingly popular and effective. But all those societies already have a functioning formal justice system. As one Afghan lawyer said “the formal justice system is very weak. There is a need to strengthen the formal justice system, rather than strengthening the informal. The formal is diseased. It will die, if the informal is strengthened.”¹¹⁹ Members of AIHRC also expressed grave concern at any investment in the informal justice system.¹²⁰

The implementation of alternatives to imprisonment, in accordance with statutory law, recommended in this document, requires the establishment of a fair and efficient formal justice system, as well as vast investment to develop rehabilitative programmes in the areas of social welfare, treatment of drug addicts and mental healthcare. Such investment is crucial not only for the implementation of non-custodial measures and sanctions that encourage and facilitate the social reintegration of offenders, but also to prevent crime. It is felt therefore that scarce resources should be channelled into these sectors as a priority. As the Afghanistan Human Development Report 2007, underlines “[p]rioritization is a major challenge in Afghanistan, when almost every sector is in need of critical reform and development. The strength of the ANDS rests in how it prioritizes across and within sectors, but there is still a need to think more carefully about how and where to focus efforts and how to sequence interventions. As one World Bank consultant to the ANDS process said, “[t]he needs are huge and the funds are sparse; the challenge is prioritizing within the priorities.” According to a costing exercise done for the I-ANDS, Afghanistan would need close to \$US 20 billion to have the possibility to achieve the development benchmarks

outlined in the ANDS. This figure takes into consideration growing domestic revenue and its implications on external financing requirements. If aid for Afghanistan gradually decreases, it could mean that the \$US 20 billion needed over the next four years to implement the ANDS may not be forthcoming. At this point, donor countries have contributed or pledged \$US 10 billion to Afghanistan since 2006 (in London)—only half of what the Government believes is necessary to fully implement the ANDS.”¹²¹

A number of reports give the impression that the informal justice system may be developed to gain legitimacy quite speedily, while it will take years to develop the formal justice system. It is proposed that the positive aspects of the informal should be harnessed and built upon in the mean time. This assertion is arguable, since there would appear to be little evidence to believe that the training of *jirga* members in law and human rights, and the changing of their attitudes towards women, would take a shorter period than that of judges and prosecutors. In addition, the structures that need to be established to monitor the system and provide the training seem to add an additional bureaucracy and financial burden on a justice system, already with immense resource problems. In a country where the informal justice system has survived partly and precisely because of the lack of authority of the central government, it is also questionable to what extent monitoring can be possible and successful in practice. These concerns are raised to underline the need for further research and the evaluation of pilot projects, proposed by other stakeholders, in order for questions to be answered and any further action taken.

The need for victim satisfaction and reconciliation should however be taken into account in the development of alternatives to prison in the formal justice system, including reconciliation and mediation between those who have already been convicted and sentenced (to prison or alternatives), and victims, in order to prevent risks of retribution.

¹¹⁹Mr Najibullah Azizi, Deputy Director, Da Qanoon Ghush-tonky, 9 December 2007.

¹²⁰Meeting with Dr Soraya “Sobhrang” and Ms Hangama Anwari, AIHRC, 16 December 2007.

¹²¹Afghanistan Human Development Report 2007, p. 122.

The capacity of the criminal justice system to respond to the needs of offenders

6.1 Criminal procedure and legal aid

Following years of civil war and alternating political regimes, the post-Taliban government inherited an extremely weak and damaged justice system, with facilities in ruin and a severe shortage of qualified staff.¹²²

There are four components to the Rule of Law Benchmark in the Afghanistan Compact;

1. By end of 2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public.
2. By end of 2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible.
3. A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end 2006 and fully implemented by end 2010; by end 2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's Office, the Ministry of the Interior and National Directorate of Security).
4. By end 2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles

Six years after the fall of the Taliban, the security situation in the country still remains critical, which hinders the concentration of efforts on rebuilding and the expansion of reforms to all regions of Afghanistan. Most international funds are channelled to improve security, with a relatively small portion targeting institutional capacity-building and especially the improvement of the situation of vulnerable groups.

There has in recent years been much increased expenditure on law enforcement with a large and better equipped police force. While the Afghan National Army represents the biggest security expenditure at 60 per cent, the National Police and Law Enforcement are a sizeable 28 per cent

¹²²Afghanistan Human Development Report 2007, p. 69.

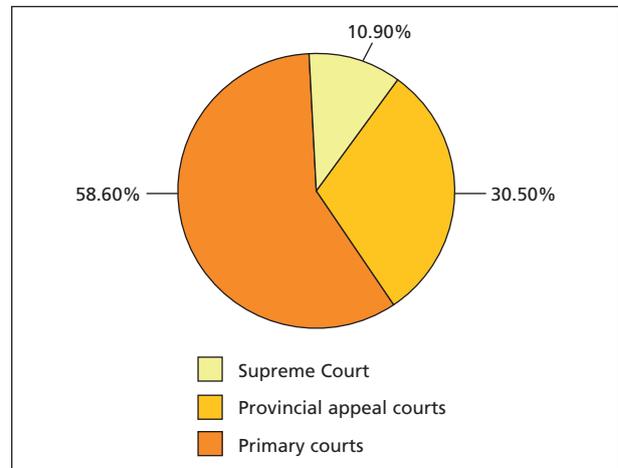
compared to the Ministry of Justice, which includes prisons at 3 per cent.¹²³ The costing projection of I-ANDS Sectors, are \$US 749 million for governance and \$US 2,800 million for security.¹²⁴

Diversion from the penal system, the effective implementation of appropriate sentences and the conditions of detention and imprisonment are inextricably linked to the criminal justice system processes. The increase in imprisonment is related to the quality of work and approaches of the police, prosecutor and courts, as well as to the lack of fair and timely trial procedures.

The judiciary is central to the provision of justice in Afghanistan. The court system consists of the Supreme Court in Kabul, Courts of Appeal in provinces, and Primary Courts at district level. Specialized courts were created to administer particular offences, including those concerning national security, property issues, and narcotics. There is a back-log of 6,000 cases awaiting adjudication.¹²⁵ Although the ratio between detainee and convict is about 50/50, the rate of detainees appears to be on the increase. This is not an unexpected trend as the number of arrests has increased while the capacity of the courts remains virtually unchanged.¹²⁶

The Centre for Policy and Human Development, Kabul University, supported by UNDP, reports that,¹²⁷ according to Supreme Court records, the total number of judges appointed in Afghan courts is 1,415. However, Supreme Court records indicate that there are only 1,384 judges in Afghanistan. Data collected by the CHECCHI Rule of Law Project reveals that the actual number of working judges is 1,107. This discrepancy is explained by the fact that a significant number of judicial positions are currently unfilled. Utilizing the latter number, there are an estimated 21,317 persons per judge in Afghanistan today. The Supreme Court records also indicate that 58.6 per cent of judges work in Urban Primary Courts or District Primary Courts, 30.5 per cent work in Provincial Appeal Courts, and 10.9 per cent work in the Supreme Court.¹²⁸

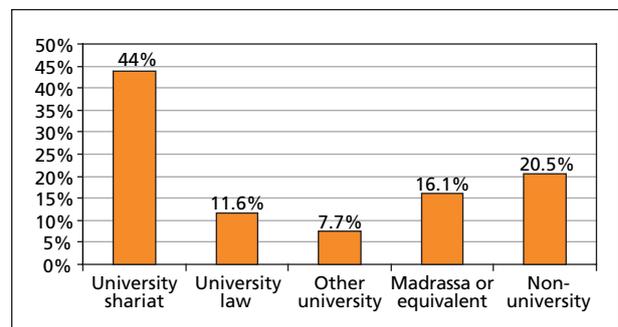
Figure 16. The distribution of judges in Afghanistan



Source: Afghanistan Human Development Report 2007. See figure 4.2, p. 71. Original source: Judges Survey of Training Needs (4 May 2006), the Supreme Court.

According to the same report, a recent survey of 157 judges revealed that 44 per cent of judges had obtained university degrees from a *shariat* (Islamic law) faculty and only 11.6 per cent had obtained university degrees from a law faculty. This indicates that little more than half of the judges surveyed had the relevant formal higher education. Of the judges, 7.7 per cent had a non-legal higher education background and 16.1 per cent were educated in informal educational settings (including madrassas, and private homes). One fifth of the judges (20.5 per cent) had only primary, secondary or high school education.¹²⁹

Figure 17. Judges' level of education



Source: Afghanistan Human Development Report 2007. See figure 4.1, p. 70. Original source: Judges Survey of Training Needs (4 May 2006), the Supreme Court.

¹²³World Bank 2005. Afghanistan Managing Public Finance for Development Report, in *ibid.*, p. 116.

¹²⁴Afghanistan Human Development Report 2007, p. 122.

¹²⁵Afghanistan Human Development Report 2007, *op. cit.*, p. 8.

¹²⁶UNAMA Justice Sector Overview, April 2007, p. 21.

¹²⁷Afghanistan Human Development Report 2007, p. 71.

¹²⁸*Ibid.*

¹²⁹Afghanistan Human Development Report 2007, *op. cit.*, p. 70.

The Constitution and the Interim Criminal Procedure Code provide for legal assistance to indigent defendants, but there are huge gaps in the provision of legal defence. The total number of lawyers registered with the Ministry of Justice is said to be around 250,¹³⁰ and not all provide legal aid. The Supreme Court has a legal aid office but it has been extremely inadequate. A new law—the advocates' law—was passed recently, which removes the legal aid responsibility of the Supreme Court and transfers that responsibility to the MoJ. It will take time for MoJ to be able to implement that law. Some donor organizations are working with MoJ on organizing legal aid. Until that happens most legal aid will be provided by private organizations and NGOs. Indeed, the last two years have seen the expansion of the outreach of a number internationally funded NGO legal aid providers. These include the International Legal Foundation (ILF), Da Qanoon Ghushtonky, Legal Aid Organization of Afghanistan, Medica Mondiale and the Afghan Women Judges Association. Nevertheless, detainees in most parts of the country rarely have access to legal representation.

The role of legal aid is not widely understood or appreciated, even among members of the legal community.¹³¹ There were reports that the judiciary and sometimes prosecutors obstructed defence lawyers.¹³² The absence of sufficient lawyers and obstruction of lawyers that do practice is severely hampering the effective implementation of new laws.

Despite these challenges UNAMA field officers and ILF report that in provinces where NGO legal aid providers are active there has been a significant improvement in the application of constitutional and legal principles and a reduction in the incidence of arbitrary detention.¹³³ Da Qanoon Ghushtonky,

reports, for example, that from 2006 to the time of writing they have covered 4,000 criminal cases. Fifty per cent were released. Sixteen per cent were convicted, but 80 per cent of them having received a much lesser sentence than they almost certainly would have done if they had not had a lawyer. Other cases were in progress. When provided with legal representation, sometimes people sentenced to the death penalty at the primary court level were released or received very short prison terms at the final stage.¹³⁴ Da Qanoon Ghushtonky also reports that there are now many requests from judges and prosecutors for defence lawyers. The Chief Judge of Herat is reported to have said that they were very pleased with the increase in defence lawyers, as it made their work easier and their own legal knowledge had improved.¹³⁵ Da Qanoon Ghushtonky also has a paralegal aid programme. The programme trains the legal department of MoWA, Legal Aid department of MoJ, Women's NGOs, teachers, prison wardens and doctors. They provide basic legal information. Last year they trained around 76 people. This year so far they trained 23 people. They invited trainees from areas where there were no defence lawyers.¹³⁶

Thus some NGOs are providing a very important service in the absence of adequate State-funded legal aid programmes. Nevertheless the provision is extremely insufficient at the current time.

The key role of judges and lawyers in the successful introduction and application of non-custodial measures and sanctions, and the immense capacity-building and training requirements of judges, prosecutors and lawyers, should be taken into account in strategies aiming to increase the use of alternatives to prison.

¹³⁰UNODC, *Female Prisoners and their Social Reintegration*, p. 28.

¹³¹Afghanistan Human Development Report 2007, p. 78.

¹³²Although the criminal procedure code specifies that the defence should be notified prior to trial, in practice, lawyers are given little or sometimes no notice of the hearing. Courts sometimes conduct hearings at prisons without notifying the lawyer. UNAMA Justice Overview, April 2007, p. 18.

¹³³UNAMA Justice Overview, April 2007, p. 18.

¹³⁴Interview, Ms Frishta Karimi, Director and Mr Najibullah Azizi, Deputy Director, Da Qanoon Ghushtonky, 9 December 2007.

¹³⁵Ibid.

¹³⁶Ibid.

Penal Reform International (PRI) in their study on "Good Practices in Providing Legal Aid in the Criminal Justice System"^a describes legal aid in line with the Lilongwe Declaration, adopted by the African Commission on Human and Peoples Rights at its 40th Session in 2006^b as broadly as possible to include: legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions. UNODC has supported PRI in establishing training courses for para-legals to work in post-conflict countries where the critical inhibiting absence of legal professionals contributes to the appalling levels of pre-trial detention, with the specific mandate to work in prison to accelerate the processing of the backlog of cases.

^awww.penalreform.org

^bThe United Nations Commission on Crime Prevention and Criminal Justice and the Economic and Social Council (ECOSOC) have adopted resolutions on international cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa, which make specific reference to the Lilongwe Declaration. Operative paragraph five of both resolutions specifically asks, . . . *the United Nations Office on Drugs and Crime, subject to extra-budgetary resources and in cooperation with the African Institute for the Prevention of Crime and the Treatment of Offenders, to assist African States, upon request, in their efforts at applying the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.*

6.2 Prisons

As of October 2006 the official prison capacity was calculated as 7,421 at which time there were 7,706 recorded prisoners and detainees in Afghanistan, excluding the Kabul detention centres.¹³⁷

Detailed figures from UNODC put the total number of known male and female prisoners and detainees as of 30 October 2007 at 10,604.¹³⁸ The most recent figure provided for December was a prison

population of 12,400.¹³⁹ Well informed anecdotal information reports prison overcrowding to be as high as 1,000 per cent in some cases. In November 2006, the CPD reported that they were unable to provide indoor sleeping accommodation for nearly 1,000 prisoners in eleven of their facilities.¹⁴⁰

According to most accounts, existing prisons legislation is not followed, as in many other areas of the criminal justice system as well, though the situation is said to have improved somewhat in recent times according to AIHRC.¹⁴¹

Detainees should be transferred to prison after 30 days, with an indictment having been submitted to the court by the prosecutor, or released (ICPC, articles 6 and 36). However, in practice detention during the pre-trial period is often extended, without any legal basis. Although, according to article 20 (4) of the Law on Prisons and Detention Houses, the prison authorities can initiate the release of a prisoner after the nine months maximum period in prison (in addition to the initial one month in pre-trial detention) has elapsed, interviews indicated that prison authorities refused to release detainees, unless a written order was received from the prosecutor.

The vast majority of the prison infrastructure is reported as appalling. The MoJ does not own all prisons and some are in rented accommodation in which they will not invest. In some cases the inadequate structures, i.e. weak mud walls, were identified as a reason for shackling prisoners to stop escape. Education, vocational training and other rehabilitative programmes are lacking in the overwhelming majority of prisons. UNODC has introduced such activities in women's prisons in Kabul and provinces, as mentioned earlier, and it was reported that following the Memorandum of Understanding signed between the MoJ and Ministry of Education, teachers had started to provide basic literacy classes in some prisons.¹⁴²

¹³⁹This figure is broadly in line with Central Prison Dept. and international agencies working closely on prison issues in Afghanistan.

¹⁴⁰Afghanistan Human Development Report 2007, p. 78.

¹⁴¹Meeting with Dr Soraya Sobhrang and Ms Hangama Anwari, AIHRC, 18 December 2007.

¹⁴²Meeting with Bob Gibson and Michael Runnels, CSSP, 10 December 2007.

¹³⁷Central Prison Department 2006.

¹³⁸UNODC Kabul 2007.

Some of the key prison facility constraints identified in 2003 are reported as still prevalent in 2007.¹⁴³ These include, amongst other things, lack of space for prisoners in cells, lack of secure exercise areas, inadequate sanitation facilities, inadequate heating, no area for education or vocational training and poor medical facilities.

The authors were informed that corruption was often an integral feature of prison life and at all stages in the criminal justice process.¹⁴⁴ People entering the system are at risk of becoming economic commodities for the enrichment of those who possess formal and informal power. Accused and sentenced are passed through the system and at each stage are vulnerable to corrupt practices, where bribes are a major mechanism for their transition from stage to stage.

Prisoners are forced to use coping mechanisms that are founded in bribery or coercion. Privileges such as better food, longer family visits and relatively better places of detention can be bought. Though the poorest have little opportunity to avail themselves of these mechanisms and this was identified as one of the main reasons for riots in Pul-e Charki.¹⁴⁵

Public perception surveys indicate that Afghans perceive the courts as among the most corrupt institutions in Afghanistan.¹⁴⁶

In both male and female prisons there are child dependents living with imprisoned parents, though much less so in the former. There is some additional provision for children with women from the NGO

community, though none was reported for dependent children living in the male prison.

There are ambitious prison refurbishment and construction plans for all provinces of Afghanistan which would give a total prison capacity of 27,000 with 10,000 held in Pul-e Charki (current capacity 3,000) alone.

Current prison construction and rehabilitation activities^a

Construction of the new closed women's facility in Kabul was very close to finalization at the time of writing and the closed juvenile reformatory was completed, though the juveniles held in the current rehabilitation centre had not yet been transferred to the new facility. These projects are being carried out by UNODC and funded by the Italian Government. UNICEF had finalized the construction of a new, open juvenile facility on the same site.

As part of the Government's Anti Narcotics Strategy the Governments of the United Kingdom, Canada and Belgium are funding the construction of a High Maximum Security Unit (HMSU) by UNODC at Pul-e Charki Prison for high-profile drug offenders. This facility had become operational at the time of writing. In addition, also in support of the Government's Anti Narcotics Strategy, the United States Government had commenced construction of a new court and detention facility for high profile drug offenders in Kabul.

UNODC, with funding from the Italian Government is also constructing a new provincial prison facility in Gardez, which will accommodate 210 prisoners, with separate facilities for 50 women. It is expected to be completed by the end of 2008.^b

The Canadian Government through their Global Peace and Security Fund (GPSF) is undertaking construction, infrastructure and training at Sarpoza Prison in Kandahar.

The Dutch Government has expressed an interest in constructing a prison in Tirin Kot in Uruzgan Province as have the British in Helmand province.

¹⁴³UNODC and UNOPS—prison construction and rehabilitation findings and recommendations, 2007.

¹⁴⁴One systemic cause of corruption in Afghanistan is the low pay. It is commonly understood that justice officials supplement their salary, either through alternate employment or bribery. The decimation of government revenue sources has made this problem more acute. Judges and prosecutors earn as little as \$US 40 per month and must also pay for accommodation and transportation. Many positions must be bought with bribes, so officials need to supplement their incomes in order to recover their "investment" costs. The lack of transparent and merit-based appointment, promotion, and transfer mechanisms further fuels corruption. UNAMA Justice Overview April 2007, p. 34.

¹⁴⁵The other main reason being continued detention, beyond the completion of the prison terms.

¹⁴⁶Afghanistan Human Development Report 2007, p. 8, (a survey conducted in 2005 found that 76 per cent of people perceive corruption as high in the judiciary).

The United States Corrections System Support Program (CSSP) plan to build a prison in Wardak, but have been unable to make progress due to the security situation.

Various infrastructure repair and maintenance activities continue to be carried out by ICRC and Provincial Reconstruction Teams (PRTs) throughout the country. These are, however, primarily emergency solutions and do not sufficiently address the broader need for full-scale construction and rehabilitation of prisons in the country that is so urgently needed.

The progress on prison construction is said to be far behind meeting the Afghan Compact benchmark of having functioning prisons, with separate facilities for men, women and children, by 2010.

^aUNAMA Justice Overview April 2007, p. 23, UNODC and CSSP.

^bUnited Nations Office of Project Services, Prison and detention centre rehabilitation and construction programme, August 2005-2008, Afghanistan, and information from UNODC. According to recent information, a prison which was planned to be built in Mazar-e Sharif, with separate facilities for women and children is unlikely to go ahead due to the lack of a water source in the prison vicinity.

The authors were given a range of information concerning the financial situation of CPD. It was reported that in 2007 CPD requested \$US 15,173,882 from the Ministry of Finance and was awarded \$US 8,790,000 for recurrent costs.¹⁴⁷

The figure provided by CSSP for CPD calculates at about \$US 708 per prisoner per annum to incarcerate against a referred cost of \$US 1,223 per prison per annum,¹⁴⁸ if the prison population figure is taken as 12,400.

Another calculation is what the Ministry of Justice, Prison Services allocates to feed each prisoner, which is \$US 1.00 per person per day.¹⁴⁹ While for juveniles the figure was \$US 0.80 per person per day until recently, it was increased to \$US 1.00 per person.¹⁵⁰

¹⁴⁷Meeting Bob Gibson and Mike Runnels, CSSP, Kabul December 2007.

¹⁴⁸Per capita income is \$US 335, UNDP, 2006.

¹⁴⁹UNODC Kabul 2007.

¹⁵⁰Mr. Moqbel Acting Director of JDC-Kabul, 2007.

The Ministry of Public Health spends on the Basic Package of Health Services¹⁵¹ \$US 5-6 per capita per year.¹⁵²

The Ministry of Education spends \$US 75 per student per year.¹⁵³

Government expenditure can also be compared through ordinary and development budgets of education on health care and social services.¹⁵⁴

Budget figures 2007/2008

(Figures are in millions of United States dollars)^a

	Ordinary budget	Development budget
Ministry of Justice	13.28	0 ^b
Ministry of Women's Affairs	1.92	0.82
Ministry of Labour, Social Affairs, Martyrs and Disabled	8.98	9.55
Ministry of Public Health	27.92	77.84

^aUp to March 2008. Budget document/Ministry of Finance, Government of Afghanistan, provided by UNODC Kabul. Please note that at present, nearly three quarters of donor assistance is disbursed and delivered outside the Government budget, so these figures would not include much of the expenditure made by donors (see Afghanistan Human Development Report 2007, p. 31).

^bIn 2006 MoJ was allocated a total of 3 million for its development budget. Since the MoJ could not develop projects for this 3 million, it was not allocated development budget for 2007. However, the MoJ has been proposed an allocation of 6 million for its 2008 development budget, starting 21 March. (UNODC, Kabul).

Although the range of figures and the different interpretation on budgeting make accurate comparisons difficult, they give an indication of the cost of imprisonment.

The Ministry of Justice appears to spend \$US 708 per year per prisoner, for recurrent costs, of which \$US 365 is for food, on incarcerating large swathes of the poorest people in Afghanistan, many of whom are in pre-trial detention and therefore presumed

¹⁵¹The Government's Basic Package of Health Services (BPHS) introduced in 2003, is now essentially the basis for the primary care system in Afghanistan. (Afghanistan Human Development Report 2007, p. 27).

¹⁵²Dr. Pakzad, Policy and Budget Department MoPH.

¹⁵³Mr. Noor-ul-Haq Farid Budget Management Department MoE.

¹⁵⁴Ordinary covers the running/operational cost for a government organization including salaries. Development budget means for development activities/projects such training, building infrastructure, etc.

innocent, with the resulting, often irretrievable damage done to health, educational, social and economic status. Thus the cumulative cost of imprisonment is even higher. These funds are not even enough however to ensure that the basic needs of prisoners are provided for and the harmful effects of imprisonment reduced. The principle of social reintegration for most prisoners in Afghanistan is an abstract concept at the current time.

A country as poor as Afghanistan can ill afford to pay so much to deepen the impoverishment of its citizens and increase the burden on its under-resourced and overstretched health services. Alternative ways of dealing with offenders should therefore be emphasized and used as a key option.

6.2.1 Health in prisons

The Law on Prisons and Detention Centres of 2005 has limited detail concerning the health services, though it provides for close cooperation with the Ministry of Public Health (MoPH), which is a member of the Supreme Council of Prisons and Detention Centres.¹⁵⁵

The draft prison regulations¹⁵⁶ make very little in the way of recommendations on health services, though broader regulations impact on health. They make no specific statements on mental health or drugs treatment.

In prison access to health care is a real problem. There is a lack of qualified medical staff and untrained guards can be promoted to significant medical roles. It was reported that in 23 provinces there were no medical staff.¹⁵⁷ While there is an identified function for the MoPH, this, consistent with the under resourced and overstretched Ministry is very limited inside prisons. Both the law and regulations lack specificity on the precise nature and arrangements between the MoJ and MoPH. A Memorandum of Understanding had been signed between the two ministries, but there was still a lack of clarity as to the financial responsibilities of each

¹⁵⁵Article 13, Law on Prisons and Detention Centres.

¹⁵⁶Submitted for review by the Taqin at the end of 2007.

¹⁵⁷General Abdul Salam Ismat, General Director, CPD, Kabul, December 2007.

Law on Prisons and Detention Centres

Article 27:

1. In collaboration with the Ministry of Health, the administrations of detention centres and prisons are required to provide the detainees and prisoners with free health services.
2. If the treatment of an ailing detainee or prisoner is not possible at the health clinic of a detention centre or prison, the head of the detention centre or the prison can transfer the patient to a hospital outside the detention centre or prison on the basis of the recommendation of the doctor-in-charge. The head of the detention centre or prison shall inform the concerned attorney's office of his action in this respect. With coordination and assistance of chief of police, the head of the detention centre or the prison is responsible to take precautionary measures to ensure security of the prisoners.
3. In order to observe the sanitary and hygienic rules and regulations, the doctor-in-charge is required to control the daily food provided for detainees and prisoners and inspect at least twice a week their cells and other services provided for them.
4. The prisoners and detainees who have infectious diseases or those who are dubious of having health problems are kept in special area separated from others in quarantine.

ministry.¹⁵⁸ It would be important to determine whether the MoPH includes the needs of prisoners in its budget at all and whether the Consultative Group for the health sector includes prisons in its policy development (see also section 9 for more about the key requirement for cooperation across sectors).

In practice, in some provinces, MoPH is said to provide mobile health clinics. It was suggested the CPD would like to develop its own health services and keep the provision under its control. Currently the CPD medical department is under performing to a very serious degree. The authors were informed of

¹⁵⁸Meeting with Bob Gibson and Michael Runnels, CSSP, 10 December 2007.

incidents where prisons procured, or were supplied with, medicines that were not relevant to the prisoner population.

It is of vital importance to have full time professional health staff and services in prisons in line with the United Nations Standard Minimum Rules. However, as discussed later, prison health is also a public health issue, and the joined up treatment for prisoners, the majority of whom become ex-prisoners, and can be infected with highly contagious diseases such as TB and multi-drug resistant TB (MDR-TB), requires prison health services to be integrated into (or collaborate closely with) public health services. The dangerously inadequate health care will further deteriorate with inter-Ministry jockeying for position and resources, with a lack of cooperation a key strategy in gaining ascendancy.

Mental health in prisons

The lack of general health care and services in prison is all too keenly experienced in the provision of mental health services. While some “care” is provided by detainees, any case that is too difficult leads to abandonment and prisoners with serious mental health issues are left without any care or support.¹⁵⁹ Prison staff are ill-equipped or unwilling to deal with prisoners with mental illness. The ICRC has tried to find alternative arrangements for very serious cases though face the problem that they cannot find clinics outside prison, except private clinics which cost per day what a very well paid Afghan would earn per month, while conditions and treatment in the mental health hospital in Kabul is said to be extremely poor (see section 8.1). It was reported that prison directors are reluctant to let prisoners attend mental health facilities, as they feel they will be held responsible for any incidents or that the family/community of the victim will be concerned that justice had not been done.

The NGO Medica Mondiale works with female prisoners with mental health problems. They have been working in Pul-e Charki Prison since 2002 where they make two visits per month or if there is a severe risk, they make exceptional visits. They have two

¹⁵⁹Meeting with Karine Benyahia, ICRC, Kabul December 2007.

psychologists and six counsellors and provide group and individual counselling.¹⁶⁰ They also run occupational therapy sessions in Pul-e Charki, and provide basic counselling training to other NGOs, doctors, midwives and sensitivity training to prison staff, who Medica Mondiale report, often demonstrate harsh relationships with the prisoners. The Medica Mondiale psychosocial team also visits Welayat Kabul detention centre once every two months, but this was said to be insufficient. The NGO Emergency has been providing a psychiatrist as well, but was not going regularly to prisons.

In prison they see many who are victims of trauma including domestic and sexual violence and abuse. While admission to prison with mental health problems is common, they also see separation from families, the lack of certainty of the outcome of the judicial process and often being held beyond end of sentences as some of the key elements that contribute to the poor mental health situation in prisons. Mental problems are exacerbated by non-release, the illegal custom of demands for “fines” and “guarantees” or bribes, in order to be released, even when the sentence is completed. Medica Mondiale informed the authors that in prison, there is no professional diagnosis and mental health issues are usually treated with inappropriate medication, including paracetamol or antibiotics.

From all the interviews during the mission there were no reports of national NGOs providing mental health care inside the male prison.

Drug use and treatment inside prisons

All indicators suggest that drug dependency is increasing in Afghanistan and that Afghans are more vulnerable to becoming addicts because of over 25 years of war, conflict, social disruption and the resulting chronic mental health problems.¹⁶¹ In 2005 there was reported to be nearly one million drug users in Afghanistan.¹⁶² The Drug Demand Reduction Action Team (DRAT), working under the Drug Demand

¹⁶⁰Meeting with Ms Humaira Ameer Rasuli, Medica Mondiale, Kabul December 2007.

¹⁶¹DRAT activity report, Drug Demand Reduction Directorate, Kabul DRAT, September 2007.

¹⁶²Afghanistan Drug Use Survey, UNODC 2005.

Reduction Directorate of the Ministry of Public Health, and supported by UNODC, has been providing services in Pul-e Charki prison. As of September 2007, they had treated 189 addicts. 148 cases were successful. A drug dependency treatment clinic was being established for the treatment of prisoners in Pul-e Charki prison by UNODC, but was not yet functional at the time of the assessment mission. UNODC is also planning to establish further rehabilitation clinics and programmes in provincial prisons, following a comprehensive drug use survey to be conducted among prisoners, as mentioned earlier, as part of the AFG/R87 project.

The DRAT team in Kabul is made up of three social workers, one psychologist and one psychiatrist, that complements the CPD team of 17 staff including three physicians.¹⁶³ According to CPD records, in Pul-e Charki there are 450 registered addicts (heroin and opium), six of them women from the total female prison population of 94. However they estimate that the number of drug users is much higher. For example in Block 2, which holds approximately 1,100 prisoners, there may be more than 800 addicts (300 heroin and 500 opium) but only 58 were registered.¹⁶⁴ In prison there is little known intravenous drug use, and consistent with practice in the community, smoking or occasional eating is the most common form of consumption.¹⁶⁵ Dependency often starts in prison, though there is also very widespread use outside prison, in particular among those who are returned refugees from Iran and Pakistan.¹⁶⁶

Opium and heroin are widely available in prison, and available at no cost for first-time users. When payment is required, a gram of heroin in prison costs about Af 2,000 compared to Af 250 outside of prison. Those who control this business inside prisons clearly have a very significant vested interest to counter demand reduction.

¹⁶³Afghanistan Drug Use Survey, UNODC 2005.

¹⁶⁴Those who have not registered are those who do not want to undertake treatment or may not be aware of the availability of treatment.

¹⁶⁵While the UNODC drugs survey reports that in the community injecting drugs accounts for only 14 per cent and 16 per cent of the heroin and pharmaceutical drug use, it reports that needle sharing is common and drug injection is reported to be on the increase.

¹⁶⁶Afghanistan Drug Use Survey, UNODC 2005.

DRAT programmes are based on motivation and then detoxification but the general experience is that when prisoners go back to blocks they restart use. DRAT lists the challenges faced as follows:¹⁶⁷

- Limited medical staff;
- Poor cooperation between the prison and DRAT authorities in Kabul;
- Poor cooperation with the transport department of MoPH with Kabul DRAT;
- Higher number of addicts in prison than reported;
- Lack of demand reduction and harm reduction activities in the prison.

As prisons are simply reflecting the power and support structures in society, there is a degree of “care” for drug addicted prisoners from fellow prisoners in the main cells. Authors were told that recently prison directors were trying to create separate wards for drug addicted prisoners. It was reported that when drug dependent prisoners are accommodated together, in the absence of formal or informal supervision, they are simply too fragile to care for each other. Drugs are still available and conditions can be worse.

6.2.2 Women in prison

Of the 10,604 prisoners held in Afghanistan’s prisons as at October 2007, 304 were women. The most detailed and thorough assessment of women in prison is provided in the 2007 research: UNODC, Afghanistan Female Prisoners and their Social Reintegration, which reports the number of female prisoners, to be 250 in December 2006, which is relatively small, representing 4 per cent of the total prison population.¹⁶⁸ However, more tellingly, the number of women in prison has also increased over the past three years, from 86 in December 2004 to the current figure, which constitutes a rise of 3.5 times.

¹⁶⁷DRAT activity report Drug Demand Reduction Directorate, Kabul DRAT, September 2007.

¹⁶⁸UNODC, Female Prisoners and their Social Reintegration, op. cit. p. 5.

The inadequate and damaging conditions of imprisonment for Afghan citizens are even more distressing and harmful for women, who are subject already to intense social injustice. Forcing women into the criminal justice system further marginalizes and harms them. While prison in some cases may provide a safer haven for those who have contravened moral laws, the “security” provided by imprisonment, should not be justification for the unnecessary and deeply damaging imprisonment and overuse of the criminal justice system.

The compounding of stigma that imprisonment brings can undermine completely the assertion that rehabilitation and reintegration are the purpose of imprisonment.¹⁶⁹ In the more conservative areas, such as the southern and eastern regions of Afghanistan, where “honour killings” represent a particular risk,¹⁷⁰ there is little hope of reintegration on release and sometimes women have no option but to stay in prison, especially in light of the inadequate facilities for women released from prison.¹⁷¹

Health services for pregnant, breast-feeding mothers and small children were reported as extremely inadequate. In December 2006 it was reported that a female gynaecologist working for AWEC had been visiting prisoners in Pul-e Charki once a month.¹⁷² The NGO, Emergency, also provided medical care to male and female prisoners in Pul-e Charki, with a 24-hour medical service available to prisoners. AWEC and Emergency supplemented the diet of pregnant women and breast-feeding mothers. In December 2006 AIHRC expressed concern regarding

the arrangements for childbirth. Hospitals apparently did not send doctors to prisons for delivery and they did not always accept women from prison for childbirth in hospitals.¹⁷³

Article 56 of the Law on Prisons and Detention Centres allows mothers to keep their children with them in prison up to the age of three, and the prison administration is obliged to provide such children with adequate facilities. The government undertakes the establishment of nurseries for children over the age of three, adjacent to the prison. However, as such nurseries are not available at the current time, most women prefer to keep their children with them beyond the age of three. The mothers state that relatives of most are unable or unwilling to care for the children; some children’s security would be at risk if separated from their mothers, due to family disputes, and placement in orphanages poses other problems. The authors were advised that in Kabul there were 67 dependent children at the time of writing.¹⁷⁴ There is considerable debate about the best place for the dependents, with conditions in orphanages reported as often appalling, and prisons, mainly because of association with prisoners, described as unfit places to bring up children. The experience during the visit was that the children were interacting with their mothers in a relatively normal way.¹⁷⁵ Although the prison environment is not suited for the upbringing of children, given the limited and questionable alternative care arrangements outside prison and security concerns for some children, the current arrangement appears to be in the best interest of most of the children and their mothers for the time being. However, a strategy will need to be developed and resources allocated to deal with the developmental, emotional and educational needs of children in a more satisfactory manner in future.¹⁷⁶ In parallel there needs to be

¹⁶⁹The Law on Prisons and Detention Centers, states in article 1 (i) This law has been enacted to ensure the rights of detainees and prisoners in the detention centers and prisons. (ii) The application of a sentence order in the prisons takes place only to prepare the prisoners to abide by the laws and social and moral standards of living, to do the beneficial social work and not commit crimes again.

¹⁷⁰UNAMA regularly receives reports of alleged honour killings. These are also not effectively investigated or prosecuted by the authorities. Article 398 of the Penal Code exempts from punishment for murder anyone found guilty of killing their spouse or other close relative for adultery and provides only for a maximum sentence of two years’ imprisonment. UNAMA Justice Overview April 2007, p. 27.

¹⁷¹There are six existing shelters in the country (four in Kabul). However, due to limited capacity, they prefer not to accommodate women who have served time in prison on the pretext of possible bad influence on the other residents of the shelters. UNAMA Justice Overview April 2007, p. 25.

¹⁷²UNODC, *Female Prisoners and their Social Reintegration*, p. 38.

¹⁷³UNODC, *Female Prisoners and their Social Reintegration*, p. 38.

¹⁷⁴Meeting with Najia Haneefi AWEC Kabul December 2007.

¹⁷⁵A brief visit to Pul-e Charki female prison was made during a certificate award ceremony for prisoners, which clearly was not the usual circumstances nor lengthy enough to make a full and informed assessment of the life of dependents in prison, though on previous visits one of the authors had gained a similar impression.

¹⁷⁶The new facilities for women and women with children being constructed in Kabul by UNODC will provide a valuable opportunity to address this issue.

legislation to prevent such large numbers of women with children and pregnant women being imprisoned (see section 10.15, for recommendations).

There is a more active civil society involvement in the female prisons compared to male prisons. Educational and skills training activities in women's prisons were being undertaken by local NGOs, many of which were supported by UNODC. In addition to Kabul, educational and skills training activities were being conducted and/or planned in Balkh, Herat and Kandahar by NGOs subcontracted by UNODC.¹⁷⁷

6.2.3 Juveniles

While there is considerable support for juvenile justice reforms and development in Afghanistan, a child rights agenda and philosophy in line with international principles is fairly new.

The new Afghan Juvenile Code adopted in 2005 incorporated many CRC standards and the age of criminal responsibility for juveniles was raised from 7 to 12 years old. A child is no longer allowed to be detained in the same lock-up as adults and must be granted the right of a defence counsel and interpreter once detained. The trial of a juvenile offence shall be conducted by a juvenile court which shall be established in all provincial capitals.¹⁷⁸

A new regulation organizing the structure and procedures of the Juvenile Justice Administration Department within the Ministry of Justice requires children suspected, accused, or sentenced to be detained only in juvenile rehabilitation centres.¹⁷⁹ The juvenile code speaks specifically of juvenile rehabilitation and social service institutions in article 35, and explicitly states in article 10.4 that children shall be kept separately from adults and further in article 12 that there should be range of specialist and appropriate health, social and educational services for detained children.

However, the justice system for juveniles, who allegedly commit crimes, is largely non-existent, especially in provinces. This leaves most of such children—in violation of both the provision of the new Juvenile Code, adopted in early 2005, and the principles of the United Nations Convention on the Rights of the Child to which Afghanistan is a party—subject to the same criminal laws and penalties as adults. Children as young as 10 years old are still arrested and imprisoned in Afghanistan¹⁸⁰ for minor crimes such as theft, and once arrested, they are sometimes detained with adults in prison. Many of these children go through the justice system without having proper legal representation. Currently in Kabul all male juveniles aged 12-18 of all nature of charges and sentences are detained in the one unit. Separate juvenile facilities countrywide are still virtually absent.¹⁸¹ In Kabul at the time of writing 128 children were reported to be in the current rehabilitation centre, which is a privately owned house, rented by the MoJ, with capacity for 60 children.¹⁸² The remaining juveniles in the provinces are detained in adult prisons. There are two new juvenile detention centres in Kabul, one closed and one open, the latter being for juveniles who will attend only during the day. The open centre was constructed by UNICEF and the closed one by UNODC, both with funding from the Italian Government. These are virtually completed and the transfer of juveniles was rumoured as imminent during the mission. There were some unanswered questions about the selection and categorization process of the juveniles to be transferred to the two centres, and practical concerns about logistical arrangements for juveniles attending the open centre. Concerns were also expressed as to the adequacy of the support required for the open centre to operate as intended.¹⁸³ For example it was noted that there was no transport foreseen to take prisoners to their homes each evening.¹⁸⁴

¹⁷⁷Funding for these projects was provided by the Austrian Development Agency, under the UNODC project "Developing Post-release Opportunities for Women and Girl Prisoners".

¹⁷⁸UNAMA Justice Overview April 2007, p. 28.

¹⁷⁹Afghanistan Human Development Report 2007, p. 59.

¹⁸⁰Figures from October 2007 report 455 juvenile prisoners of which 42 are females, with a known age range of 10 to 22 years.

¹⁸¹There is currently one juvenile rehabilitation centre in all 34 provinces throughout Afghanistan. Centres in Logar, Panjir, Nooristan and Zabul are still not operational, UNDP Human Development Report 2007, p. 59.

¹⁸²Figures from UNODC Kabul, 2007.

¹⁸³Meeting with Ms Marzia Basel, Director Afghan Women's Judges Association, 16 December 2007.

¹⁸⁴Ibid.

Afghanistan: Implementing Alternatives to Imprisonment

Nevertheless the open centre for juveniles represents a first step towards an “alternative” for children in conflict with the law and the only facility which can provide an alternative at the current time.

There is currently a review being conducted by the Italian Justice Office (IJO) and Legal Aid Organisation of Afghanistan (LAOA) of all cases of minors in the current rehabilitation centre.¹⁸⁵ The LAOA is providing defence lawyers for juveniles and their records give an indication of the profile of juvenile detention population in Kabul, as well as how the imprisonment of the children in conflict with the law can be reduced, when they have access to legal counsel. Of the 88 cases taken up some were released as charges were withdrawn, in some sentence were reduced and 30-40 cases were still ongoing. UNICEF had signed a contract with LAOA to undertake the same in provinces in 2008.¹⁸⁶

Juveniles are subject to the same, (but much intensified) and additional pressures and risks in the justice system as adults. They are forced to adapt to the distorted system of guarantees to secure progress through the criminal justice system and also release. But they are even more vulnerable as they have no resources. Any “guarantees” have to be provided by parents can take the form of property or land rights, particularly at the time of release. This practice is in fact illegal and LAOA had helped resolve the problem in Kabul. In November 2007 the prosecutor had issued an instruction stating that there was no need for a guarantee for the children to be released.

There is an additional and very real problem for girls who are released. Families are ashamed of the perception of their conduct. As a consequence girls are at serious risk on release. There are no risk reduction structures after release and LAOA asked for visits to families to broker the release but these are usually refused.

¹⁸⁵Meeting with Ms Veronique Marissiaux, Legal Adviser, Embassy of Italy, 13 December 2007.

¹⁸⁶Ibid.

Social and health consequences of prisons

In considering the damage caused by overuse of imprisonment and the extremely poor prison conditions for all the prison population, it is important to sketch the risks posed to prisoners, prison staff and the public. Beyond the individual damage, the costs of overuse of imprisonment to the fifth poorest country in the world are wider societal and health consequences as Afghanistan strives towards its Millennium Development Goals.

There is a clear link between the effects of imprisonment and poverty. Young, disenfranchised, unemployed, poor men with low educational attainment are vastly over-represented in prisons across the world. Penal Reform International and the African Centre for Democracy and Human Rights (The Gambia) in 1999¹⁸⁷ conducted a number of country studies in Cape Verde, Côte d'Ivoire, Egypt, Gambia, Senegal and South Africa. In all the countries studied, the majority of those in prison come from very poor backgrounds, often having received little education. Only a fairly small proportion of prisoners had regular, paid employment at the time they committed their offences. The coping strategies of the poor are criminalized and as a result it is even harder for them to break the cycle of poverty.

When released, often with no skills, money or prospects for employment, they are generally subject to socio-economic exclusion and are thus vulnerable to an endless cycle of poverty, marginalization, criminality and imprisonment. Increased levels of societal intolerance also means the poorest and most vulnerable people (including women and accompanying children, juveniles, drug users, individuals with mental healthcare needs) are more susceptible to arrest leading to abuse and discrimination within the criminal justice system.

The impact of imprisonment falls not simply on the prisoner but also on the prisoner's family. The removal of a wage provider can have a devastating effect on the family, sometimes compounded by that family's need to then provide food for the prisoner where the prison is failing to do so. Unjust and unnecessary imprisonment contributes directly to the impoverishment of the prisoner, of his family (with a significant cross-generational effect) and of society by creating future victims and reducing future potential economic performance.

The profile of prisoners interviewed in Kabul in December 2007, correspond to these findings. Moreover, there is an intensified problem in Afghanistan for families to be in a position to take care of themselves without the male income provider, as women have very limited opportunities for employment, and especially employment that is adequately paid. For example, among the 27 prisoners interviewed in Kabul, only one said that his wife was employed, while all others were being cared for by their own fathers, members of the extended family or their sons, putting pressure on the economic circumstances of their relatives and extended families, no doubt themselves living in poverty.

¹⁸⁷www.penalreform.org.

Prisons also have very serious health implications. In most countries, the prevalence of HIV infection in prisons is significantly higher than within the population outside of prison. Penal Reform International¹⁸⁸ reports that in Central Asia, an estimated one third of people living with HIV/AIDS are in prison; in Kyrgyzstan the figure is thought to be as high as 56 per cent. In Europe 20 per cent of Poland's 7,000 infected people have spent time in prison or pre-trial detention facilities during their lives while in Latvia, one-fifth of the HIV cases concern people in prison. In South Africa, it is estimated that as much as 45.2 per cent of the prison population is living with HIV/AIDS; HIV prevalence is thought to be more than twice the rate of prevalence amongst the same age and gender in the general population.¹⁸⁹

In Tangerang Youth Penitentiary, Indonesia, 50 deaths from HIV-related infections were recorded in 2006. This was set to increase dramatically in 2007 with the Director General of correctional institutions at the Justice and Human Rights Ministry revealing in December 2007 that 72.5 per cent of deaths last year in prison were caused by infections including high fever, tuberculosis, pneumonia, hepatitis, diarrhoea and thrush all of which were related to HIV/AIDS. Of the 116,000 people serving jail terms in more than 300 penitentiaries and prisons nationwide, 32,000 were imprisoned for drug cases. Seventy per cent of those convicted in drug cases were drug users and the rapid spread of HIV behind bars is mostly blamed on rampant drug abuse and unprotected sex.¹⁹⁰

A recent study undertaken in India¹⁹¹ also found that HIV prevalence to be much higher in prisons than in the community. 83.4 per cent of drug users in prison tested positive for HIV, while 45.5 per cent had hepatitis C, 36.4 per cent had STDs and 18.2 per cent had TB. The report suggests that governments,

rather than forcing drug users into prisons, could give offenders the option of being referred to drug treatment, as imprisonment simply exacerbated the problem.

Goyer's¹⁹² analysis of South African prisons is that inside prison, high risk behaviours for transmitting HIV include homosexual activity, intravenous drug use, and the use of contaminated cutting instruments. These are compounded by overcrowding, stress and malnutrition which negatively affect the overall health of all inmates, and particularly those living with HIV or AIDS. A weak or abusive prison department that ignores or seeks to use the informal power groups inside the prisoner community that in turn use violent coercion in an environment of scarcity of goods does further damage and increases risk.

WHO¹⁹³ reports that to date in Afghanistan, 245 HIV cases have been reported, but estimates that there could be between 1,000 and 2,000 Afghans living with HIV. They further identify that Afghanistan's emerging epidemic is likely to be fuelled through a combination of injecting drug use and unsafe paid sex. They use details from a 2006 study, which states three per cent of IDUs in Kabul were HIV positive. Almost one third of the IDUs participating in the study said they used contaminated injecting equipment. In addition, large proportions of these (male) drug users also engaged in other high-risk behaviour. For example, 32 per cent had sex with men or boys, and 69 per cent bought sex. Only about half of the IDUs knew that using unclean syringes carried a high risk of HIV transmission or that condoms could prevent infection. Aside from the poor state of blood transfusion facilities, a lack of comprehensive information on the HIV/AIDS prevalence among those at "high risk"—in particular, the estimated 14,000 injecting drug users (IDUs)—throughout the country is a matter of great concern. A study by the Government and UNODC (2005) revealed approximately one million drug users in the country, 14 per cent of them IDUs. Neighbouring Iran, Tajikistan, and Pakistan

¹⁸⁸Penal Reform International, *Health in Prisons, realising the right to health*, 2007, www.penalreform.org

¹⁸⁹HIV/Aids in Prison, Problems, Policies and Potential, KC Goyer, 2003.

¹⁹⁰www.thejakartapost.com/detailheadlines.asp?fileid=20070501.A06&iirc=

¹⁹¹Study conducted by the Delhi-based NGO, Sharan, and the Indian Harm Reduction Network (IHRN). www.navhindtimes.com/articles.php?Story_ID=01305

¹⁹²K. C Goyer, *HIV/Aids in Prison, Problems, Policies and Potential*, 2003.

¹⁹³<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSAREGTOPHEANUT/EXTSAREGTOPHIVAIDS/0,,contentMDK:20288512~menuPK:568870~pagePK:34004173~piPK:34003707~theSitePK:496967,00.html>

have each reported outbreaks of HIV/AIDS among IDUs. International experience shows that the spread of this infection within the IDU community is rapid.¹⁹⁴

The World Bank has identified the following risk factors which may contribute to a significant increase of HIV and AIDS in Afghanistan:

Injecting drug use: Afghanistan is the world's largest producer of opium, which is used to make heroin. A 2005 survey estimated that Afghanistan had almost one million drug users including 200,000 opium users and 19,000 drug injectors of whom 12,000 inject prescription drugs and 7,000 inject heroin. A 2006 survey in Kabul estimated that several categories of drug use had increased by more than 200 per cent in 12 months. The intensification of the war on drugs, by reducing the availability of heroin, can cause drug users to turn to injecting drugs as a more cost-effective option. These factors, combined with poverty and the lack of information, can lead to widespread injecting drug use and the sharing of needles. The use of non-sterile injecting equipment can jumpstart an epidemic and lead to rapid increase in HIV prevalence.

Large numbers of refugees and displaced people: Approximately eight million Afghans spent some time living abroad as refugees, in Pakistan (5 million) and Iran (3 million). Today, about one million widows and 1.6 million orphans, four million returnees and 500,000 internally displaced people live in Afghanistan, while almost four million Afghan refugees still live in Pakistan and Iran. These countries have rapidly growing IDU driven HIV epidemics. Although little is known about the HIV risk behaviours of Afghan refugees and displaced people, such groups generally have little access to information about HIV. They are also at risk due to isolation from their families and lack of means to support themselves.

High levels of illiteracy: Illiteracy presents a barrier to HIV awareness and prevention. The

literacy rate in the general population is very low (36 per cent) and lowest among women (13 per cent) with little awareness about HIV/AIDS and almost no condom use.

Competing health priorities: Afghanistan has one of the worst maternal mortality rates in the world, with an estimated 15,000 Afghan women dying every year from pregnancy-related causes. One in four children dies before its fifth birthday; more than half the deaths are due to acute respiratory tract infections, diarrhoea, and vaccine-preventable diseases. Early attention and response to HIV and AIDS risks getting lost amid the focus on these other urgent health issues.

Low status of women: Women in Afghanistan experience one of the lowest social positions in the world. Denied access to education and jobs and often not allowed to leave their homes without a male relative, they lack access to information on how to protect themselves.

Weak health system: Much of the population lacks access to basic health services. There is also an acute shortage of health facilities and trained staff, particularly female staff, in most rural areas. Of the facilities that exist, most are ill-equipped and unable to treat opportunistic infections, or prevent mother-to-child transmission of HIV. Unsafe blood transfusion adds to the risk of HIV spread to the general population, with only 30 per cent of transfused blood being tested for HIV. People engaged in high risk behaviours often have limited access to health care.

Source: HIV/AIDS in Afghanistan, The World Bank, August 2007. Accessed at: siteresources.worldbank.org/INTSAREGTOPHIVAIDS/Resources/HIV-AIDS-brief-Aug07-AF.pdf

For a country that ranks 17th out of the 22 countries with the highest tuberculosis levels¹⁹⁵ and where the current prevalence of tuberculosis is estimated at 228 cases per 100,000 of the population, the statement "[t]he only way to control TB anywhere, is to control it everywhere."¹⁹⁶ is especially prescient.

¹⁹⁵Afghanistan Human Development Report 2007, p. 5.

¹⁹⁶Reyes, H., Pitfalls of TB management in prisons, revisited, *International Journal of Prisoner Health*, Month 2007; 3(1): 43-67, p. 46.

¹⁹⁴Afghanistan Human Development Report 2007, p. 28.

Communicable diseases remain high

Tuberculosis (TB), at annual incidence of 70,000 cases, is a serious health problem and is high in women. The immunization coverage remains at best around 50-65 per cent, in spite of major efforts and some successes. There has been good progress for malaria control by MoPH and partners since 2002.^a

^aWHO, The Islamic Republic of Afghanistan, Country Cooperation Strategy at a Glance May 2007 www.who.int/countryfocus/cooperation_strategy/ccsbrief_afg_en.pdf

Reyes¹⁹⁷ reports tuberculosis is today a major health issue in prisons around the world. The prevalence of TB in prisons is higher, sometimes much higher, than in the general population. In countries with a high prevalence of TB in the outside community, prevalence of TB can be 40, 80 or even 100 times higher inside the prisons. Prisoners are at increased risk from TB as they are predominantly from poorly educated and socio-economically deprived sectors of the general population. Prisoners often belong to

minority or migrant groups, and live on the very margins of society. They are more likely to have poor health status. Prisoners thus constitute a high-risk population for tuberculosis and many prisoners bring tuberculosis into prisons. Prisoners often have difficulties getting access to healthcare for the reasons seen in Afghanistan: poor capacity and corruption. The cold winter climate reduces ventilation increasing risk of infection. Prisoners carry TB from prison to possibly infect their families and the general community and without proper follow-up, TB and resistant forms of TB not dealt with in prison will disseminate into the general community.

The potentially catastrophic combination for Afghanistan of a population at high risk of HIV and AIDS and an already high TB prevalence, increasing number of IDUs, the rapidly increasing prison population, the dire prison conditions, and the vulnerability of the prison population before and during imprisonment demands a social and criminal justice framework that reduces the use of imprisonment, through criminal justice policy and sentencing reform and increases the use of targeted health and education programmes.

¹⁹⁷Reyes, H., Pitfalls of TB management in prisons, revisited, *International Journal of Prisoner Health*, Month 2007; 3(1): 43-67.

State and community capacity to respond to the rehabilitation needs of offenders

Alternatives to imprisonment require monitoring and support structures within the community, most preferably independent of feared or mistrusted penal and security agencies.

As outlined above, according to existing legislation, limited non-custodial provision should be provided by mental health, drug addiction treatment and other social programmes, at pre-trial and sentencing stage. This is a particularly strong element of the new juvenile justice legislation.

The very inadequate provision of all of these services in the community represent one of the key obstacles to the implementation of non-custodial sanctions and measures which address the social reintegration needs of offenders.

8.1 Mental health services in the community

There is a huge need for mental health services, especially with the trauma of the last decades of conflict manifesting itself in Afghan society. The erosion of civil society and human rights, particularly for women, raises risk. Most of the women drug users started using drugs as self medication in particular for mental health problems such as depression, anxiety, insomnia and post-traumatic stress disorder.¹⁹⁸

Long period of conflict has afflicted anxiety and depression among many

Due to the long period of conflict, over two million Afghans are affected by mental health problems, with high cases of post-traumatic stress disorder, depression and severe anxiety, particularly among women.^a

^{HP_1a}WHO, The Islamic Republic of Afghanistan, Country Cooperation Strategy at a Glance, May 2007 (www.who.int/countryfocus/cooperation_strategy/ccsbrief_afg_en.pdf)

In the community there is a significant stigma related to mental health, including among some of the less effective healthcare bodies. In addition it was reported that many people did not take mental health problems seriously.¹⁹⁹

¹⁹⁸Drug Demand Reduction Directorate, Kabul DRAT, 2007.

¹⁹⁹Medica Mondiale, Ms Humaira Ameer Rasuli, Psychosocial Programme Project Coordinator, 14 December 2007.

There is a mental health hospital in Kabul with only 60 beds, including 20 beds for drug addicts and 40 for psychiatric patients. There are five mental health out-patient subclinics in Kabul. Patients are referred from those clinics to the hospital or they self refer. In the mental health hospital facilities are reported as extremely poor and there is little in the way of medicine. Most frequently patients have to purchase medicine outside of the hospital.²⁰⁰

Medica Mondiale reported of a recent slight improvement in conditions at Kabul mental health hospital, where the use of chains has apparently been stopped.²⁰¹ But there is still a dire lack of qualified psychiatrists. There is a mental health clinic in Herat run by the Norwegian Refugee Council and a government mental health hospital in Mazar-e Sharif which Medica Mondiale reports as having very poor services.

Since 2003 Medica Mondiale has been working on mental health in the community. The psychosocial team provides group and individual counselling for women with trauma and other mental health problems. They work in five districts in Kabul, two prisons and two shelters. Women who apply to Medical Mondiale for counselling are usually victims of violence and those suffering from mental health problems, often as a result of domestic violence.

The Medica Mondiale team also provides training on psychosocial support to doctors, midwives and nurses. This involves training in basic counselling. They also provide public awareness through radio broadcasts, including small plays, round tables, interviews, and information broadcasts about when people should go to mental health professionals. They have also been training others in mental health education and seem to run a sound curriculum with a good training document in Dari and English, which they use to train people in the community from social support backgrounds. Medica Mondiale reported that CARITAS Germany was also providing psychosocial counselling in the community.

8.2 Drug treatment in the community

Less than 0.25 per cent of drug users can be treated each year with the current treatment facilities in Afghanistan.²⁰² According to the Drug Demand Reduction Directorate, as of September, 2007 there are, including the mental hospital in Kabul, 39 drug treatment, rehabilitation and harm reduction services in Afghanistan. Some provinces have no services. These services are run by government and NGOs and offer a total of 495 residential places. DRAT teams work in six regions of Afghanistan, including Kabul, Kandahar, Balkh, Herat, Nangarhar and Badakhshan. UNODC was responsible for their training, as well as improving their resource capacity, such as the payment of salaries, purchase of cars, computers, photocopiers, TV, VCR and office furniture. Their primary responsibility is treatment in the community, but wherever needed they also work in prisons in all six regions. These teams started work in 2004.²⁰³

The drug treatment at the Kabul hospital follows the patterns of motivation, detoxification and occupational therapy. Aftercare services following discharge do not exist and the outcome of treatment is not fully known, but conditions outside treatment centres are extraordinarily high risk.

With the number of drug addicts rising rapidly, with probably a million users, despite the increasing resources to treat drug users, there is a huge gap in demands and need. The public education strategy remains deeply inadequate.

In the north of Afghanistan opium use is extremely common, it is the medication of first choice, the substance to enable hard physical activity and very much an integral part of day to day existence, and forms part of child "care".²⁰⁴ Kabul has the highest number of heroin users in Afghanistan. Injecting drug use occurs in heroin and pharmaceutical drug

²⁰⁰Drug Demand Reduction Directorate, Kabul DRAT, 2007.

²⁰¹Medica Mondiale, Kabul, December 2007.

²⁰²Afghanistan Drug Use Survey, UNODC 2005.

²⁰³Mr Jehanzeb Khan, Drug Demand Reduction Expert, UNODC, Kabul.

²⁰⁴A vivid illustration of this is available through a video of opium use amongst women and children in north east Afghanistan www.unodc.org/afg/

user communities and to a lesser degree among opium users.²⁰⁵ Needle sharing is common.

8.3 Services for women

Extensive and multi-layered support is required for women who are in conflict with their communities and the law. Once a break has occurred between women and their families, communities and the law, it is extremely difficult to repair the damaged relationship, and doing so is fraught with risk. Female offenders returning to their families and communities are at serious risk of retribution. Even for women to access social services can be dangerous. In order to be safe shelters need to be secret.

In the context of diversion from the criminal justice system, an encouraging development is the diversion of cases relating to women and girls who have run away from their homes by police to the Ministry of Women's Affairs (MoWA) and AIHRC, who usually refer them to shelters.²⁰⁶ Running away from home is not an offence according to Afghan legislation, but women who run away are most often detained during the period in which the prosecution will try to determine whether the woman involved had committed *zina*. If it is proven that she had not committed *zina*, she will usually be released. Thus if such a woman is eventually imprisoned, the conviction would typically be on the basis of the commission of *zina*, rather than the act of running away alone. In practice, women are detained for long periods and sometimes also sentenced to imprisonment for running away from home.

In Jalalabad police have been referring women to the first referral centre established by UNIFEM in partnership with MoWA.²⁰⁷ Whereas previously almost all cases relating to "running away from home" would be subjected to criminal procedure and at least a period of detention, it was suggested that, since the establishment of the referral centre in Jalalabad, only

one case relating to elopement had resulted in detention. The first referral centre is presented to the public as first point of call for women on a variety of issues but does also have shelter capacity for victims of violence, which allows for women to be accommodated for 72 hours while their case is being investigated. It was sadly reported that MoWA often return women to husbands too soon and before any mediation or binding agreement. UNIFEM, together with MoWA was in the process of establishing another referral centre in Parwan, at the time of writing. The establishment of referral centres in 34 provinces to increase access to justice for women and children was included in the recommendations of the Technical Advisory Groups for Women and Children submitted to the Rome Conference in June 2007,²⁰⁸ and is supported by the Ministry of Interior.²⁰⁹

There are currently four shelters in Kabul, one in Mazar-e Sharif and one in Herat, all run by NGOs, in cooperation with MoWA and AIHRC.²¹⁰ The capacity of each safe house is for around 20 women. According to AIHRC, most do not provide legal assistance and there is a lack of coordination among them.²¹¹

Activities aiming to assist victims of violence include the development of Family Response Units in police stations, in collaboration with the Ministry of Interior, which started with District 10 in Kabul.²¹² It is reported that five more have been established during 2007, but information as to the success rate of their activities was not available.

²⁰⁵Afghanistan Drug Use Survey, UNODC 2005, p. 2.

²⁰⁶UNODC, Afghanistan, Female Prisoners and their Social Reintegration, op. cit., p. 26, referring to interview with Ms Orzala Ashraf, Director, HAWCA, 9 December 2006.

²⁰⁷Interview with Dr Anou Borrey, Gender and Justice Consultant, UNIFEM and Kamala Janakiram, Human Rights Officer, UNAMA, Jalalabad, 18 December 2007.

²⁰⁸Recommendations from the TAG (Technical Advisory Group for Women and Children) to the Rome Conference, June 2007, p. 4 (www.rolafghanistan.esteri.it/NR/rdonlyres/62601DB1-316A-4198-A39B-07AD57EE09ED/0/Paperonaccesstojusticeof-womenandchildren.pdf).

²⁰⁹Interview with Dr Anou Borrey, Gender and Justice Consultant, UNIFEM and Kamala Janakiram, Human Rights Officer, UNAMA, Jalalabad, 18 December 2007.

²¹⁰UNODC, Female Prisoners and their Social Reintegration, op. cit. p. 37.

²¹¹Meeting with Ms Hangama Anwari and Dr Suraya Sobhrang, AIHRC, 16 December 2007.

²¹²Supported by the Canadian International Development Agency (CANADEM), UNAMA and United Nations Population Fund (UNFPA), and assisted by US police advisors. (See Murray, T., Police Gender Advisor, Ministry of Interior Affairs, Afghanistan, "Evaluation of the Family Response Unit District 10 Police Station Kabul", CANADEM, Kabul, Spring 2006, p. 7.

Over the past year there has been discussion of establishing transitional houses for released female prisoners in need of protection and assistance. UNIFEM, UNODC, CSSP and UNAMA are developing a policy to guide their establishment and implementation.²¹³ At the time of the Rome Conference, the issue was reported as being “in the pipeline”, with a policy to be developed.²¹⁴ The establishment of transitional houses, planned to house female prisoners in need of protection following release may effectively be used as a base for those who gain a right to early conditional release, in certain cases. Women can, for example, be accommodated in transitional houses while support is provided to find suitable accommodation and employment, while any legal assistance can also be offered at this time.²¹⁵ It is vital that transitional houses do not acquire the characteristics of new prisons, and the policy and management is developed, taking into account such risks.²¹⁶

8.4 Services for juveniles

The Ministry of Labour, Social Affairs, Martyrs and Disabled (MoLSAMD)²¹⁷ estimates there are about six million children at risk in 23 categories in Afghanistan.²¹⁸ MoLSAMD reports that they currently have 60 social workers in Afghanistan, though they do not work in prisons or are not associated with prisons, except for two social workers who recently started work in the Kabul juvenile prison. It was quite difficult to establish what MoLSAMD social workers do in the community, but there seemed to be an emphasis on children at risk and gender issues and not children or others in conflict with the law. According to the Afghanistan Women’s Judges Association, MoLSAMD social workers are not

working effectively and despite commitments made in 2002/3, the training of social workers is not adequate.²¹⁹

MoLSAMD informed the authors that with support from UNICEF and Save the Children Fund, United Kingdom, the Ministry is expanding its social worker capacity. Currently social workers are being trained in many provinces and cities, including Kandahar, Herat, Kabul, Jalalabad, Baghlan, Bamian and Kunduz. They expect to have 300 social workers trained at the end of the programme of four months.²²⁰ MoLSAMD suggested to the authors that with training and proper inter-Ministerial protocols, social workers could be deployed in prisons, as well as to provide support within the wider criminal justice system, as part of a programme of alternatives to imprisonment.²²¹

AWEC report that for children at risk there are three orphanages, two of them state run, and one managed by a German NGO in Kabul, and there are some in provinces of Mazar and Faria. It has been reported that conditions in orphanages are poor.

In the circumstances it is difficult to see how the provisions included in the Juvenile Code for alternatives, which require much support from community social services, can be implemented. As often happens, whereas legislation has been put in place, the infrastructure to enable that legislation to be implemented is extremely poor and in need of investment. In the meantime the ANDS costing for social protection (for the whole population) remains extremely low. According to a costing exercise done for the I-ANDS, the social protection sector needs \$US 233 million, compared to \$US 2,800 million for the security sector and \$US 749 million for governance.²²²

²¹³UNODC, *Female Prisoners and their Social Reintegration*, p. 37.

²¹⁴Recommendations from the TAG to the Rome Conference, June 2007.

²¹⁵UNODC, *Female Prisoners and their Social Reintegration*, p. 37.

²¹⁶*Ibid.*, pp. 87-88.

²¹⁷Formerly known as the Ministry of Labour and Social Affairs.

²¹⁸Meeting with Prof. Wasil Noor, Deputy Minister, MoLSAMD, 11 December 2007.

²¹⁹Afghan Women’s Judges Association, Kabul December 2007.

²²⁰Meeting with Prof. Wasil Noor, Deputy Minister, MoLSAMD, 11 December 2007.

²²¹Meeting MoLSAMD Kabul 2007.

²²²Afghanistan Human Development Report 2007, p. 122.

A sector-centred reform process

The consultative process for developing the ANDS is centred on the multi-tiered consultative group system, based on eight sectors across three pillars referred to in section 1.

The eight sectors are:

1. Governance
2. Security
3. Infrastructure and natural resources
4. Education, culture and media
5. Health
6. Agriculture and rural development
7. Social protection
8. Economic management and private sector development.

Each sector is represented by a Consultative Group (CG), which comprises Afghan Government officials, representatives of civil society organizations, and officials from international organizations and United Nations Member States. Each Consultative Group has subsidiary working groups. Both the Consultative and Working Groups meet quarterly and prepare a series of reports for the ANDS secretariat.²²³ To support the CGs, Working Groups are aligned by ministries and designed to focus on one or more of the benchmarks in the Afghanistan Compact.²²⁴ These Working Groups form the points of contact in gathering information for monitoring purposes, as well as liaising with relevant ministries to prepare details of budget proposals.²²⁵

Decisions taken at the Rome conference in July 2007 continue to focus on a sector-based strategy, though recognizing the vital need to improve coordination mechanisms within the justice sector. The draft NJSS and NJSP address the need for cooperation between justice institutions, which is a crucial prerequisite for the effective application of non-custodial sanctions and measures.

²²³Ibid, p. 120-121.

²²⁴Ibid.

²²⁵Ibid.

However, also key to the success of the implementation of alternatives to prison is coordination between justice institutions and services in the community and therefore coordination between the justice sector and other sectors responsible, for example, for health and social protection in particular. The authors are not aware of any systematic coordination mechanism across sectors. Thus, taking account of all the discussion and findings above, it seems that a key obstacle to the successful introduction of rehabilitative alternatives to prison in Afghanistan, is not only the lack of adequate services in the community to cater for the needs of offenders who may be diverted to community programmes or sentenced to non-custodial sanctions, but the lack of an integrated approach to justice, which requires coordination between justice institutions and healthcare, education and social

services in the community (state and non-governmental). This coordination may include, for example, a coordination of budgets (e.g. the budget of the MoPH to take account of the needs of offenders with mental healthcare needs or drug dependencies who may be diverted from the criminal justice system or sentenced to non-custodial sanctions²²⁶ or the development of policies and procedures that create links between police, prosecutors and services in the community, to enable diversion, etc.).

The establishment of such coordination mechanisms should be one of the priorities of any programme that, while aiming to expand the use of non-custodial measures and sanctions, also aims to enhance the social reintegration of offenders with special needs, while protecting their human rights.

²²⁶It should also include the needs of prisoners in its budget, though as noted earlier, it is not clear to what extent ministries responsible for the education and health of prisoners, according to the Law on Prisons and Detention Centres and the MoUs signed between the MoJ, MoPH and MoE, actually include prisoners' needs in their budgets and if they do how adequate this budgeting is. Practice would suggest that there is also a serious shortcoming in accounting for the needs of prisoners.

Conclusions and recommendations

As this assessment has outlined, there are immense challenges to implementing non-custodial measures and sanctions in Afghanistan, though at the same time there is an urgent need to reduce the numbers of people entering the criminal justice system. If the prison population continues to increase at the current rate, the social and health consequences of imprisonment, and the costs involved, will place a very heavy burden on the Afghan authorities and the international community. Action needs to be taken without delay to reverse the trend. Amending legislation to increase the use of alternatives is relatively simple. However, law reform must be accompanied by adequate investment in the infrastructure and services to ensure that alternatives can be implemented, alongside far reaching civic education and awareness raising to ensure that the rehabilitative aims of non-custodial sanctions are understood, accepted and can be effective. There is also an urgent need for a comprehensive strategy which includes cooperation between all sectors that should be involved in the implementation of alternatives to prison. Finally, the strategy must not only be accepted, but also led by the Afghan authorities, if it is to be sustainable.

GENERAL POLICY AND STRATEGY

10.1 Reasonable expectations consistent with Afghan realities

In the context of Afghanistan, with its limited resources and the need for prioritization among a myriad of fields that need investment, this assessment endeavours to limit itself to recommendations that are most relevant, applicable and cost-effective. This is in line with one of the key principles agreed at the Rome Conference in July 2007, that “[r]ule of law programming should be based on reasonable expectations and should be consistent with Afghan needs and realities”.²²⁷ Therefore it does not propose a long list of new and complicated alternatives to prison nor another department or bureaucracy for the supervision of non-custodial sanctions and measures (e.g. a probation service), which to some experts interviewed appeared to represent the most logical immediate need. Probation services are costly, requiring an adequate number of specialized staff, training, premises, transport and communication facilities, which Afghanistan cannot afford to invest in at the current time. The priority in Afghanistan is to invest in the establishment of the rule of law, and in the context of this document, to prevent illegal detention and unfair trials to reduce the prison population, to rationalize sentencing policy and to prioritize the implementation of existing alternatives, rather than setting up a new machinery that will not be used, and possibly provide another instrument for corruption and other forms of abuse.

²²⁷Rome Conference on the Rule of Law in Afghanistan (July 2-3, 2007), Joint Recommendations. (www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gli_uffici/).

Recommendations

- To establish before the end of 2008 under the Chair of the Supreme Court, a national working group with international support, to lead a comprehensive study and the development of an alternatives to imprisonment strategy in Afghanistan. The international lead may come from UNODC. The working group should include representatives from the community, working in social programmes and the criminal justice system. Afghan Government stakeholders should be drawn from Parliamentary bodies, the MoJ, Attorney General's Office, MoI, MoLASMD and MoPH, as a priority.
- The working group will need to establish obstacles to existing alternatives, and also ascertain how the philosophy and practice of sanctions that represent in some cases, diversion from the criminal justice system, and in others, alternatives to imprisonment, fit within the national rule of law, social protection and health service capacities.

Further, the working group, to avoid establishing new government agencies and bureaucracies, should consider existing community structures, especially NGOs engaged in criminal justice reform and the provision of social services, for their potential role in the oversight of non-custodial sanctions, and in providing support services to offenders in need (such as psychosocial support and drug treatment).

- The implementation of many of the recommendations set out below, would logically fit within the framework of the working group's remit, though some would need to be included in the work of existing working groups of the Rule of Law CG (see also appendix 2: Working Group on Alternatives to Prison (WGAP): Suggested Next Steps for further suggestions, in terms of priorities in the short term).
- To rationalize sentencing policy by decriminalizing certain offences, reducing prison terms for others and introducing alternatives to pre-trial detention and prison sentences for a range of offences (see specific recommendations below).

- To ensure that existing alternatives to imprisonment are used in practice, by changes to legislation, introduction of sentencing guidelines for judges and by the development of the necessary infrastructures (see specific recommendations below).
- To take steps to reduce corruption in the criminal justice system, to reduce and eliminate corrupt practices in the application of detention, imprisonment and non-custodial sanctions and measures. UNODC's new project (AFG/R86) is an important step forward in this area, the success of which will be crucial to the effective implementation of a programme of alternatives to prison.²²⁸

10.2 The need for cooperation within and across sectors

In the discourse about the shortcomings of the formal justice system and rule of law in Afghanistan, much has been written about the lack of cooperation among the various justice institutions, such as the judiciary, the Ministry of Justice, Attorney General's Office, the police, prosecutors and Central Prison Department. This concern is fundamental and constitutes a key challenge that needs to be addressed, as set out in the draft NJSS. What seems to be lacking in most discussions relating to justice sector reform, however, is the need for cooperation between the justice sector and other sectors—such as social welfare and health services, in particular—if the aim of justice is ultimately to improve the lives of Afghan citizens, rather than merely resolve conflicts or punish perpetrators, albeit in line with human rights standards and the rule of law. This need is strikingly

²²⁸Separate recommendations have not been included, the subject being vast and beyond the scope of this assessment. Reducing corruption is one of the priorities addressed in the draft NJSS. Activities undertaken and planned by UNODC, within the framework of its project launched in October 2007, such as a vulnerability corruption survey being conducted in partnership with UNDP to assess the corruption in justice and law enforcement institutions; support to anti-corruption strategy development; capacity-building for prosecutors, judges, the Anti-Corruption Unit of the Supreme Court; the development of anti-corruption training materials and tools for criminal justice practitioners and law enforcement officials and assistance planned to draft legislation based on the recently ratified UNCAC, are all extremely relevant to the success of the recommendations of this assessment.

evident in the assessment of non-custodial measures and sanctions, and their applicability in the Afghan reality. Without a systemized cooperation between social welfare and health services and the justice sector, amendments to legislation which introduce new alternatives to prison, will remain on paper. Truly rehabilitative sanctions cannot be implemented.

Recommendations

- The working group suggested above would address this need to a large extent.
- There is also a need to establish a mechanism for sustainable cooperation between the CGs of the justice, health and social services sectors, within the framework of strategies and processes of consultation which aim to introduce alternatives to imprisonment in Afghanistan. It is crucial that activities are coordinated, and that programmes in the social welfare and health sectors, take into account the needs of offenders.
- The need for such coordination should also be reflected in donor strategies, i.e. donors supporting justice sector programmes that include alternatives to prison should encourage coordination with relevant “non-justice” sectors and be prepared to fund initiatives that establish formal coordination across sectors and to develop relevant programmes in the “non-justice” sectors to enable the implementation of non-custodial sanctions and measures.

10.3 Need for investment in services required to implement alternatives

Related to the above conclusion is the lack of such services and facilities that make the implementation of alternatives possible and their outcome effective and rehabilitative. As this assessment has explained, currently the articles relating to alternative measures and sanctions included in the Juvenile Code cannot

be applied, for a number of key reasons, including the lack of any social services and other facilities, which are referred to in the legislation, but which do not exist, or if they do, are not even sufficient to provide for the needs of the general population, let alone offenders. The immense challenges relating to the level of drug dependency, which is known to be a factor that can lead to criminal behaviour cannot be addressed without adequate treatment and rehabilitation for those who are addicted. As explained above, currently only 0.25 per cent of the treatment needs of Afghan’s are met,²²⁹ while drug addiction, including injecting drug use increases.²³⁰ The mental healthcare provided for Afghan citizens is highly inadequate, as explained in section 8.1 and any alternative sanctions that may be introduced into legislation for those who are in need of mental healthcare will be inapplicable in the absence of treatment in the community. Concerns relating to the sector-based reform process and the lack of cooperation between sectors, referred to above, is thus aggravated by lack of services in the social welfare and health sectors especially, and the fact that these services are not perceived to be essential elements of the implementation of rehabilitative justice in Afghanistan.

Recommendations

- To establish partnerships with NGOs, and to provide funding for their programmes, in order to provide services for offenders diverted from the criminal justice system or sentenced to alternatives.
- To invest in services and programmes provided by the State, to ensure that the needs of offenders are included in the budgets of relevant ministries (such as MoLSAMD and MoPH in particular), to address the needs of offenders in need of rehabilitative support, such as mental healthcare, drug addiction treatment and vocational training.

²²⁹UNODC, Afghanistan Drug Use Survey 2005, p. 2.

²³⁰Ibid.

10.4 Targeting

As one of the leading experts on alternatives to imprisonment has noted,²³¹ an analysis of world experience suggests that the introduction of alternatives can easily fail; they can come into law but not be used. If they are used, they may not be used as alternatives to prison (thereby increasing the overall volume of criminal sanctions). Alternatives are often introduced without a clear idea of which offenders, currently sent to prison, will be given the alternative sanctions. When this happens the prison population will continue to grow. Therefore targeting is an important consideration when introducing alternatives. Targeting should be based on an analysis of those currently being sent to prison for shorter prison terms and their offences.

Recommendations

- Undertake a thorough and comprehensive research relating to current crime and sentencing trends to determine criteria for targeting the types of offences and sentences for which alternative sanctions should be the rule and those where non-custodial measures and sanctions may be an option (see some initial recommendations in section 10.11, below).
- Undertake a screening of the current prison population to initiate the release of those whose imprisonment does not have a legal basis.

10.5 The role of the judiciary and legal aid

Engagement of the judiciary in the development of strategies to increase the implementation of non-custodial measures and sanctions, as well as providing training in their application, are essential to the effectiveness of programmes on alternatives to imprisonment. Judges' confidence in alternatives must be secured, by ensuring that legislation can be

successfully put into practice. Additional advocacy activities should also be carried out to increase judges' knowledge about alternatives and to influence their sentencing tendencies. Increasing the State's and NGOs' capacity to provide legal and para-legal aid services to indigent and vulnerable defendants are also key to ensuring that their right to non-custodial measures and sanctions are respected, where applicable.

Recommendations

- Engage senior judges in the development of a strategy to increase the use of alternatives to pre-trial detention and prison in Afghanistan, for example, as members of the working group, suggested above.
- Provide training to judges on international standards relating to non-custodial sanctions and measures and on Afghanistan's existing legislation which includes alternatives to pre-trial detention and prison, outlined above, and which, in the Constitution's articles 24 and 25 emphasizes the presumption of innocence until proven guilty and obliges the State to respect and protect its citizens' liberty.
- Organize advocacy activities to increase judges' knowledge about alternatives and to influence their sentencing tendencies.
- Increase the legal aid programme for indigent defendants and vulnerable groups especially. Donors should increase and continue support to NGOs providing legal aid, while assisting to increase State capacity to undertake this function in the medium and long term.
- Explore further scope for paralegals within the formal system to meet the legal aid requirements.
- Provide training to lawyers and paralegals on alternative measures and sanctions (international standards and Afghan legislation), including on how to address the needs of vulnerable groups.
- Establish pilot schemes with a district or provincial level criminal justice co-coordinating body to which NGOs are invited to address backlog of cases.

²³¹Stern, V., *Developing Alternatives to Prison in East and Central Europe and Central Asia, A Guidance Handbook*, King's College London, International Centre for Prison Studies, May 2002, p. 23

10.6 Importance of victim-oriented alternatives

The informal justice system of Afghanistan, which has been in existence for centuries, emphasizes the needs of the victim. As explained earlier, if the victim or his or her family is not satisfied with the punishment received by the perpetrator, then there is a risk of retribution, whether or not the offender receives a punishment. This is an important issue which needs to be taken into account in introducing new alternatives to Afghanistan. It is therefore felt that victim-offender mediation should be introduced into legislation. Mediation should be possible at all stages of the criminal justice process, including after a sentence has been passed, to prevent retribution against the offender following release. Mediation may accompany other alternatives, such as the payment of fines and suspension of sentences, depending on the type of offence, in order to ensure that “soft sentences” are perceived as acceptable by the public.

Expanding the use of mediation in the case of female offenders is particularly important as many face abandonment by their families, as well as retaliation, such as “honour killings” following release from prison (or immediately, if not imprisoned but diverted). Mediation has been used by NGOs and lawyers to reconcile women prisoners with their families to enable them to return to their homes following release from prison, with some success. These experiences should be built upon. At the time of writing the Da Qanoon Gushtonky, had started to provide training on mediation to its lawyers.

Recommendations

- Introduce victim-offender mediation programmes, with the assistance of NGOs working on legal assistance and psychosocial support programmes.
- Invest in training for members of such NGOs, as well as lawyers and other experts in victim-offender mediation.
- Consider the wider use of affordable and relevant compensation orders within the criminal justice system.

- Within the guidelines for police, prosecutors and judges recommended below, include guidelines and criteria relating to the diversion of offenders to victim-offender mediation programmes.

The above may be tested within the framework of a pilot project, before expansion.

10.7 Informing public opinion

Parliament will not legislate and the judiciary will not sentence if there is too much community misunderstanding and opposition to alternatives, which are often perceived as soft sanctions not adequately penalizing offenders.

Recommendations

- Ensure circulation of literature concerning United Nations standards and good practice guides related to particular alternatives to imprisonment.
- Develop a public education campaign and engage with the media.
- Ensure that there is clear, easily accessible and understood information available on key issues including:
 - why the use of alternatives,
 - who will be eligible and
 - how they will be implemented and supervised.

10.8 Research and monitoring

The importance of monitoring and evaluating the outcomes of increased use of non-custodial measures and sanctions should not be disregarded.

- The working group recommended above should prepare and undertake studies analysing some of the cost consequences of imprisonment e.g. public health and the parallel implications with non custodial sanctions (for example, in Zimbabwe a non-custodial sanction costs one sixth of the

equivalent prison sentence and TB rates for offenders serving non-custodial sanctions are dramatically reduced).

- Mechanisms should be developed to monitor the application of non-custodial measures and sanctions and sentencing tendencies, and to evaluate the outcomes of pilot schemes initiated as part of an alternatives programme.

SPECIFIC LEGISLATIVE RECOMMENDATIONS

10.9 Diversion from prosecution

Consideration should be given to giving prosecutors discretion to suspend a charge subject to conditions, which if met, should lead to the discharge of the case.²³² The conditions imposed may include treatment for substance abuse, mediation between offender and victim, which might include compensation for the damage done.

If it is deemed inappropriate for prosecutors to be given discretion, conditional discharge may be decided by the judge upon the request of the prosecutor. This second option would however have the disadvantage of adding further pressure on the courts and leading to delays in decision-making.

Decisions would need to be based on legally defined criteria (e.g. taking into account the potential prison sentence, whether first-time offender or not etc), with suspension of proceedings for a defined period of time when the additional conditions set out in law must be fulfilled.

Recommendations

- Either amend legislation to increase prosecutorial discretion in deciding discharge, diversion and suspension of charges or give prosecutors the authority to request conditional discharge from the court.

²³²One of the elements of the successful diversion and community-based treatment programme in Thailand was the encouragement given to prosecutors to use more discretion to suspend charges subject to conditions. (See Kittipong, K., Dr., op. cit).

- Develop legally defined criteria for prosecutors and judges setting out the conditions as to when discharge, suspension of charges and diversion from the criminal justice system can be applied (see Tokyo Rules 5.1).

10.10 Pre-trial alternatives

As explained earlier, the size of the pre-trial prison population in Afghanistan is large and growing, due to the lack of application of bail, slow criminal justice process (mainly due to the caseload of courts, their lack of capacity and lack of cooperation between justice agencies). A large pre-trial prison population is characteristic of many low-income countries which all face similar challenges. It is crucial to reverse the trend by relaxing the conditions for bail and introducing other alternatives to pre-trial detention. Action is recommended to ensure that judges are obliged to use pre-trial alternatives in certain cases and encouraged to use them in others.

Recommendations

- Introduce a rule into the Criminal Procedure Code which implements articles 24 and 25 of the Constitution and article 9 of International Covenant on Civil and Political Rights (ICCPR) in that it:
 - establishes pre-trial detention as applicable only after it has been demonstrated that other measures would not suffice to guarantee an unobstructed course of proceedings.
 - specifies the level of proof and specific conditions for the applicability of pre-trial detention.
 - requires immediate discontinuation of the pre-trial detention when the conditions cease to be present.
 - requires that, after the initial period of police arrest, the detention can only be applied by a judge upon a hearing of the defendant and then must be periodically reviewed.
- Introduce a rule into the Criminal Procedure Code, which obliges courts to impose an

alternative to pre-trial detention, if the potential prison sentence of the suspect is not above a certain fixed period.

- Review the list of offences for which bail cannot be applied (in the CPC of 1965) and reduce the number of offences considerably.
- In cases where a person is known in the community, has a job, a family to support, and is a first-time offender, authorities should consider unconditional bail. In all cases where the offence is not serious, unconditional release should be an option. Under unconditional release, sometimes known as personal recognizance, the accused promises to appear in court as ordered.
- When fixing the amount of monetary bail, take into account the economic circumstances of the offender.
- Introduce other alternatives to pre-trial detention, to ensure that poor and vulnerable groups, such as women, are not disadvantaged in the application of bail.

Other alternatives may include:

- An obligation to report to police stations or to the court on a regular basis.²³³
- Limitation of freedom, such as prohibition of approaching certain places, engaging in a particular conduct or an obligation to remain at a specific address.

Some of the above measures are already part of security measures included in the Afghan Penal Code, though currently not used at pre-trial stage, so there should be some experience in applying them.

10.11 Alternatives to imprisonment

Reduce the use of short prison terms, replace with alternatives such as fines and suspended sentences.

²³³Which is included in the CPC of 1965 (Article 103), and according to some reports is applied. See Section 3.2.2.

In the short term the simplest short-term measure that can be taken is to ensure that alternatives currently available in Afghanistan's Penal Code are applied in practice. The current main alternatives are fines and suspended sentences, both of which are relatively simple to apply. There are nevertheless concerns and some costs involved with the effective implementation of both of these sanctions. In addition fines especially, but also suspension of sentences, carry risks of aggravating or being driven by corrupt practices.

Fines

Fines are among the most effective alternatives in keeping many offenders out of prison.²³⁴ Fines also appear relatively simple to use, but the imposition of fines and their implementation require some administrative support. Issues that need to be addressed are: the equitable calculation of fines, so that they do not disproportionately disadvantage the poor; minimizing opportunities for corrupt practices and setting rules in law and in guidelines to judges, obliging courts to consider fines as a first option, for certain crimes, with a fixed maximum length of prison sentences.

The collection of fines in line with legal procedures needs transparent and efficient administrative structures. As explained in section 3.2.3, a system currently exists, with a special bank account of the Ministry of Finance, where fines are deposited, thus a new bureaucratic structure does not appear to be necessary to collect fines. There is a need to ensure that the Ministry of Finance is held accountable for the fines deposited and that a system to audit the account should be put in place.

In order for the system of fines not to disadvantage the poor and vulnerable, a fairer calculation of fines, based on the offender's income may be considered. Although the Penal Code does allow the courts to take into account the economic and social circumstances of the offender when determining the amount of the fine to be imposed, less vague provisions based on rules specified in law would be more

²³⁴UNODC, Handbook of basic principles and promising practices on Alternative to Imprisonment, Criminal Justice Handbook Series, 2007, p. 29.

effective. A system of day fines may be introduced, following the successful application of this system in other countries, which requires fines to be fixed in relation to how serious the crime is in terms of units. Then each unit is valued in proportion to the income and financial situation of the convicted person. Thus, if a crime is valued at 20 “days”, each day might be valued at \$US 1 for a poor person and \$US 20 for a richer person.²³⁵

Suspended sentences

In general terms, the purpose of a suspended sentence is to give the perpetrator of an offence a strong warning with the potential of imprisonment at a future stage, by pronouncing a custodial sentence, without executing it. It aims to deter the offender from committing any further offences, while not subjecting him or her to the harmful impact of imprisonment. It is a simple and effective measure which is usually used against offenders who have committed non-violent and petty offences, first time offenders, in cases where mitigating circumstances apply and for special categories, such as juveniles and women with small children or pregnant women. The advantage of suspended sentences is that they do not require the input of significant additional human or financial resources for their application.

According to the Penal Code of Afghanistan, suspended sentences may currently be applied in the case of prison terms not exceeding two years or Af 24,000, but as explained earlier, suspension is rarely applied or is not applied legally. The use of suspended sentences should be increased and a system put in place to eradicate corrupt practices in their imposition.

The maximum two-year prison term for eligibility for suspension is not unreasonable, although increasing the upper limit of the prison term may be considered.²³⁶

²³⁵Stern, V., *Developing Alternatives to Prison in East and Central Europe and Central Asia, A Guidance Handbook*, King's College London, International Centre for Prison Studies, May 2002.

²³⁶For example, in the Penal Code of Slovenia the prison term is three years, in Turkey it is two years for offenders above the age of 18 and below the age of 65 and three years for those outside this age group, Penal Code, article 51 (1). In Kosovo the limit is higher at five years, and can also be applied for a criminal offence punishable by imprisonment of up to ten years, if the provisions of mitigation of punishment are applied, Criminal Code of Kosovo, Article 44 (1).

Most important is to ensure that suspension of sentences is used in practice. Suspension of sentences may be made obligatory in certain cases relating to vulnerable groups, or at least the judge should be required to give an explanation of why he/she did not impose a suspended sentence, if that were the case. Sentencing guidelines to judges need to be issued which encourage suspension of sentences in specified cases, such as those of first time offenders, and if not made obligatory in legislation, vulnerable groups (such as women, children, offenders with mental illness, drug dependent offenders).

Depending on the circumstances of the offender, conditions which are set for the suspension of a sentence may be merely not to commit another crime in the period of suspension, but they may also include a condition to undergo treatment for drug addiction or other rehabilitation programme, such as psychosocial rehabilitation in the community.

Recommendations

- Establish rules which introduce the equitable calculation of fines, with for example the introduction of day fines, and include these rules in the Penal Code or CPC.
- Develop transparent mechanisms to reduce to a minimum possibilities for corruption in the fine collection and expenditure.
- Consider increasing the upper limit of prison terms, for which suspension can be applied, for example to include prison sentences of up to three years.

In order to ensure that both fines and suspension of sentences are applied in practice:

- Judges may be required by law to impose suspended sentences or the payment of fines instead of short prison terms specified in law, which may be between six months and one year.
- Alternatively as in the case example in the box below, judges may be discouraged from imposing short prison sentences by having to

explain the reasons for a prison sentence when the sentence is below the limits determined.

- For periods over the limit set above, more discretion may be allowed to judges, but retaining suspension and fines as a possibility, up to a limit to be determined.

Case example: Germany

Fines and suspended sentences instead of short prison terms

In 1969, West Germany overhauled its penal code in order to reduce the use of custodial measures. To achieve this, it restricted the use of short-term imprisonment. To this day, what is now the German Penal Code strongly discourages the imposition of sentences of imprisonment of fewer than six months, with judges being required to specify their reasons for imposing such sentences. As a result, courts have turned to alternative sanctions to replace short-term prison sentences. Fines became the most influential alternative after the adoption of a day-fine system in 1969. The day-fine system increased both the amount and credibility of fines as an alternative, much as it happened in the Scandinavian countries that originally developed this system. The use of fines was among the key factors that explained the radical fall of annually imposed short-term prison sentences. In 1968, the courts imposed a total of 119,000 prison sentences of fewer than nine months. By 1976, that number had fallen to 19,000. During the same period, the use of fines rose to 490,000 from 360,000. The expanded use of suspended sentences enabled the courts in the following years to hold the number of prison sentences stable despite a steep increase in crime between the late 1960s and the early 1990s.

Source: For more information: Thomas Weigend, "Sentencing and Punishment in Germany" in *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard Frase, New York: Oxford University Press, 2001; UNODC, *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, Criminal Justice Handbook Series, 2007, p. 43.

Case example: Kazakhstan^a

Judges must explain the reasons for imposing prison sentences if an alternative is provided

In October 2001 a decision was taken by the Criminal Collegium of the Supreme Court to introduce a mechanism obliging judges to explain in their court decisions the reasons for imposing a prison sentence, rather than an alternative, if the law provided for both options for the offence committed. This requirement had an important impact on the reduction of prison sentences in late 2001 and 2002.

The change was reflected in figures, as follows:

In 2000, 51.3 per cent of sentences were imprisonment;

In 2001, 47 per cent of sentences were imprisonment.

In 2002, 41.8 per cent of sentences were imprisonment.

^aHuman Rights and Health in Prisons: a review of strategy and practice, Penal Reform International and The Royal Netherlands Tuberculosis Foundation, Atabay, T., Laticevschi, V., Vasil'eva, T., 2006, p. 72 (www.penalreform.org/human-rights-and-health-in-prisons-a-review-of-strategy-and-practice.html)

Introduce new alternatives that are relatively simple to administer

There is scope for introducing a few new non-custodial sanctions to increase the range of alternative sentences available to courts, in line with the Tokyo Rules, rule 8.1. These should include sanctions that do not need investment in an additional bureaucracy and infrastructure. For example, some of the complementary punishments, already included in the Penal Code, could be included in the principal sentences (though still being retained as complementary punishments as well).

Recommendations

To consider introducing new non-custodial sanctions, such as:

- Confiscation or expropriation order
- Deprivation of some rights
- House arrest

10.12 Post-sentencing alternatives: early conditional release

Legislative and practical measures should be put in place to increase the use of early conditional release, both to reduce the prison population and to encourage the social reintegration of prisoners.

The prospect of early conditional release, based on attendance of certain programmes in prison (e.g. drug treatment programmes) can also be used as an incentive for prisoners to participate in such programmes.

Currently the conditions for early conditional release are set out in the Interim Criminal Procedure Code, chapter 13, which gives courts the authority to take decisions relating to early conditional release. Very little is said in the Law on Prisons and Detention Centres, and nothing is included in the draft regulations. More emphasis on the use of early conditional release should be made and the topic should be included in the training of prison staff.

Recommendations

- Either to add a clause to article 50 of the Law on Prisons and Detention Centres, setting out the conditions which apply for eligibility or to make reference here to the prison regulations, where the conditions for eligibility should be outlined, with reference to the ICPC (i.e. proportion of sentence that needs to be served, need to have demonstrated good conduct etc).
- The law should also set out what kind of conditions the offender may be required to fulfil following release until the end of his/her sentence term. (e.g. treatment, rehabilitation, vocational training etc). In the short term some of the security measures already included in the Penal Code may be applied, pending the development of appropriate programmes in the community.
- Consider giving the responsibility for early conditional release decisions to a parole board, rather than having courts make the decision, as per current legislation. The heavy caseload of courts is unlikely to allow for speedy

decisions and adding to their work may lead to increased delays with other cases. As parole boards are usually affiliated with the prison authorities, it would be important to ensure their independence and safeguards must be put in place to prevent corrupt practices.

- Training of judges, prison staff and if a parole board is set up, of its members, on early conditional release, including its objectives of providing offenders with gradual, planned reintegration into society.

Case example: Kazakhstan^a

In Kazakhstan, new legislation came into force in 2003, which increased the use of alternatives to imprisonment, reduced sentences for certain offences and relaxed the requirements for gaining the right to early conditional release, among other measures.

In 1998, the prison population of Kazakhstan totaled 86,000 (prisons) and 16,000 (pre-trial detention facilities). It occupied third place in the world in terms of high prison population rate. By March 2005 these figures were 44,284 and 8,324 respectively and it was 25th in the world. The reduction in the prison population was achieved mainly due to the relaxation of rules regulating the right to early conditional release. The figure for prisoners released on parole more than doubled after the new law came into force. The general rate of recidivism (including all prisoners released) was decreased by 7.8 per cent between 2002 and 2003, despite the increase in those being released from prison.

The alternatives programme in Kazakhstan was a component of a comprehensive project including the introduction of strategic management to prisons, TB and HIV control and alternatives to imprisonment supported by Penal Reform International and the Royal Netherlands Tuberculosis Foundation.

^aHuman Rights and Health in Prisons: a review of strategy and practice, Penal Reform International and The Royal Netherlands Tuberculosis Foundation, Atabay, T., Laticevschi, V., Vasil'eva, T., 2006, p. 71 (www.penalreform.org/human-rights-and-health-in-prisons-a-review-of-strategy-and-practice.html)

SPECIAL CATEGORIES

10.13 Drug users

The high level of drug use in Afghanistan, coupled with the ready availability of drugs, lack of treatment programmes and the punitive policies reflected in the CNL, provide all the requisite conditions for a dramatic increase in Afghanistan's prison population, with all the associated risks such as HIV and TB epidemics. Afghanistan, with its scarce resources, and existing healthcare problems, is in no position to take such a risk. There is an urgent need to reassess the new drugs policy in this country, making a clear differentiation between medium and high level traffickers, with those arrested for low level drug trafficking and drug use. An approach which emphasizes treatment and social reintegration for the latter groups, with harsh penalties for the former, would appear to be a much more effective long-term strategy than the punitive policies which have been recently introduced, and which have failed elsewhere. Such an approach would of course need substantial investment in drug treatment programmes in the community and the establishments of links between them and criminal justice actors—the prosecutors and judges—to ensure that legislative amendments, recommended below can be implemented. UNODC, with its expertise in the fields of criminal justice and drug-related problems, is in a unique position to assist in the development and implementation of such a policy.

Recommendations

Legislation

- The Law Reform Working Group and the Counter-Narcotics Working Group should review the Counter Narcotics Law, to bring it in line with the spirit of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, taking into account Afghan realities and the failure of punitive drugs policies elsewhere to reduce drug offences. Specific recommendations on amendments to the CNL have been made in appendix 1 of this document. See also appendix 2, for extracts from a discussion paper prepared by UNODC and WHO regarding drug dependence treatment and the criminal justice system.

Practice

- To develop a policy that incorporates punishments and treatment in a way that reduces the imprisonment of low level drug traffickers and users, while increasing their chances of social rehabilitation and treatment.
- To encourage treatment for drug users, especially, but not only for addicts, and to expand drug treatment centres available in the community as a priority.
- To establish links between drug treatment centres/programmes and prosecutors and judges to ensure that non-custodial measures and sanctions for drug offenders can be implemented efficiently and effectively.

10.14 Prisoners with mental healthcare needs

According to article 67(1) of the Penal Code offenders with serious mental illness, defined as insanity, are not considered to have criminal responsibility and therefore cannot be imprisoned. Paragraph 2 requires extenuating circumstances to be applied to those with a defect in their senses and intelligence while committing a felony or misdemeanour. Paragraph 3 stipulates that offenders with a lesser mental health problem, who commit an obscenity, should not be punished. This article does not provide for any treatment for such offenders.

Thus the determination of the sentence is dependent on offenders' mental and intellectual capacity at the time of committing the offence. Developing mental illness during criminal proceedings or imprisonment does not impact on the sentence of offenders, apart from rendering them eligible for treatment in a mental health institution, following which they will be sent to or returned to prison.²³⁷ The focus of the

²³⁷Unless the courts take account of article 141 (1) of the Penal Code which gives judges authority to take account of extenuating circumstances, including the circumstances of the offender, which however do not specifically mention mental illness which developed after the commission of the offence as an extenuating circumstance.

law is the criminal responsibility of the offender and does not adequately take into consideration the rehabilitative needs of the offender, in light of the harmful impact of imprisonment on mental health.

In order to put into practice the principles expressed in international standards, in relation to the treatment of offenders with mental illness, there is a need to ensure that the medical examination of those with suspected mental illness take place at the earliest possible stage, following their contact with the criminal justice system, in order to ensure timely decisions. This may include diversion by prosecutors to mental health facilities at first point of contact, as well as diversion during pre-trial and trial stage.

There is also a need to ensure that there is a standing commission, which is independent and made up of suitably qualified medical specialists, with clear responsibility for the diagnosis of mental illness, and that it is accessible. In order to comply with the rehabilitative purpose of non-custodial measures, there is also a need to emphasize treatment. However, the application of this latter principle is problematic, due to the lack of treatment facilities for persons with mental health problems. It can only be implemented if investment is made in providing better mental healthcare in the community, including for offenders.

Recommendations

Legislation

- The development of a mental healthcare policy by the MoPH, referred to in section 4.1 signals a very positive step forwards. It would be extremely useful for stakeholders intending to develop a strategy for alternatives to prison, such as UNODC in particular, to join discussions before the strategy is finalized and to ensure that offenders are taken into account adequately and that the non-custodial sanctions and measures put forward for offenders with mental illness are in line with the overall strategy.
- To adopt mental health legislation to protect the rights of people with mental illness. Such legislation should aim to protect the human rights of all persons with mental healthcare needs, including defendants, offenders and prisoners, should guarantee such persons' right to appropriate, individualized treatment, while including strict safeguards against treatment without free and informed consent, in line with international standards such as the Mental Illness Principles and the Convention on the Rights of Persons with Disabilities (CRPD).²³⁸
- To explicitly refer to the new mental health legislation in relevant articles of the new Criminal Procedure Code or ensure that the CPC itself provides safeguards against arbitrary decisions of detention in a closed institution for the purposes of diagnosis or mental health treatment without consent.
- Ensure that the new Criminal Procedure Code includes provisions that oblige police and prosecutors to ensure that a suspect receives immediate medical examination, if he or she appears to have a mental disorder (by an independent and competent medical board—see practical recommendations, below). The examination should not be dependent on the request of a lawyer, though a lawyer should be summoned to be present during the procedure. Provisions should be in place to divert persons diagnosed with mental illness from the criminal justice system to suitable treatment, taking account of the offence committed and public safety requirements, also considering the fact that imprisonment is likely to exacerbate the mental health problems of the offender. Those with serious mental illness (insanity) should not be imprisoned (as per article 67 (1) of the Penal Code).

²³⁸CRPD introduces stricter safeguards against treatment without free and informed consent and promotes supported decision-making in the case of persons with mental disabilities.

Medical examination on arrest

If the behaviour of a person arrested indicates a possibility of mental disorder, a medical examination should be conducted promptly by a medical professional to establish: (a) the person's need for medical care, including psychiatric care; (b) the person's capacity to respond to interrogation, and (c) whether the person can be safely detained in non-health care facilities.^a

The person should have the right to assistance from an appropriate personal advocate during the procedure.^b

Clear procedures should be in place for undertaking such examination, which should not be conducted against the wishes of the person in question.^c

^aSee Council of Europe, Committee of Ministers Recommendation, No. Rec. (2004) 10, concerning the protection of the human rights and dignity of persons with mental disorder, article 33

^bIbid.

^cMental Illness Principles, principle 5: "No person shall be compelled to undergo medical examination with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorised by domestic law".

- Sentencing alternatives should also be introduced for offenders with mental healthcare needs. Such sentences should incorporate comprehensive medical care in a suitable facility and supervision. The current ICPC gives the court and prosecutors the authority to suspend a trial or sentence of a person with mental illness, while he or she is being treated, but then the offender will be imprisoned or returned to prison after treatment, which is likely to negate the positive outcomes of any treatment. Certain categories of offenders (such as non-violent and first-time offenders and where mitigating circumstances apply) should not be sent to prison, but be subject to alternatives, which include continued psychosocial support, in addition to sanctions such as the payment of fines, suspension of sentences or new alternatives discussed in section 10.11, unless there is justification to believe that they pose a risk to the public.

- In the case of offenders who present a danger to the public, it is better for them to receive treatment in secure medical facilities, rather than in prison settings which will worsen their condition.

Practice

- The implementation of diversion measures will necessitate the training of law enforcement officials to recognize mental illness, in order to seek the assistance of medical professionals at the first point of contact with the criminal justice system.
- There is also a need to ensure that there is a standing commission which has clear responsibility for the diagnosis of mental illness and that it is accessible. In order to prevent the arbitrary detention of defendants and to protect their human rights it is essential that the commission is independent and that it is made up of suitably qualified mental health specialists.
- Investment needs to be made in developing community mental healthcare services as a priority, working together with NGOs in the short term while building the capacity of the State system in the long term. Unless such investment is made, all above recommendations will have extremely limited impact, if any. This is one of the issues that should be included in the agenda of the working group recommended above, in the new mental health policy currently being developed and in the consultation process "across sectors".

10.15 Women

Most women imprisoned in Afghanistan would not be potential candidates for alternatives, since those who have been convicted of moral crimes, *zina* in particular, usually receive long prison terms and in addition have protection needs. Therefore priority should be given to the development of a strategy to ensure that women are treated fairly in the criminal justice system and that their circumstances are taken into account in sentencing, including and especially when the offences constitute so called "moral

crimes”, rather than trying to develop non-custodial sanctions at the current time.

There is a need to put in place safeguards that prevent victims of rape and sexual abuse from imprisonment on charges of *zina* (which would require a clear definition of rape in the Penal Code and sentencing guidelines to underline the need to differentiate between the two acts).

In parallel, those who run away from home should be diverted to appropriate services, as early as possible, if they are apprehended by law enforcement agencies, where they will need to be provided with appropriate legal and psychosocial assistance.

The establishment of transitional houses for released women prisoners who need protection, including those who may be subject to early conditional release, needs to be speeded up to ensure that women can take advantage of post-sentencing alternatives on an equal basis with men and that those in need of protection do not feel obliged to remain in prison for prolonged periods.

Recommendations

- The setting up of referral centres in all provinces of Afghanistan, as planned by MoWA, UNIFEM and MoI, and investment by donors in this initiative.
- The expansion of Family Response Units, currently said to be operational in 5-6 police stations.
- Investment in additional shelters to be set up in different provinces of Afghanistan, with psychosocial and legal aid services.
- Training to judges and prosecutors to differentiate between victims and perpetrators, especially in the context of “moral crimes”, and to take into account the circumstances of the offence during sentencing, with a view to protecting victims of violence and other forms of injustice, from being penalized and re-victimized.
- Training to police officers and prosecutors on diversion from the criminal justice system, for

example to MoWA, AIHRC and referral centres, when they are established, in appropriate cases, such as running away from home.

- Establishment of transitional houses for released female prisoners in need of protection.

10.16 Pregnant women and women with young children

Pregnant women and women with young children should not be imprisoned unless absolutely necessary. When the offence is committed by a pregnant woman or a mother with a baby, sentences may be deferred, for example, until the child reaches a certain age and reviewed at that time. Currently the ICPC provides that if a prison sentence is passed on a woman who is six months pregnant, the prosecutor can postpone the imprisonment until four months after the delivery of the child. (article 89). But this requires the woman to return to prison after the term is completed.

Recommendations

- To introduce suspended sentences for pregnant women and women with small children into the Penal Code, in cases where the offence committed is not a felony.
- The suspension should be for a long period, for example until the child reaches the age of 14. The sentence should then be reviewed and cancelled, if the offender does not commit another offence during the period of suspension.

Such legislation is in place in Russia and Kazakhstan, for example, where the execution of a sentence may be postponed and then reduced or cancelled for pregnant women or women who have children under 14 years of age, with the exception of those sentenced to imprisonment for terms longer than five years for grave and specially grave crimes.²³⁹ In Afghanistan the protection needs of the women concerned will

²³⁹Criminal Code of the Republic of Kazakhstan, article 72; Criminal Code of the Russian Federation, article 82.

have to be taken into account in the suspension of sentences. If there is no appropriate community provision, then article 53²⁴⁰ of the Law on Prisons and Detention Centres may need to be applied, at least on a temporary basis, and subject to the agreement of the offender.

10.17 Juveniles

Legislation has advanced considerably in Afghanistan to include provisions in line with the United Nations Convention on the Rights of the Child (CRC) which Afghanistan ratified on 28 March 1994. But despite the CRC provisions reflected in Afghanistan's Juvenile Code, that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time,"²⁴¹ juveniles at risk are still drawn into the criminal justice system.

The main challenge in Afghanistan is to ensure that the Juvenile Code is implemented throughout Afghanistan. This requires the setting up of juvenile courts in each province, the training of judges and prosecutors on the Juvenile Code and provision of legal aid to juveniles as a priority.

Policies and practice should be focused on child rights, reducing illegal detentions and violence within the juvenile justice system, and building on the practical application of international instruments: the CRC, the Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. The lessons of the Inter-Agency Coordination Panel on Juvenile Justice documented by UNODC "Protecting the rights of children in conflict with the law"²⁴² provides a useful starting point.

²⁴⁰Article 53 (1): Heads of detention centres and prisons by the distinction of attorney general office after the permission of ministry of justice and written demand by the individual can provide temporary shelter and protection in detention centres and prisons to those who have been seriously threatened and their safety are at serious risk.

²⁴¹ CRC Article 37 (b).

²⁴²www.penalreform.org/protecting-the-rights-of-children-in-conflict-with-the-law-3.html

Recommendations

Legislation

There are a few places where amendment to the Juvenile Code appears necessary:

- There is a need to expand provisions for diversion from the criminal justice system, by giving prosecutors more discretionary powers to divert juveniles to community programmes, temporary supervision and guidance, in addition to the provision for mediation already provided in article 21.1. Although some of these provisions may not be implemented in the short term, due to the lack of community programmes, legislation will make it possible for application in the long term.
- There is also a need to introduce a number of other alternatives to pre-trial detention, taking into account especially that currently juveniles may spend months and sometimes over a year in detention during the adjudication process (see section 3.2.2 for possible alternatives).
- Article 38, which covers the treatment of juveniles with mental illness should clearly exclude imprisonment for juveniles with mental illness.
- An article should be added explaining that in cases of drug use and trafficking, the Juvenile Code applies. In principle according to article 39 of the Juvenile Code juveniles should receive reduced prison terms for all offences, with different criteria applying depending on the age of the offender, but this provision mentions the Penal Code only. Perhaps by changing the reference to mention all other criminal legislation, rather than the Penal Code only, CNL will be covered and the objective would be achieved.

Practice

- To build the capacity of juvenile justice institutions in Afghanistan, via training, development of infrastructure, ensuring that juvenile justice actors have access to the Juvenile Code in Dari, etc, which are activities that are no doubt already planned within the programmes

of the Rule of Law Working Group, UNICEF and international donors. Alternatives to prison should comprise a key component of prosecutors' and judges' training to encourage and help them use the non-custodial provisions of the Juvenile Code.

- Ensure that training includes training on chapter 6 of the Juvenile Code, pertaining to protection of children in need of care and protection. Children in need of protection, such as girls who run away from their homes and boys who are victims of sexual exploitation, should be recognized as victims and be assisted, in line with the provisions of article 55 of this chapter and the victims provided with physical, psychosocial and legal protection.
- Consider placing trained and independent juvenile officers or legal assistants at police stations to ensure that the proper authorities are alerted and diversion to families or social service providers is seen as the first priority for children in conflict with the law.
- Investment needs to be made in social service providers responsible for taking care of and supervising children in conflict with the law who are subject to alternative sanctions and measures, as provided by the Juvenile Code. Such services should have staff trained to take care of the needs of children, which should include a specialist in child psychology, if possible. Some of such services should have shelter capacity to ensure that children at risk can be protected. Unless such investment is

made, many provisions of the Juvenile Code will be inapplicable, irrespective of whether the capacity of the juvenile justice system is improved or not.

10.18 The informal justice system

Decisions by a number of stakeholders to undertake further research, to develop a policy that regulates the authority of the informal justice system, to monitor decisions to prevent human rights violations, to set up a system to record the decisions of *jirgas*, both for research and for monitoring purposes, and to implement a few pilot projects, and then to assess the results, are useful initiatives. There does not appear to be any justification to make any further investment in the development of informal justice mechanism at the current time, apart from that which is already being done and planned.

Recommendation

- UNODC to monitor outcomes of research, evaluations and pilot projects undertaken by other stakeholders, before developing any programmes or strategies to include diversion to the informal justice sector, in its alternatives programme. For UNODC, focus should be on the formal justice system, where many possibilities exist for the expansion of the use of alternatives to prison as outlined above, but much needs to be done.

Appendix 1

Recommendations on amendments to the counter narcotics law

Juveniles

A new article should be introduced, where it is stated that in the cases of juvenile offenders, the Juvenile Code applies, or that the law should be interpreted in conjunction with the Juvenile Code (which provides for shorter prison terms and encourages non-custodial sanctions and measures).

Chapter IV Offences and penalties

Article 15 Drug trafficking offences and penalties

1. (a) "Possession" and "purchasing" referred to in this article, should be made explicit to refer to possession and purchasing for the purpose of trafficking, in line with article 3, Para. 1 (a), (iii) of the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances (the Convention), in order to make clear the distinction between possession and purchasing for personal use and for the purposes of trafficking.

Article 16 Drug trafficking penalties

In general, fines should not be fixed, but calculated on the basis of the economic circumstances of the offender, at least for small quantities of drugs. The sums included in these provisions are extremely high for an average Afghan citizen (see recommendations re fines, section 10.11 of the assessment).

United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances

Article 3, para. 4

- (a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.
- (b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.
- (c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

1. Article concerning heroin, morphine or cocaine:
 - (i) Suggest providing an alternative to imprisonment. The penalty provided should be six months to one year imprisonment OR a cash fine, rather than AND, or any other alternative sanction, such as a warning (e.g. for first time offenders involving very small quantities), taking into account the circumstances of the offence and the background of the offender (in line with article 3, para. 4 (c) of the Convention).
 - (ii) Again suggest replacing AND with OR, as well as providing a possibility for other non-custodial sanctions (in line with article 3, para. 4 (c) of the Convention).
2. Article concerning opium:
 - (i) and (ii) As above, suggest replacing AND with OR, to provide for fines as an alternative rather than additional punishment, and adding the possibility of other alternatives sanctions, such as warnings, vocational and rehabilitation programmes, depending on the circumstances of the offence and the background of the offender (in line with article 4 (c) of the Convention).
3. Article concerning all substances, with the exception of the above. This article therefore includes sanctions for trafficking of cannabis resin (hashish) and cannabis.

Would suggest establishing a lower limit for cannabis resin and cannabis, below which imprisonment should not be an option at all, with alternatives provided in its place.

- (i) So this article should state a lower and an upper limit, at least for cannabis and cannabis resin, and provide cash fine as an alternative, rather than an additional sentence for cases involving all substances
- (ii), (iii) Suggest making fines an alternative rather than an additional sentence, when cannabis and cannabis resin is involved.

Article 27
Consumption of illegal drugs, and treatment of dependent persons of addicts

As regards the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption, the Convention provides that States may provide alternatives to conviction and punishment, such as treatment, education, aftercare rehabilitation and social

reintegration programmes. The Convention does state that these could be in addition to the main punishment, but provide for States to make their own decisions. The CNL provides an alternatives in article 27 (2), but only if a person is drug addicted. This article therefore has potential to lead to the imprisonment of a large number of people in Afghanistan, as drug use (especially hashish and opium) is so common, and the latter is often used as medication due to the lack of access to healthcare services. Such criminalization would serve no purpose in terms of eradicating drug trafficking and apprehending high level narcotics traffickers.

United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances

Article 3, para. 2

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Article 3, para. 4

(d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

This assessment's suggestion would be to set a lower limit for certain drugs, and to decriminalize possession for personal consumption below that lower limit and to provide alternatives to imprisonment for possession between this lower limit and the upper limits set in article 27.

Specifically:

1. To add the words "above the limits set below".

To include both lower limits and upper limits in each of the following articles:

- (a) In addition to the recommendation above, to provide for a cash fine as an alternative to imprisonment, rather than in addition, and to add other

alternatives such as treatment and rehabilitation, which can be used whether or not the user is a medically certified addict, provided that he or she is willing to undergo treatment.

(b) As recommendation for the above article.

(c) As above.

(d) In principle, this article is contrary to the Convention because it provides that those who have more than a certain quantity of drugs for personal possession should be treated and punished as traffickers. The Convention clearly differentiates between possession for the purposes of trafficking and possession for personal consumption and provides for sentences in line with these definitions. It should be amended accordingly, perhaps by changing the word “shall” to “may”, leaving judges discretion to decide depending on circumstances and quantities involved.

2. Would strongly recommend compulsory treatment for those who are addicted and no provision for imprisonment following treatment, as it is almost certain that imprisonment following treatment will ensure that the offender will return to drugs.

4. To remove this article altogether in line with the above suggestion.

5. To provide cash fine as an alternative not as an additional sentence.

Article 29 Repeat offenders

This article takes away any discretionary powers from judges and should at least be amended so as to differentiate between repeat offenders who are traffickers and those who are users or addicts. The latter should not be imprisoned, but should undergo treatment again, if the repeat offence is due to a relapse following treatment.

Article 30 Home leave

This article prohibiting home leave for those who have been sentenced to a prison term above five years of imprisonment should be removed. It serves no purpose other than harsh punishment, as the prospect of not having any home leave, if imprisoned, is unlikely to deter people from committing drug offences. It also reduces chances of successful social reintegration of prisoners.

The Tokyo Rules, rule 9.1 urges the use of post-sentencing dispositions, including furlough, half-way houses, work and educational release. Rule 9.4 provides that any form of release from prison should be considered at the earliest possible stage.

With regard to long prison terms and prison leave, the Council of Europe Committee of Ministers has noted that⁹:

Considering that the enforcement of long-term sentences may have adverse effects on the prisoner and his dependants;

Considering that the enforcement of long-term sentences and the provision of appropriate rehabilitation is a difficult task for institutions and their staff;

And recommended the following:

7. reinforce the contacts of the prisoners with the outside world, particularly by encouraging work outside the institution;

8. grant periods of leave from prison not as a relief from detention but as an integral part of the programme of treatment;

9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted.

⁹Council of Europe, Committee of Ministers Resolution (76) 2 on the Treatment of Long-term Prisoners, adopted by the Committee of Ministers on 17 February 1976 at the 254th meeting of the Ministers' Deputies.

Article 32 Penalty aggravation

2. This clause which takes away all discretionary powers from judges and prohibits the use of alternatives, including suspension, for drug trafficking offences should be removed. Offenders who differ in terms of conduct, danger to the community and culpability should not be treated identically. Judges should be given an opportunity to use their judgment and discretion in identifying suitable and proportionate sentences in each case. The recommendations in the assessment, regarding the application of suspension should be applicable to drug traffickers as well.

Appendix 2

Principles of drug dependence treatment: discussion paper, UNODC, WHO, March 2008²⁴³ [Extract]

Principle 6. Addiction treatment and the criminal justice system

Description and justification

Drug-related crimes are highly prevalent, and many people are incarcerated for drug-related offences. These include offences to which a drug's pharmacologic effects contribute; offences motivated by the user's need for money to support continued use; and offences connected to drug distribution itself. A significant proportion of people going through criminal systems worldwide are drug dependent.

In general, drug use should be seen as a healthcare condition and drug users should be treated in the healthcare system rather than in the criminal justice system where possible.

Interventions for drug dependent people in the criminal justice system should address treatment as an alternative to incarceration, and also provide drug dependence treatment while in prison and after release. Effective coordination between the health/drug dependence treatment system and the criminal justice system is necessary to address the twin problems of drug use related crime and the treatment and care needs of drug dependent people.

Research results indicate that drug dependence treatment is highly effective in reducing crime. Treatment and care as alternative to imprisonment or commenced in prison followed by support and social reintegration after release decrease the risk of relapse in drug use, of HIV transmission and of re-incidence in crime, with significant benefits for the health of the individual, as well as public security and social savings. Offering treatment as an alternative to incarceration is a highly cost-effective measure for society.

Components

- *Diversion schemes from criminal justice system into treatment.* Treatment as an alternative to imprisonment or other penal sanctions should be made available to drug dependent offenders. Such schemes bring people with drug dependence out of the criminal justice system into medical and rehabilitation programmes and allow drug treatment under a compulsory court order instead of penal sanctions. If treatment is discontinued, penal sanctions will be the consequence. In this way, treatment is offered as an alternative to incarceration or other penal sanctions, but not imposed without consent.
- *Human rights* principles described in a separate section certainly apply to people charged with crimes related to illicit substances. This includes the right of addicted patients in prison setting to receive the health care and treatment that are guaranteed in treatment centres in the community.

²⁴³For full text, see: www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf

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- *Continuity of services.* Specific interventions to reduce high-risk behaviour in regard to infectious diseases should be available in prison. If prisoners go into withdrawal, treatment should be initiated following good clinical practices. For those inmates already in treatment before incarceration, medical treatment, especially pharmacological therapy, should not be discontinued when entering prison. Special facilities for pregnant women and mothers with small children are needed to provide for the best bonding circumstances.
- *Psychosocial interventions,* including vocational training can support reintegration after release.
- *Continuous care in the community* upon release is crucial to meaningfully reintegrate drug dependent offenders into the community. Without access to education, job opportunities, housing, insurance, and health care including drug dependence treatment, persons in recovery face a higher risk of relapse and related mortality and also increase the burden on their communities.
- *Neither detention nor forced labour* have been recognized by science as treatment for drug use disorders,

Actions to promote this principle

Ensure that:

1. the legal framework allows the full implementation of drug dependence treatment and care options for

offenders, in particular treatment as an alternative to incarceration and psychosocial and pharmacological treatment in prisons.

2. mechanisms to guarantee coordination between the criminal justice system and drug dependence treatment system are in place and operational. Such mechanisms and collaborative work will promote the implementation and monitoring of diversion schemes as an alternative to incarceration.

3. drug using inmates are offered a range of treatment and care services, including prevention of transmission of blood-borne diseases, drug dependence pharmacological and psychosocial treatment, rehabilitation, preparation for release and linkage to community services.

4. criminal justice and prison staff are made aware of the needs of drug dependent offenders and trained to support prevention and treatment interventions in prison settings.

5. staff in charge of delivering drug dependence treatment (either health prison staff or external staff) are properly trained in the provision of evidence-based treatment and ethical standards, and show respectful, non-judgmental and non-stigmatizing attitudes.

6. links and referrals to community agencies are established for the continuation of the treatment for patients in the criminal justice system.

Appendix 3



UNITED NATIONS
Office on Drugs and Crime

Country Office for Afghanistan
House 49/51, Lane 4, Street 15
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Kabul, Afghanistan

Questionnaire for prisoners in Kabul

Interview date and time:

Interviewer:

Province:

- The interview is conducted on a confidential and anonymous basis.
- This questionnaire forms part of an assessment which aims to assess the feasibility of implementing alternatives to imprisonment in Afghanistan .

A. PERSONAL DETAILS

1. Age: _____

2. Province: _____

3. Occupation: _____

4. Education: _____

Literate Illiterate

a. If literate, level of education:

Primary school Secondary school High School

University Informal education (Madrassa)

5. Were you working at the time of arrest or before it?

Yes No

a. If so, what sort of work?

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6. Marital status:

- Single Married Separated
 Divorced Widow

7. Number of children?

8. Where are the children now living?

- Living with their mother or father With their grandparents With a relative
 In an orphanage Other (please specify)

B. ECONOMIC—SOCIAL AND FAMILY BACKGROUND

9. How do you assess your family economically?

- Very poor Poor Medium Rich

10. Who in the family worked and looked after the family?

- Both husband and wife Only the husband Only the wife
 Both unemployed Other

11. If you were the sole earner, what is your spouse (wife or husband) doing now? How does he or she earn a living?

C. CASE DETAILS

12. Date of arrest? _____

13. Place of arrest? _____

14. Do you know which offence you are charged with?

- Yes No

If so, which offence are you charged with?

- Murder Robbery Theft Moral crime
 Assault Drug trafficking Drug possession Other

15. Have you been tried and sentenced?

- Tried Sentenced

If sentenced:

16. Primary Court decision _____

17. Secondary Court decision _____

18. Supreme Court decision _____

19. Have you be in prison before or is this your first time?
 I have been in prison before it is my first time.
20. If you have been in prison before, how many times?
 Once Twice Three times More than three times
21. Brief case details—why did you commit the offence? _____

D. LEGAL REPRESENTATION AND PRE-TRIAL DETENTION

22. Do you have a lawyer?
 Yes No
23. If you have a lawyer, how long after arrest did you first meet her/him? _____
24. Did you have to pay for your lawyer or were you assisted free-of-charge?
 Assisted free-of-charge I had to pay
25. Were you offered release on bail (by paying money or other securities) during your pre-trial detention?
 Yes No
26. Were you able to provide the necessary money or securities to be released on bail?
 Yes No
27. If you were not released on bail, how long did you spend in pre-trial detention?
 Less than one month One month Two months More than two months

E. SKILLS

28. Do you have any job skills?
 Yes No
29. What are they? _____

F. MENTAL/PSYCHOLOGICAL HEALTH

30. Have you ever had any mental health or psychological problems, before imprisonment?
 Yes No
31. If so, what were they? _____
32. Did you ever receive any treatment for psychological/mental health problems before imprisonment?
 Yes No
33. If so, where? _____
34. Did you develop any psychological or mental health problems during your imprisonment?
 Yes No
35. If so, did you see a psychologist or other doctor for your psychological or mental health problems and did he or she diagnose your problem?
 Yes No
36. If so, do you know what your problem is? _____
37. Did you receive any treatment?
 Yes No
38. If so, what treatment did you receive?
 Medication Counselling Other (specify)

G. DRUG DEPENDENCE

39. Have you ever used drugs?
 Yes No
40. If so, what type of drugs?
 Heroin Opium Cannabis Pharmaceutical drugs
41. What was/is your method of intake?
 Smoking Eating Injecting
42. For how long have you used drugs? _____
43. Do you use drugs now?
 Yes No
44. If so, what type of drugs?
 Heroin Opium Cannabis Pharmaceutical drugs

45. Method of intake?

Smoking

Eating

Injecting

46. When did you start taking drugs?

Before the arrest

In prison

47. Have ever tried to give up drugs?

Yes

No

48. If so, where? _____

49. How many times?

Once

Twice

Three times

More than three times

50. Are you attending the drug addiction treatment centre in the prison?

Yes

No

51. If so, do you think it will help you give up drugs?

Yes

No

Appendix 4

WORKING GROUP ON ALTERNATIVES TO PRISON (WGAP): SUGGESTED NEXT STEPS

1. Establishment and membership of WGAP: UNODC, in consultation with other United Nations agencies and stakeholders, to facilitate the establishment of a broad based Working Group on Alternatives to Prison (WGAP). This WGAP may be established as a cross-cutting working group, within the existing consultative group structure—cross cutting across Governance, Social Protection, Health and Education sectors. International membership should include selected members from the technical working groups of the Rule of Law Working Group, and other relevant working groups of the Governance, Rule of Law and Human Rights Consultative Group,²⁴⁴ as well as relevant working groups from the social welfare, health and education sectors, in order to ensure that the decisions of WGAP are mainstreamed in the strategies of the relevant sectors, and activities coordinated with those of the other working groups. Suggested membership from Afghan authorities has been included in section 10.1 of the assessment. It is important to give leadership to the main Afghan stakeholders and a prominent role to the Supreme Court, as judges' support and participation in strategy development is essential to ensure that alternative sanctions are understood and used.

2. There is also a need to coordinate with NGOs to harness their involvement in the delivery of health and social services in the community for offenders and former prisoners, especially to provide such services in the short term. Membership of selected NGOs, especially the AIHRC, on WGAP would be beneficial.

3. The establishment and functions of WGAP should form part of the implementation of the relevant objectives of the NJSS, referred to in section 2.

4. WGAP members to review the current assessment (and any other relevant studies undertaken by other stakeholders), agree a strategic framework to introduce and increase the use of non-custodial sanctions and measures in legislation and practice, starting from law reform to practical measures, and to prioritize next steps. Different stakeholders could be responsible for coordinating or undertaking different activities, in line with their field of work and expertise.

For example:

5. **Research:** As a first step, members of WGAP may initiate comprehensive research and analysis in provinces and Kabul, to identify reasons why existing provisions for pre-trial and sentencing alternatives are not applied in practice, to develop appropriate responses to overcome obstacles, taking into account the findings and recommendations of this report. Another important area of research would relate to the current composition of the prison population, crime and sentencing figures, to establish a reliable knowledge base to determine criteria for targeting the types of offences and sentences for which alternative sanctions may be an option (see section 10.4 of the assessment).

6. Another priority for research may be the commission of an assessment of the minimum funding necessary to fulfill recommendations regarding the development of health, drug treatment, mental health-care and social protection services, made in section 10.3.

²⁴⁴For example, Counter-Narcotics and Anti-Corruption Working Groups.

7. **Legislation:** Taking into account the findings of further research and the recommendations of this assessment, WGAP should develop its own recommendations and take appropriate steps to introduce the agreed changes to legislation, in coordination with the Law Reform and Counter Narcotics Working Groups.

8. **Capacity-building and awareness raising:** UNODC should facilitate capacity building and awareness raising about alternatives to prison and information exchange about good practice in other countries, among members of the WGAP by providing training and study visits, to ensure that the members of WGAP increase their knowledge base and are themselves advocates of alternatives to prison.

9. A public education and awareness raising campaign should be initiated at the same time to increase understanding about and harness support for non-custodial sanctions and measures and to raise awareness about the harmful consequences of imprisonment.

10. **Training:** Training of judges, prosecutors and lawyers in alternatives to prison—both international law and Afghanistan’s provisions for alternatives. Training on the Juvenile Code provisions for alternatives and on articles relating to children in need of protection, to judges, prosecutors and lawyers responsible for juvenile cases.

11. **Prisoners with mental healthcare needs:** There is a need to coordinate, without delay, with the task force developing a mental health policy at the time of writing, under the leadership of the MoPH (see sections 4.1 and 10.14), in order to include the needs of offenders with mental healthcare needs in strategies and budgets, and to establish coordination between mental healthcare services in the community and criminal justice institutions, so that offenders with mental illness can be diverted from the criminal justice system to appropriate treatment in the community. In this context, it is important to ensure

that the provision of such treatment includes safeguards provided in the United Nations Principles for the protection of persons with mental illness and the improvement of mental healthcare (MI Principles) with regard to consent to treatment and prevention of abuse of persons with mental healthcare needs.

12. **Pilot Projects:** A later step may be to initiate pilot projects in selected regions, in partnership with NGOs, based on the outcomes and recommendations of the studies and assessments suggested above, to test the practicability of recommendations and their impact.

Such projects could include: legal aid projects; setting up of mediation/restorative justice programmes, starting with juveniles and women; drug treatment/social reintegration programmes for offenders who have committed minor drug offences, among others.

13. Other priorities and the sequence of steps to be taken should be decided by WGAP, based on the recommendations listed in section 10 of the assessment, and outcomes of further research recommended above.

14. **Coordination and monitoring:** In order to ensure coordination among sectors and monitoring of activities, WGAP also needs to develop an information management system to track project planning, implementation and achievement across sectors.

15. **Donor support:** It is essential that the WGAP works with key donors to keep them informed of the comprehensive approach and harness their support for projects that cover justice, social protection, health and education, perhaps starting with pilot projects as suggested above. It is also essential that donors funding poverty reduction programmes, currently outside the justice sector, are made aware of the links between increased rates of imprisonment and poverty, and are prepared to include the needs of vulnerable offenders in their programmes.



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