

AFGHANISTAN JUSTICE SECTOR SUPPORT PROGRAM

FUNDED BY THE U.S. DEPARTMENT OF STATE / INL AFFAIRS

پروگرام حمایت سکتور عدلی افغانستان

تمویل کننده: وزارت خارجه امریکا - ریاست بین المللی مبارزه با مواد مخدر و تنفیذ قوانین



J S S P

**ASSESSMENT OF PROVINCIAL DEFENSE
CAPABILITIES IN BALKH, HERAT, KUNDUZ,
AND NANGARHAR**

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
INTRODUCTION	
I. Background.....	7
II. Data Collection/Assessment Process	8
III. Legal Basis for the Right to a Lawyer	10
IV. Literature Review.....	12
V. Defense Capacity Defined	13
BALKH PROVINCE JUSTICE SECTOR ASSESSMENT	
I. Summary of Findings.....	15
II. Introduction.....	16
III. Assessment Interviews.....	16
IV. Overview of Current Capacity	17
V. Synopsis of the Data Collected.....	18
HERAT PROVINCE JUSTICE SECTOR ASSESSMENT	
I. Summary of Findings.....	27
II. Introduction.....	28
III. Assessment Interviews.....	28
IV. Overview of Current Capacity	29
V. Synopsis of the Data Collected.....	30
KUNDUZ PROVINCE JUSTICE SECTOR ASSESSMENT	
I. Summary of Findings.....	40

II.	Introduction.....	40
III.	Assessment Interviews.....	41
IV.	Overview of Current Capacity	41
V.	Synopsis of the Data Collected.....	44

NANGARHAR PROVINCE JUSTICE SECTOR ASSESSMENT

I.	Summary of Findings.....	52
II.	Introduction.....	52
III.	Assessment Interviews.....	53
IV.	Overview of Current Capacity	54
V.	Synopsis of the Data Collected.....	57

CONCLUSION	65
-------------------------	----

APPENDICES

Appendix A.....	Assessment Tool
Appendix B	MOJ Registry of Defense Lawyers
Appendix C	Defense Assessment Flow Chart
Appendix D.....	NGO Lawyers in the Assessment Provinces

EXECUTIVE SUMMARY

Background

The Justice Sector Support Program (JSSP) is focused on strengthening the capacity of the Afghan criminal justice system. JSSP is funded by the United States (U.S.) Department of State. The Access to Justice and Integration Section (AJIS) is one of four components of the JSSP program.¹ AJIS assists Afghan criminal justice sector institutions to create and implement fair and transparent criminal justice processes. The AJIS team comprises five U.S. Justice Advisors (Advisors), three Afghan Legal Consultants (ALC), and two translators.

This assessment seeks to provide the central and regional governments of Afghanistan as well as nongovernmental organizations (NGOs) and donor countries with sufficient information to estimate the need for growth of criminal advocacy services. This assessment reports on the status of criminal defense services in four provinces and what capacity exists in them. Where there are significant gaps between what is available and what is needed, a follow-up report will propose trainings and other interventions to remediate some of the gaps. This assessment is the first of these documents.

Current State of Defense Services in Balkh, Herat, Kunduz, and Nangarhar Provinces

Article 31 of the Afghan Constitution provides for a right to defense counsel. In Afghanistan, however, the concept of a criminal defense institution is a new phenomenon. Consequently, during this build-up phase, capacity is limited and certainly insufficient to provide legal assistance to each and every criminal defendant who needs or wants a criminal defense lawyer. As of September 2007 there were only 325 defense lawyers registered with the Ministry of Justice (MOJ) across Afghanistan.² There are other advocates providing limited scope criminal defense assistance, such as retired judges, former prosecutors, elders, relatives and others. Most of the law graduates or former legal professionals are not registered with the MOJ as required pursuant to Article 19(2) of the Interim Criminal [Procedure] Code for Courts (ICPC) and are unregulated. Unregulated justice sector actors may frustrate efforts toward developing professionalism and implementing minimum standards for representation of clients.

The majority of registered criminal defense lawyers are provided and funded by national and international NGOs. The prominent organizations providing these services to the indigent include Medica Mondiale (MM), International Legal Foundation (ILF), Da Qanoon Ghushtonkay (DQG), and the Legal Aid Organization of Afghanistan (LAOA). These NGOs have their largest, and central, offices in Kabul. The Assessment Team

¹ Other project components include an Attorney General's Office Assistance Section, a Ministry of Justice Assistance Section, and a JSSP Regional training program.

² See, Appendix B, MOJ Registry of Defense Lawyers.

found only a handful of registered private defense lawyers unaffiliated with NGOs providing a full spectrum of criminal defense services to clients. In most of the provinces assessed, NGOs provide the sole source of defense assistance (from investigation through trial and appeal) to the indigent. Afghans who were not destitute and who need legal assistance when suspected and/or accused of crime must pay for a defense counsel or go without one. In other words, current capacity favors the very poorest Afghans over those of low and moderate means.

Of those provinces that were included in this assessment, Herat province has the most NGOs providing defense services. ILF, MM and DQG all have branch offices there. Also in Herat, the Open Society Institute (OSI) has partnered with ILF to offer a legal clinic class to third year law students. This clinic provides students with the opportunity to participate in classes on trial techniques and practice. These students also are given the opportunity to observe trials and work directly with defense lawyers on cases. The Assessment Team found nothing like it in other provinces assessed.

As for the other provinces assessed, ILF has small offices in Jalalabad, the capital city of Nangarhar Province, and in Kunduz. ILF is scheduled to open an office in Balkh province in early 2008. On a monthly basis, three MM lawyers travel to the city of Mazar-e-Sharif, the capital city of Balkh province, to provide legal advice.

Perceptions of Defense Lawyers Among the Criminal Justice Professionals Community

The Assessment Team interviewed police officers, prosecutors, and judges within each province to obtain information regarding the role of defense lawyers and their capacity to meet right to counsel requirements of Afghan law. While all of the interviewees had a general understanding of the role of defense lawyers, the police officer interviewees were the least informed as to the proper role of the defense attorney. Routinely, the police officer interviewees would report that defense lawyers are necessary for the integrity of the system, but they did not perceive that their work should be subject to the scrutiny of defense lawyers. Police officer interviewees would often state that defense lawyers work in the courts and, therefore, only interact with judges and prosecutors.

Prosecutor interviewees were generally more familiar with the specific roles, responsibilities, and legal authority of defense lawyers in the criminal justice process. Prosecutors had more specific knowledge and experience working with defense lawyers. Consequently, prosecutors were able to provide more in-depth and substantive answers to the assessment questions than other justice sector actors, including judges. Generally, prosecutors' answers indicated their respect for the role of defense lawyers. Many, however, had concerns regarding the quality of the defense services being offered in their provinces.

In Nangarhar and Kunduz, the prosecutors who spoke with the Assessment Team had very limited experience working with defense lawyers. Their responses, however, were often colored by their limited encounters with defense lawyers appearing in cases

assigned to them. Several prosecutor interviewees indicated that only innocent people should receive defense services, as many suspects are caught “red handed” and therefore defense lawyers would be of limited utility to an accused. All prosecutor respondents were amenable to further trainings regarding the role and function of defense lawyers.

The responses of judicial interviewees reflected a general lack of interest regarding whether an accused had a defense lawyer representing them or not. They viewed their job responsibilities as determining the truth in a case and expressed the view that the presence or absence of a defense lawyer had very little impact on their ability to do their job. In several interviews, however, judge interviewees stated that they requested the presence of a defense lawyer to assist with the criminal justice process. Usually, these were high profile cases involving murder. Nevertheless, even this small subset of judges viewed defense lawyers as necessary only in exceptional cases, rather than as a matter of routine.

Judicial interviewees tended not to recognize or acknowledge a need to learn more about the defense function unless prompted. When asked an open-ended question about legal education, judges asserted that defense lawyers should receive more training. However, when prompted specifically as to whether they would personally be interested in training to better understand the roles and efficiencies of defense lawyers, most were amenable to the concept.

The Assessment Team interviewed law students as well as educators regarding the needs and current status of the defense function in criminal proceedings. Three of the four provinces included in this study have a university that offers both a law and a Shari’a faculty. Kunduz Province does not have a law or Shari’a faculty at its university. The university in Herat Province has a legal clinic which offers students practical instruction and mentoring in trial practice and defense work. Balkh and Nangarhar Universities have legal programs, but there were significant issues with respect to the quality of instruction on those topics relating to defense work. Most law students and professors indicated that the defense lawyers in the area were too busy with their practices to contribute a significant amount of time to teaching law students practical aspects of the defense function and to serve as mentors and role models.

Legal Training

Every category of interviewees felt that further training regarding the role and functions of defense lawyers was important and necessary. Specific training was requested by each category of interviewees:

- Police requested training on police/defense attorney coordination during investigations as well as on Afghan laws that pertain to when a defense attorney can get involved in a criminal investigation;

- Judges requested training about defense lawyers and application and implementation of the Advocates Law and the rules and regulations governing the profession of defense lawyers;
- Prosecutors requested training on the role and function of defense lawyers;
- Defense lawyers requested specific trainings on trial practice and techniques, interviewing witnesses, investigations, and oral advocacy skills; and
- Law students and faculty requested practical experiences to complement the theoretical learning about defense lawyers provided in their classes.

Overall Findings

There are a number of significant findings that that the Assessment Team believes can provide a foundation for building defense capacity across Afghanistan. These findings are summarized as follows:

- Article 18(2) of the ICPC requires that practicing defense lawyers be registered with the MOJ. There are very few defense lawyers in the provinces that are registered with the MOJ. In those instances where defense lawyers are registered with the MOJ, the list of registered defense lawyers does not accurately identify where those lawyers actually practice. The inaccuracies in the list of licensed defense lawyers makes it very difficult for ordinary citizens, police, prosecutors, and court officials in the provinces to locate and retain qualified defense lawyers when they are needed.
- In most provinces, only the poorest of the poor have access to a full spectrum of criminal defense services. Even there, access of indigent persons to legal counsel is limited to a small number of NGO lawyers. Those who are not destitute enough to qualify for an NGO-funded defense lawyer or who are destitute, but cannot get a lawyer because of capacity problems, have access only to a small number of unregistered lawyers and non-lawyers. These unregulated actors generally provide limited scope assistance that is often less than the criminal defense services a suspect and/or accused may actually require. These lawyers do not attend trials or other court proceedings on behalf of their clients and, primarily, limit the scope of their practice to providing the accused client with written defense statements for a fee.
- Many of the persons interviewed during the assessment, regardless of position or occupation, felt that the few unregistered defense lawyers currently providing limited scope services in the provinces provided poor quality services.
- Most persons who were convicted of crimes and who are serving criminal sentences in the provinces did not have any access to a defense lawyer prior to conviction or on appeal.

- Many of the people interviewed reported that the people who are generally suspected and/or accused of crime lack education about, and understanding or awareness of, their rights under Afghan law. Consequently, many persons who need the services of a defense lawyer did not know that they could request the assistance of a defense lawyer or did not make such a request because they did not know how. Equally troubling is the fact that in many instances if they had asked for defense counsel, the police, prosecutors and courts lacked procedures or mechanisms to locate and appoint counsel.
- Police, prosecutors and judges had only a superficial understanding of the role and responsibilities of criminal defense lawyers. Most had never worked with or even met a defense lawyer. Furthermore, they appear to have given little thought to how a fully operational criminal defense institution would impact the criminal justice process in general or their duties in particular.
- The majority of police officer and prosecutor respondents across the provinces stated that they generally inform suspects of their right to have a defense attorney appointed in their cases, despite the unavailability of such lawyers in the area. This finding suggests that despite police officer statements that they understood the importance of defense counsel in the criminal justice process, they treated the right to counsel as a matter of form over substance because, as a practical matter, there is no access to defense counsel.
- Generally, prosecutor and police respondents stated that the criminal justice processes would be greatly improved by the addition of registered defense lawyers. Prosecutors and police reported that they would be likely to cooperate with defense lawyers. Judges seemed somewhat indifferent to the addition of defense counsel. Because of lack of experience with defense attorneys, police, prosecutors, and judges have no real idea of how to interact with defense counsel in the criminal justice process, what to expect from them, or how they might respond to them during the course of real investigations and trials.
- All criminal justice actors asked for further training on the role and responsibilities of a defense lawyer.
- Individuals who are suspected and/or accused of crimes in the four provinces assessed and who cannot qualify for legal services provided by the NGOs face significant obstacles to obtaining legal defense services. There are few registered defense attorneys to retain. More likely than not, people seeking legal defense assistance will receive legal assistance from an unregistered lawyer who will provide generally less assistance than needed.

The good news in this assessment, and reflected in the findings, is that in most provinces, the Assessment Team identified a “mixed” system of defense lawyers—NGO funded defense lawyers and individual lawyers in private practice—upon which to build capacity.

Measures can be implemented based on this “mixed” provider system to build both capacity and the competence of criminal defense services in the provinces.

INTRODUCTION

Background of JSSP AJIS Team and the Defense Assessment

The Justice Sector Support Program (JSSP) works to strengthen the capacity of the Afghan criminal justice system and is funded by the United States Department of State. The Access to Justice and Integration Section (AJIS) is one of four JSSP program components. AJIS assists Afghan criminal justice sector institutions improve access to justice through capacity building, legal reform and direct assistance. The AJIS team comprises five American Justice Advisors (Advisors), three Afghan Legal Consultants (ALC), and translators.

The AJIS team is engaged in assisting government and private sector actors develop the necessary capacity to provide criminal defense assistance in Afghanistan consistent with the requirements of law. AJIS lawyers work with defense lawyers, judges, prosecutors, educators, and others, to:

- Promote the passage of laws creating an independent bar association;
- Strengthen Afghan NGOs providing criminal defense services; and
- Assist in the professional development of Afghans working in the criminal justice system.

While JSSP and other international organizations have been working diligently to improve the capacity of the overall justice system, little is known about the specific capacity and quality of criminal legal defense services in the provinces. There has been significant interest among those involved in rule of law programs to undertake a qualitative and quantitative assessment of defense services in the provinces. AJIS undertook the task of assessing the capacity and quality of defense services in four key provinces: Herat, Balkh, Nangarhar and Kunduz. The AJIS assessment is just one of a number of assessments that have been launched recently to evaluate defense services across Afghanistan.³

The delivery of legal services in Afghanistan has changed dramatically since the 1964 Penal Code was adopted, because, *inter alia*, there is now a constitutional requirement that criminal defendants be afforded the right to counsel. These changes have required a fresh effort to assess how Afghanistan is faring as a nation in its efforts to provide rule of law reforms, as well as to provide individuals suspected and/or accused of crime with necessary access to legal assistance. When Afghanistan's Constitution and other laws

³ A good example of an ongoing program concerned with defense capacity and the competence of defense lawyers is the Trial Monitoring Program implemented by the United Nations Assistance Mission in Afghanistan (UNAMA). UNAMA has established a monitoring program that observes criminal trial proceedings and assesses their compliance with the existing national codes, the Constitution, and international human rights standards.

providing for the right to counsel were enacted, the country was emerging from nearly 30 years of external and internal war. Three years after adoption of Afghanistan's Constitution, there is primarily anecdotal evidence regarding the nation's criminal defense capacity. The evidence indicates that defense capacity is almost non-existent except for a patchwork of programs staffed and funded through NGOs located primarily in urban areas. Such anecdotal reports, however, must be closely scrutinized.

In order to get a more fact-based picture of defense capacity, AJIS undertook to examine legal services available to those suspected and/or accused of crime(s) in select provinces. The purpose of the assessment was to identify the level of access to defense services.⁴ This assessment is intended to provide the central and regional governments of Afghanistan, as well as NGOs and donors with sufficient information to identify what services are being provided in select provinces and what defense assistance is needed. Where there are gaps identified in these provinces, this information can help the Afghan government and international stakeholders make reasonable assumptions about growing defense capacity across the country and take steps to ensure "minimum access" to justice. Once "minimum access" had been achieved, additional steps toward meeting the ultimate goal of responding fully to the criminal defense needs of the general population (and particularly low-income people) can be pursued.

Data Collection/Assessment Process

The Criminal Defense Assessment Team (Assessment Team) consisted of two Kabul based Advisors, one ALC, and a rotating group of interpreters. In preparing for the data gathering phase of the assessment, the Advisors reviewed current and pending legislation⁵ to gauge its effects on right to counsel issues as well as other literature thought to provide relevant background for the study. The Assessment Team then worked with the JSSP regional teams in the provinces to arrange site visits. Between 28 JUL and 8 SEPT 2007, the Advisors and ALC travelled to Balkh, Herat, Kunduz, and Nangarhar provinces, often supplemented with one or more interpreters. Using Regional

⁴ For purposes of this assessment and as used in this report, we have defined "minimum access" to criminal defense services as the access necessarily required by the Afghan Constitution and the country's other right to counsel laws.

⁵ Presently, the criminal defense institutions in Afghanistan are undergoing major changes. Legislation will soon be enacted which creates an independent bar association for defense lawyers. Additionally, the government legal aid department, currently housed in the Supreme Court, will be moved to the Ministry of Justice. These two changes will have a substantial impact on the growth of defense services in Afghanistan. The Advocates Law, which will be signed into law in the next few weeks, provides for the establishment of an independent, non-governmental Afghan Bar Association. The Afghan bar association will lead and regulate all activities of defense advocates. The establishment of an independent bar association is a significant step in the development of the legal profession in Afghanistan. The bar association will be a self-governing professional association of lawyers representing the interests of lawyers, and promoting the continuing legal education and training of members. The bar association will regulate entry into the profession, uphold professional standards and ethics, protect the interests of the public, and advocate for the rule of law and the independence of lawyers. The establishment of the bar association will require substantial donor support, through assisting with both infrastructure needs and technical support.

Training Centers (RTC) as bases of operations, the Assessment Team worked with JSSP staff to schedule and coordinate interviews of relevant justice sector actors in the provinces, and visited police stations, courthouses and prosecutors' offices to conduct interviews.

AJIS conducted its defense capacity assessment by designing an assessment instrument (the "assessment tool") to assist with data collection from defense lawyers, judges, corrections officers, police officers, prosecutors, and other justice sector actors. The assessment tool attempts to measure the current level of "defense capacity" in the four provinces included in this assessment. The assessment tool was designed to engage relevant justice sector actors in a qualitative and quantitative discussion about criminal defense capacity and identify gaps in the delivery of defense services. The assessment tool was administered by an Assessment Team consisting of two international lawyers, an Afghan lawyer, and a team of translators.

Much of the information obtained during the assessment was taken from those personal interviews using the assessment tool with police, prosecutors, defense lawyers, judges and other relevant justice sector actors. Much of the information the Assessment Team recorded, however, reflects self-reported personal opinions and attitudes. The Assessment Team recognizes that these responses must be scrutinized.

The Assessment Team did everything practicable to confirm or verify responses, but as with any attitudinal reporting (e.g., "Yes I think defense lawyers are important,") there are limitations on accuracy. Some accuracy of the data collected was sacrificed to the language itself. Questions were translated into Dari or Pashto and answers translated back from Dari or Pashto into English. There were many opportunities for miscommunication. No less a concern was that many of the respondents may have suspected that failure to give the "appropriate" responses would negatively have affected how they were perceived by the interviewer or others. Consequently, the respondents' concerns about the perception of "foreigner" interviewers may have affected their responses. In the end, however, the Assessment Team could not prevent such problems, it could only take reasonable steps to test respondents' answers.

Defense capacity in this assessment is measured in three distinct ways. The first approach examines the population of individuals suspected/accused of crime. The second method measures the extent to which police, prosecutors, and judges are sufficiently educated about and responsive to the role of the defense lawyer. The third measure looks at the number of defense lawyers that are currently providing criminal defense services in each of the provinces assessed. While not all of the statistical information the Assessment Team requested was provided, the information proved relevant and was included where appropriate. These different methodologies are more fully discussed below:

- Methodology #1: The Assessment Team gathered data where and when information was available to estimate the size of the population potentially needing defense assistance in each of the provinces. To this end, the

Assessment Team collected relevant statistical information regarding the number of cases prosecuted in each province, the number of pre- and post-trial prisoners, and the number of trials and hearings conducted in each province. From this information, the Assessment Team attempted to identify the number of indigent criminal defendants that were drawn into the criminal justice process and whether or not they were provided with a lawyer. The Assessment Team asked various government ministries, donor countries involved with rule of law projects, and non-governmental organizations providing legal services to contribute statistics, if any, regarding:

- The number of people seeking defense assistance;
 - Whether or not applicants were provided defense assistance when it was requested; and
 - The number of individuals who were *not* provided defense assistance due to an insufficient number of defense counsel.
- Methodology #2: The Assessment Team documented knowledge of and attitudes about defense lawyers from relevant justice sector actors. The Assessment Team also inquired about the gaps in defense services perceived by justice sector actors in each of the four provinces using the assessment tool. The Assessment Team collected information on a non-attribution basis. The Assessment Team conducted interviews in the four provinces from July through September 2007. A copy of the assessment tool is attached as Appendix A.
 - Methodology #3: The Assessment Team obtained a list of lawyers registered with the Ministry of Justice as a basis for analyzing capacity. This information was cross-checked during interviews with relevant justice sector actors during the assessment and used to make reasonable estimates about the number of criminal defense lawyers actually providing defense assistance in each province. The information obtained from this list was also used to estimate any shortfall in the number of legal defense lawyers available to the population of people suspected and/or accused of crimes in each of the provinces assessed.

Legal Basis for the Right to a Lawyer

The Constitution of Afghanistan captures the principle that equal justice under law is not merely a platitude, but a substantive right of all Afghans. It recognizes a fundamental aspect of good governance – that the promise of access to justice must be meaningful and available to all without regard to economic status. An individual’s right to defense counsel is fundamental to the Afghan justice system. The right to a defense lawyer when an individual is accused of criminal conduct is rooted primarily in Article 31 of the

Afghan Constitution.⁶ There are also, however, other laws that support this right to defense counsel.⁷ For instance, there are provisions of international law applicable to Afghanistan that support the primacy of a right to defense counsel for those persons suspected and/or accused of crime. These laws include the International Covenant on Civil and Personal Rights⁸ and the United Nations Basic Principles on the Role of Lawyers, which have been ratified by Afghanistan.⁹

There are also legislative enactments under Afghan law that address and clarify the right to defense counsel. These laws include: Art. 11 of the Law on the Structure and Competencies of Courts;¹⁰ Art. 22 of the Juvenile Code;¹¹ Arts. 5, 18, 19, 20, 38, 41, 42, 51(2) 53 and 55 of the Interim Criminal Code for Courts.¹² These laws not only further

⁶ Article 31 of the Afghan Constitution provides as follows: “(1) Every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law. (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law. (3) In criminal cases, the court shall appoint an advocate for the needy. (4) The confidentiality of oral, written, or telephonic communications between an advocate and his accused client are immune from invasion.” This is the English translation taken from the *Report and Evaluation of the Fair Trial Workshop, Max Planck Institute for Comparative and Public International Law* (Heidelberg 2005).

⁷ The Assessment Team did not resolve the issue whether the right to seek an advocate (which is the typical translation of Art. 31 of the Afghan Constitution) equates to the right to counsel, as articulated in the U.S. Constitution. Although the literature review and other Afghan laws referencing a right to counsel suggest that the Afghan reference to an “advocate” may be broader than the American concept of a right to counsel, most internationals equate the right to seek an advocate as equivalent to the right to counsel. See footnote 14 herein; see also *Special Report: Establishing the Rule of Law in Afghanistan* (Washington, DC United States Institute of Peace, 2004); *Report and Evaluation of the Fair Trial Workshop, Max Planck Institute for Comparative Public and International Law* (Heidelberg 2005).

⁸ Section 3 of Art. 14 provides “everyone shall be entitled to the . . . minimum guarantees . . . (b) to communicate with counsel of his own choosing; (d) . . . to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require; and without payment by him, in any such case if he does not have sufficient means to pay for it;

⁹ Principle 16 provides that “[G]overnments shall ensure that (a) lawyers are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with professional duties, standards and ethics.

¹⁰ Art. 11 provides that “[E]very person upon arrest has the right to appoint defense counsel to defend himself in regard of the accusation and evidence against him. In criminal cases a defense counsel shall be appointed for destitute persons according to the provisions of law.”

¹¹ Art. 22 (1) provides that “[I]n all stages of investigation and trial, the minor has the right to defense counsel In the case parents or legal representatives cannot afford a defense counsel . . . the court shall appoint a defense counsel . . . at government expense.”

¹² For example, Art. 19 (1) provides “[T]he suspect of the accused who is financially unable to appoint a defense attorney is entitled to have a free defense attorney appointed for him or her . . . (a) . . . on the petition of the . . . destitute person . . . from amongst the lawyers officially permitted to work as defense lawyers.”

support the right to counsel, but clearly define the rights and responsibilities of defense lawyers involved in representing those suspected and/or accused of crime.

Despite the laws giving Afghans suspected and/or accused of crime the right to defense counsel, there appears to be limited capacity to provide such assistance in practice, particularly in the provinces. Currently, the only government defense lawyers providing criminal defense services in Afghanistan are the fourteen lawyers employed by the Legal Aid Department of the Supreme Court. Clearly, this is not a sufficient number of lawyers to meet the legal needs of all those Afghan citizens who cannot afford to retain their own counsel but are entitled to professional and independent legal assistance when accused of criminal conduct. While there is a developing culture of criminal defense advocacy in Afghanistan, there are very few registered defense lawyers employed across the country. Furthermore, these defense lawyers are most often employed through a variety of nongovernmental organizations (NGOs) funded by international donors, and provide services primarily to clients of very limited means.

This report is designed to provide preliminary information on the capacity of defense services provided by the government, NGOs and international donors and private practitioners. This report is an important step in the process of building defense capacity because it quantifies the gaps between the criminal defense services that are being provided and the assistance that is needed. This report also suggests steps that can be taken by Afghans themselves to build and sustain needed capacity. A goal of this assessment is to ensure that the citizens of Afghanistan are provided with the promises espoused in Art. 31 of the Constitution and other right to counsel laws when they stand suspected and/or accused of crime.

Literature Review

The Assessment Team conducted an extensive literature review to prepare for the assessment, develop a framework for the study¹³ and to structure data gathering efforts.¹⁴

¹³ See the Defense Assessment Flow Chart attached as Appendix C.

¹⁴ While the Assessment Team reviewed countless reports, position papers, and studies, the most relevant writings on the issue of establishing rule of law and building defense capacity in Afghanistan include: *Building on Success*, The London Conference on Afghanistan, The Afghan Compact, London 31 January – 1 February 2006; *Afghanistan's Justice Sector Overview* (2006); *The Customary Laws of Afghanistan*, A Report by the International Legal Foundation (ILF) (September 2004); Drumbl, M.A., *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 Columbia Journal of Transnational Law, 349 (2003/04); *Justice for All, A Ten Year Strategy for Justice Reform in Afghanistan* (2005); Amnesty International, Afghanistan, *Re-establishing the Rule of Law*, AI Index: ASA11/021/2003 (14 August 2003); M. Lau, International Commission of Jurists, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards* (February 2007); A. Borrey, *Medica Mondiale, Legal Aid Program Facts and Figures*" (July 2004); J.A. Their, *Reestablishing the Judicial System in Afghanistan* (Stanford, CA Center for Democracy, Development and Rule of Law, Stanford Institute for International Studies 2004); A. Senier, al Nakhla, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law* (2006); *Afghanistan: Judicial Reform and Transitional Justice* (Brussels International Crisis Group 2003); *Special Report: Establishing the Rule of Law in Afghanistan* (Washington, DC United States Institute of Peace 2004); *Report and Evaluation of the Fair Trial Workshop*, Max Planck Institute for Comparative Public and International Law (Heidelberg 2005); and *Measuring Progress Toward Safety and*

The focus of the literature review was on studies, articles and reports related to building the Afghan justice processes in general as well as literature discussing the criminal justice sector in particular. The review provided important insight into perceptions of those justice sector actors previously and currently involved in rule of law reform. The literature review helped the Assessment Team identify the conditions under which access to justice was and is being developed and helped establish methods to accurately measure defense capacity. Because of the literature reviewed, the assessment is grounded in information, methodology, and comparative analysis of data performed by other rule of law experts on Afghanistan.

Defense Capacity Defined

As noted above, the methodologies employed in this assessment allow government and international stakeholders to piece together a picture of defense capacity from a variety of data points and document the legal needs of individuals suspected and/or accused of crime. They can also help interested parties quantify capacity to estimate the extent to which the provinces meet the necessary access to legal assistance required under the Afghan Constitution and other right to counsel laws.

For purposes of this assessment, the Assessment Team defined “minimum access” as the level of assistance that must be provided to each individual suspected/accused of crime and entitled to a defense lawyer when required pursuant to the Afghan Constitution and other right to counsel laws.

Understanding “minimum access” is made somewhat difficult because of the various English translations of Article 31 of the Afghan Constitution. In the English translation published by the Transitional Islamic State of Afghanistan Constitutional Commission Secretariat, the right to counsel is translated as a right to a “defense lawyer.”¹⁵ In the English translation published in the Max Planck Manual of Fair Trial Standards, 3d ed. 2006, the right to counsel is more broadly interpreted as a right to an “advocate.” For purposes of this assessment, JSSP has interpreted the right to counsel as a right to a criminal defense lawyer, and thus considers “minimum access” to mean minimum access to a lawyer. This appears to be consistent with Article 18 of the Interim Criminal [Procedure] Code for Courts, which requires a “qualified professional” who is registered with the Ministry of Justice and possesses a university degree from a faculty of law or Shari’a.

Justice: A Global Guide to the Design of Performance Indicators Across the Justice Sector, Vera Institute (New York 2003).

¹⁵ Other elements of this English translation of Article 31 may run contrary to the presumption of innocence contained in Article 25 of the Afghan Constitution. Article 25 provides for a presumption of innocence for those accused of crime. The English translation suggested by the Secretariat states that “[u]pon arrest, or to prove truth, every individual can appoint a defense attorney.” If this translation is correct, it arguably places the burden of proving “truth” on the defendant, which runs contrary to the notion of a presumption of innocence that can be overcome only upon sufficient showing by the state.

In this assessment we have defined the difference between the current levels of legal assistance available to suspects and/or those accused of crime in the provinces and the level which we believe is necessary to meet the actual needs of the regional populations as the “Criminal Justice Gap.”

This report also attempts to provide information necessary to address future questions such as:

- What will it take to achieve the goal of “minimum access” to legal defense counsel?
- What should be the role of governmental and non-governmental funding in building capacity?
- What level of competence is necessary for criminal defense lawyers?

BALKH PROVINCE DEFENSE CAPACITY ASSESSMENT

Summary of Findings

Data collected from Balkh province can be summarized as follows:

- There are virtually no registered defense lawyers in Balkh province. Several sources stated that there are eight (8) defense lawyers providing limited scope criminal defense assistance. These lawyers do not attend trials or other court proceedings on behalf of their clients and, primarily, limit the scope of their practice to providing accused persons with written defense statements.¹⁶
- Male prisoners do not have any access to criminal defense lawyers.
- Female suspects and/or accused are visited in jail monthly by criminal defense lawyers employed by a Kabul-based NGO.
- There were significant issues regarding the quality of services offered by those few unregistered defense lawyers currently offering criminal defense services to the public in Balkh province.
- The prisoners interviewed generally lacked education and understanding of their rights under Afghan law. Consequently, many prisoners interviewed did not request the assistance of a defense lawyer when they were entitled to do so.
- Those pre- and post-trial prisoners who did receive the limited scope services of an unregistered defense lawyer expressed general dissatisfaction with that assistance.
- Police, prosecutors and judges interviewed for this assessment had very little understanding as to the role or responsibilities of defense lawyers. Most had never worked with or even met a defense lawyer. Those that had worked with defense lawyers could only recall having done so in one or two instances over the course of their careers.
- The majority of police officer and prosecutor respondents stated that they generally inform clients of their right to have a defense attorney appointed in their cases despite the unavailability of such lawyers in the area.

¹⁶ Police, prosecutors, and judges identified the written “defense statement” as the primary response of the accused to the allegations of criminal conduct alleged in the indictment filed by the prosecutor. The Assessment Team was informed by judges, prosecutors and defense lawyers that the “defense statement” is the most comprehensive challenge to the charges mounted by the defense besides the trial itself. The “defense statement” combines in writing the defendant’s legal challenge to the charges and authority, a concise explanation of exculpatory facts and a well articulated theory of the case. It forms the basis of the legal argument and facts that that could be presented by the defendant at trial.

- All respondents stated that the criminal justice processes would be greatly improved by the addition of registered defense lawyers. All criminal justice sector actors interviewed during the assessment state that they would be likely to cooperate with defense lawyers in all phases of the criminal justice process.
- All criminal justice actors asked for further training on the role and responsibilities of a defense lawyer.

Introduction

Balkh is one of the thirty-four provinces of Afghanistan. It is in the north of the country. Its capital is Mazarh-e-Sharif. Ethnic Tajiks make up the majority of the population, followed by Pashtuns, Uzbek and Hazara. Balkh has fifteen districts.¹⁷ Balkh province has a population of approximately 869,000 (2002 official estimate). The province encompasses an area of approximately 17,249 square kilometers.

Balkh Province



Assessment Interviews in Balkh Province

During the week of 4 AUG through 11 AUG 2007, the Assessment Team interviewed police officers, prosecutors, correctional officers, and one private practitioner providing criminal defense services in the province. In total, the Assessment Team interviewed 27 individuals actively involved in relevant justice sector activities.¹⁸

¹⁷ The 15 districts are: Balkh, Chahar Bolak, Chahar Kint, Chimal, Dawlatabad, Dihdadi, Kaldar, Khulm, Kishindih, Marmul, Mazar-e-Sharif, Nahri Shahi, Sholgara, Shortepa, and Zari.

¹⁸ The total number of interviews conducted in Balkh province is more specifically broken down as follows: 3 judges and court staff, 6 prosecutors, 6 police officers, 2 prison officials and staff, 1 defense lawyer, 4 inmates, and 5 students and faculty members.

Overview of Current Capacity

The Assessment Team collected data indicating that, within Balkh province, there are one or two private defense lawyers who are registered with the MOJ and eight (8) defense lawyers who are not registered with the MOJ. These unregistered defense lawyers predominantly work in private law firms and provide limited scope services to clients. These legal services generally include no more than providing a written defense statement to an accused.

It was reported to the Assessment Team by police officials interviewed that there are 1,959 (criminal and security) police officers in Balkh province. There are 588 officers, 104 sergeants and 1,267 police soldiers. There are 78 administrative employees. From 1 JAN 2007 to 11 AUG 2007 the police had responded to approximately 508 alleged criminal incidents. In approximately 407 of those matters, the complaint was referred to the prosecutor's office. Approximately 101 incidents remain under investigation by the police.

Prosecutors interviewed for the assessment reported that there are approximately 78 prosecutors employed in the province including administrative staff. Between 1 JAN 2007 and 11 AUG 2007, the prosecutors reported that they handled approximately 321 matters. Of these 321 matters, 164 indictments were filed with the court. Nineteen cases were dismissed. Nineteen cases resulted in convictions. Of the 164 cases in which indictments were filed with the court, the accused in 139 of those cases had not yet been arrested or had failed to appear for subsequent court proceedings.

Respondents employed in the prison system indicated that there are approximately 211 prisoners currently held in detention facilities. There were 22 female prisoners in custody in Balkh at the time of the assessment. Of these, 10 were awaiting trial and the remaining 12 female inmates were serving sentences after their primary court convictions.

During the assessment interviews, all categories of respondents indicated only a very limited awareness of defense lawyers practicing in the province. The vast majority of respondents had never met a defense attorney. The single defense lawyer registered with the MOJ interviewed by the Assessment Team limited his practice to preparing written defense statements on behalf of paying clients. He did not conduct investigations or appear in court for hearings or trials.

Prison officials reported that visits from lawyers are not always documented. The one registered defense lawyer indicated that he had visited a client in prison only once. A female corrections officer respondent stated that defense lawyers from Herat and Kabul visit females incarcerated in the prison about once per month, but she also reported that no information is kept regarding the lawyer visits.

Synopsis of the Data Regarding Defense Capacity in Balkh Province

Police

The Assessment Team interviewed six police officers assigned to Balkh Province. Four of the six police officer respondents reported that their highest level of education was high school. All respondents were assessed as being literate. Two respondents reported that they were graduates of a Kabul-based police academy. All of the police respondents had been involved in some form of police training program sponsored by an international organization. One respondent described his involvement in a four month long training program taught by an Egyptian judge. That program included one month of human rights training and a three month component addressing police procedures and investigative techniques taught by American police trainers.

A police respondent in Balkh said he had only seen defense lawyers in movies; never in real life.

Police officers interviewed for this assessment were assigned to crime detection and investigatory units and were responsible for arresting suspects, investigating crimes, facilitating the confinement of suspects, and transferring case information to the prosecutor's

office. Several police officers reported having supervisory duties, and therefore were responsible for ensuring that junior members of the police force properly enforced the law.

Police officer respondents had virtually no experience working with defense lawyers. Only one of the respondents stated that he had met a defense lawyer. The respondent reported that the encounter involved a meeting in late 2006 with a representative of a defense organization to discuss the possibility of that organization opening an office in Balkh. The police officer respondent was unclear whether this organization did, in fact, open an office in Balkh. None of the respondents reported that they had seen or worked with a defense lawyers in the course of their investigations, specifically during searches or interrogations.

None of the police respondents had contact information for any defense lawyer working within Balkh province. One respondent stated that he had only seen defense lawyers in movies, but never in real life. Another respondent stated that he thought he might have heard of a defense lawyer, but believed he now works in the prosecutor's office.

The respondents' statements indicated a general and limited understanding of the role of defense lawyers. None of the respondents indicated that they had any prior training or exposure to the role of defense lawyers. The respondents uniformly stated that the role of a defense attorney is to defend the suspect or accused in court.¹⁹ The respondents'

¹⁹ In a number of interviews across all four provinces surveyed, respondents gave nearly uniform responses to some of the questions asked. The Assessment Team considered the possibility of coached responses. On further examination of those responses, the Assessment Team discounted coached responses and attributed the uniformity of to the fact that respondents were simply restating the requirements of the law.

answers reflected that they had little awareness that a defense lawyer's work could possibly intersect with that of police work. One respondent specifically stated that he was interested in learning about a defense lawyer's "responsibilities during the initial 72 hour investigative phase in which the police handle the investigation."

All of the police respondents stated that they uniformly advise suspects that they have a right to a lawyer if they want one. This advisement is done early on in the investigation. Only one respondent modified his answer by explaining that he advises suspects only when he deems them "sick or drunk." Considering the limited exposure police interviewees had to defense lawyers, it is surprising that all police respondents were adamant that it is part of their job to advise suspects of their rights to counsel. None of the respondents had ever encountered a suspect who asked for a defense lawyer after being advised of his or her rights. One respondent explained that he is not sure what he would do if a suspect in fact asked for a lawyer, as he is not aware of any defense lawyers working in Balkh province.

All police respondents expressed the view that defense lawyers provide an essential function in preserving the rights of the accused. Two of the six respondents stated that defense lawyers are necessary to stop bribery and corruption. One respondent explained this phenomenon by explaining that "there are some people who are powerful or have money to be released through corruption, but many accused persons do not." All respondents agreed that defense lawyers are necessary to ensure that the rights of the accused are not breached.

All respondents were receptive when asked if they would be interested in receiving training regarding the role of the defense attorney. Two of the respondents specifically requested training on the role of the defense lawyer during the investigative phase of a criminal case.

Prosecutors

The Assessment Team interviewed six prosecutors. The prosecutors interviewed in Balkh province fell into three categories: (1) primary prosecutors (those coordinating matters referred by the police); (2) investigating prosecutors (who investigate the cases and prepare charging sheets, and (3) prosecutors who file indictments and prosecute cases in court. All of the respondents reported that they had baccalaureate degrees from the faculty of law at Kabul or Balkh Universities. Two respondents work in specialized sections of the prosecutor's office. One prosecutor is assigned to the narcotics unit. Another is assigned to the "moral crimes" unit.²⁰

Prosecutors' interview responses uniformly indicate that they have rarely, if ever, worked with defense lawyers. One respondent stated that in his six years of employment with the prosecutor's office, he has worked on only two cases in which the accused was

²⁰ The moral crimes unit handles cases of "zina," or adultery and so called "running away from home."

represented by a defense lawyer. None of the respondents knew the names or contact information for any defense lawyers.

Uniformly, prosecutor respondents also reported that the role of a defense lawyer is a valid and worthwhile function, and is necessary for the legitimacy of the criminal justice system. Three of the six respondents explained that due to illiteracy and lack of education, poor people experience particular disadvantage within the criminal justice system, and require the assistance

In Balkh, none of the prosecutors who were interviewed knew the names or contact information for a single defense lawyer.

of an educated person who is familiar with the laws of Afghanistan. One respondent, however, expressed hesitation about the importance of the defense lawyer because “most suspects are caught *in flagrante delicto*... [and] while the [defense lawyer] can assist the accused in asserting rights, they cannot claim that the accused did not commit the crime.”

Four of the six prosecutor respondents stated that they routinely advise suspects and accused of their right to have an attorney. One respondent stated that “[n]ot only should the prosecutor, but also the police and the judge inform the accused or suspect of the right to have defense lawyer according to the law. Right now I have a case to work on. It is about Zina (adultery). There is not any defense lawyer to take the case. There is not any organization to provide a defense attorney in her case.” The two prosecutor respondents who do not routinely advise suspects and accused of their rights explained their views that this is the responsibility of the courts. One respondent clarified that his job is to “sort out the truth ... if [an accused] wants a defense lawyer the judge will ask them, in which case I may help them to get one if the judge requires me to.”

Only three respondents could describe the role of the defense lawyers during the investigative stages of a case. All prosecutor respondents stated that if there were defense lawyers working in Balkh, they would be entitled to the contents of the case file, and that it should be provided to them by the courts. Four of the six respondents stated that if a defense lawyer were involved in a case they would be notified of searches and interrogations in a case. One respondent stated that defense lawyers would not likely need to be notified of such proceedings, as defense lawyers are only involved in a criminal case after an indictment is filed and the matter is before the court.

Balkh Table 1

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM THE PERSPECTIVE OF 6 PROSECUTORS INTERVIEWED*)				
	Always	Usually	Seldom	Never
Crime Scene				5
Suspect Interrogation	2			
Witness Interviews	2			

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM THE PERSPECTIVE OF 6 PROSECUTORS INTERVIEWED*)				
	Always	Usually	Seldom	Never
Prosecutor's Office to Discuss Case	2			
Courtroom for Hearings		2		
Judge's Chambers	2			
For the Trial	2			
Sentencing	2			

* Not all prosecutors interviewed had sufficient contact with defense lawyers to respond. Six prosecutors were interviewed, but only two respondents had sufficient knowledge to answer these questions.

The respondents had very little knowledge about the proper role of defense lawyers during the trial phase of a criminal case. Only one out of the six respondents had faced a defense lawyer at a trial.

Balkh Table 2

PROSECUTORS REPORTS ON DEFENSE PRESENCE DURING TRIAL (BASED ON REPORTS OF 6 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Introducing Defense Witnesses		1		5
Question Prosecution witnesses		1		5
Quoting Specific Articles of Law	1			5
Arguing that the Accused Was Not Guilty			1	5
Arguing that the Accused Should Receive a Lesser Sentence		1		5
File an Appeal	1			5

*.Not all prosecutors interviewed had sufficient contact with defense lawyers to respond. Six prosecutors were interviewed, but only two respondents had sufficient knowledge to answer these questions.

Judges

Balkh province has three (3) full time judges who handle approximately 25-30 criminal cases per month. Balkh also has five (5) part time judges who each handle approximately five (5) cases per month. The Assessment Team interviewed three judges - two primary court judges and one appellate court judge. One of the two primary court judges is the chief judge. All respondents were literate. One of the judge respondents did not finish high school. The other judge respondent had baccalaureate degrees from Kabul University.²¹

Like prosecutors and police officers, judge respondents had limited exposure to defense lawyers. One respondent stated that only in three cases that he presided over was there a defense lawyer. Another stated that in the past four months only three defense lawyers had submitted documents on behalf of an accused, but none of these had appeared in court on the matters. Respondents uniformly stated that defense lawyers often only provide a written defense statement on behalf of their client and do not appear in court.

One respondent estimated that in approximately ten cases per month, a case file includes a written defense statement prepared by a defense lawyer who makes no in-court appearance. The respondent stated that he requires the presence of a defense lawyer only in cases where the accused is illiterate and cannot read a defense statement that has been prepared by the lawyer. These defense lawyers, as reported by the respondent, are former judges and prosecutors who charge fees to write defense statements for accused people. Another respondent would appoint a defense lawyer only in serious cases, specifically if the result of a guilty verdict would be a sentence of death. He described a case in which the accused was being charged with murder, and faced execution by hanging. He wanted to appoint a defense lawyer for the accused, but stated that there are no NGOs or international organizations in Balkh that assist in such situations.

All the judge interviewees stated that law students and lawyers should be trained to provide defense services. Two of the three respondents stated that defense lawyers should be trained on the Advocates Law and all rules that apply to lawyers.

Corrections Officers

The Assessment Team interviewed two correctional officers from the only male and female detention facilities in Mazar-e-Sharif. Both facilities hold pre-trial and post-trial inmates. The male correctional officer respondent reported that he was literate and had graduated from high school, whereas the female correctional officer did not have a high school education and was illiterate. Both respondents had held their positions for over two years.

²¹ One judge respondent did not the answer the question regarding educational background.

The respondent working within the male facility had never encountered a defense attorney visiting an inmate. The male facility has no rules or regulations regarding lawyer visits. The facility does not have a meeting room for defense lawyers and clients. The respondent stated that if there were defense lawyers visiting the prison, there would need to be administrative rules created to regulate their presence.

The respondent working within the female facility did have more information regarding the presence of defense lawyers. According to this respondent, three lawyers from an internationally funded NGO, Medica Mondiale, travel from Kabul and Herat to Mazar-e-Sharif every month to meet with female inmates. These lawyers meet collectively with all inmates at one time to discuss their respective cases. While the respondent did not make this absolutely clear, it appears that these defense lawyers may be involved with appeals before the Supreme Court in Kabul on behalf of these prisoners.

Prisoners

The Assessment Team interviewed two male and two female prisoners. Two respondents had been convicted of crimes and were sentenced by the primary court, and two were awaiting their primary court trial. Only one of the four respondents had a defense lawyer representing her. This lawyer is employed by Medica Mondiale, and travels from Kabul to represent her client. As noted above, this defense lawyer probably was involved in the prisoner's appeal to the Supreme Court. The other sentenced respondent did not have a defense lawyer on his case. He reported that he had access to a defense lawyer, knew he was entitled to one, but as he was formerly a police officer, he thought he could do a better job representing himself than a lawyer.

One female respondent indicated that she did have a lawyer assisting her with her case.

One prisoner in Balkh reported: "I did not have a defense lawyer. The judge would not let me present any evidence. There was a co-defendant. I believe he paid the prosecutor and the judge because he was released. I also had a hearing in front of the secondary court. I had about three hearings in front of four judges. Those hearings lasted 35-40 minutes. The judges asked the prosecutor and me questions. . . . They would not allow me to ask any questions. I did not think they were fair."

She reported that she saw her lawyer four times in prison and twice in the court. Her lawyer for the primary and secondary court trials is not the same lawyer from Medica Mondiale who apparently represents her case before the Supreme Court. Her lawyer at the primary and secondary court levels was present during interrogations by the authorities, pre-trial hearings, the trial and the sentencing. Two of the four respondents were unaware that they had a right to an attorney, and three of the four respondents were unaware as to which Afghan laws provided them the right to an attorney. Only the respondent who had worked as a police officer was aware of the role and function of defense lawyers, as well as his rights under Afghan law to the appointment of a defense lawyer.

Two respondents who had been sentenced were present at their trials. Both trials lasted less than an hour, and neither defendant had the opportunity to present evidence. One respondent described his trial as follows: “I did not have a defense lawyer. The judge would not let me present any evidence. There was a co-defendant. I believe he paid the prosecutor and the judge because he was released. I also had a hearing in front of the secondary court. I had about three hearings in front of four judges. Those hearings lasted 35-40 minutes. The judges asked the prosecutor and me questions. . . . They would not allow me to ask any questions. I did not think they were fair.” The other female respondent indicated that her lawyer at the trial court levels had been helpful, but she was convicted anyway.

Defense Lawyers

Finding defense lawyers in Balkh province proved to be a difficult task for the Assessment Team. None of the internationally funded NGOs have offices in Balkh, although at least two are expected to open offices in 2008.²² It was reported in some of the interviews with other justice sector actors that there are approximately eight defense lawyers practicing in Balkh. The majority of these lawyers provide limited services to clients. Those services include preparing and submitting defense statements and occasionally attending trials when the judges request their presence.

The Assessment Team interviewed one defense lawyer in private practice.²³ This lawyer reported having graduated from Kabul University in 1973. He is registered with the Ministry of Justice. This respondent participated in a Supreme Court stage program, and he worked as a military court judge prior to becoming a defense lawyer. He was in private practice with his son. He reported that his son is also a registered defense attorney. The criminal defense services he provides are primarily preparing and submitting written defense statements. He charges 1,500AF (\$30) for this service. This respondent reported that he has only visited a client one time in prison.

The defense lawyer respondent rarely went to court to attend hearings and trials. He stated that he does not attend searches or interrogations of clients, as he is not informed of these activities and he is forbidden to be present during investigations by the government authorities. Additionally, the respondent stated that he only receives the indictment from the case file, and to receive this one document he must “threaten the prosecutors with the law” in order to have access to it.

The Assessment Team spoke with one lawyer in private practice who provides defense services in Balkh. His services are largely limited to preparing written defense statements; he charges 1,500 AF, or \$30, for the service.

²² These organizations include Medica Mondiale and International Legal Foundation-Afghanistan.

²³ The Assessment Team asked various government officials, including the chief judge and members of the prosecutor’s office, and this was the only defense lawyer for whom they had contact information.

This defense lawyer received no specialized training in law school or while working in private practice. The reason he became a defense lawyer was to “help defend all regardless of whether they are guilty or innocent.”

Law Students and Faculty

The Assessment Team interviewed three students and two professors from Balkh University. One professor respondent taught in the faculty of Law and Politics, and the other taught in the Shari’a faculty. One student was enrolled in the faculty of Shari’a, while the other was enrolled in the faculty of Law and Politics. The Shari’a student respondent said that approximately 50 students will graduate from the Shari’a faculty in 2007. The faculty of law and politics expects 60 students to graduate in 2007. The majority of the Shari’a law graduates reportedly find jobs in government offices, particularly with the prosecutor’s office. Respondents within the department of Law and Politics stated that graduates look for employment with NGOs, and often find employment because of other skills they might have, such as computer expertise or English language skills.

Respondents were asked to provide information regarding which criminal law courses were being offered by the faculties of Law and Politics and Shari’a. Table 3 below shows the types of topics covered within these faculties. Two of the four respondents stated that, while some classes relating to defense work are being offered, the instructors do not have much particular knowledgeable and defense experience among the faculty is limited.

Balkh Table 3

LEGAL SUBJECTS OFFERED IN BALKH UNIVERSITY’S LAW SCHOOL		
	YES	NO
Definitions of Ta’zeeri Versus Houdoud Crimes	LP/SH	
Application of the Penal Code	LP/SH	
Interpretation of Criminal Statutes	SH	LP
How to Identify the Elements of a Crime	LP/SH	
Practical Techniques of Criminal Investigation	LP	SH
Legal Motions Practice	SH	LP
Understanding Physical Evidence	SH	LP
Oral Legal Argument	SH	LP
Techniques for Questioning Witnesses	SH	LP
Defenses to Crimes	SH	LP
Alternatives to Imprisonment	LP	SH
How to Work as a Defense Lawyer		LP/SH

How to Start a Business		LP/SH
How to Bill Clients for Legal Services		LP/SH
LP= Faculty of Law and Politics SH – Faculty of Shari’a *This is not currently being taught, but one respondent reported that it will be added to the curriculum		

All respondents stated that they would be interested in more practical instruction regarding the work of defense lawyers. All respondents stated that if there were more career opportunities for defense lawyers they would certainly be interested pursuing a career as a defense lawyer.

HERAT PROVINCE DEFENSE CAPACITY ASSESSMENT

Summary of Findings

Data collected from Herat province can be summarized as follows:

- The provincial capital, Herat, has a small but significant community of defense lawyers. The majority of these lawyers are employed by internationally funded NGOs providing indigent criminal defense services. The criminal defense NGOs present in Herat include: Medica Mondiale, Da Qanoon Ghushonky and the International Legal Foundation-Afghanistan. There are a few defense lawyers in private practice.
- Herat province, however, still has an insufficient number of practicing defense attorneys to ensure that every accused person who is entitled to defense counsel can be provided with one. The shortage of defense lawyers is even more pronounced in the rural districts of the province. Despite the number of defense attorneys the Assessment Team identified in Herat, interviewees from the criminal justice institutions raised significant concerns regarding the quality of the defense services being offered.
- Among the population of pre- and post-trial prisoner interviewees, very few had requested the assistance of a defense lawyer. The prisoner interviewees were unaware that Afghan law provides every indigent person the right to a defense lawyer. They were also unclear as to the purpose of having a defense lawyer assigned to their case.
- Those prisoners interviewed who did have a defense lawyer expressed general dissatisfaction with the assistance of their lawyers.
- The justice sector actors interviewed, specifically prosecutors and judges, expressed a firm opinion that defense lawyers improve the quality and transparency of the criminal justice system. However, the interviews suggest that there remains a distinct lack of specific knowledge about the authority of a defense lawyer to participate in the investigatory stages of a criminal case.
- Police officers were the least informed about the role of a defense lawyer. They perceived defense lawyers as being relevant once a case is transferred to the prosecution, but not during the initial investigatory stages of a case.
- All criminal justice actors in Herat asked for further training about the defense lawyer function.

Introduction

Herat is one of the 34 provinces of Afghanistan; together with Badghis, Farah, and Ghor provinces, it makes up the north-western region of the country. Its primary city and administrative capital is also named Herat. It is situated in the valley of the Hari Rud, a river flowing from the mountains of central Afghanistan to the Kara-Kum Desert in Turkmenistan. Situated in a fertile area, Herat has a vibrant economy based on farming and trade. It is about two hours driving distance from the border with Iran. Herat City once flourished as the capital of the Timurid Dynasty and as a center of arts and literature in Central Asia. Herat City is the third largest city in Afghanistan, encompassing an area of approximately 54,778 square kilometers (as of 2002). The population of the province was approximately 1,182,000 (as of 2002). The city of Herat has a population of approximately 349,000 (2006 official estimate). Herat province is divided into 15 districts.²⁴ Farsi-speaking Tājiks (or Fārsīwāns) are the main inhabitants of the city.

Herat Province



Assessment Interviews in Herat Province

During the week of 28 JUL through 1 AUG 2007, the Assessment Team interviewed a variety of justice sector actors, including police officers, prosecutors, correctional officers, and representatives of nongovernmental organizations (NGOs) providing criminal defense services in the province. As in Balkh, Kunduz, and Nangarhar provinces, the purpose of these interviews was to assess familiarity with the roles and responsibilities of defense lawyers as well as the capacity and competence of defense

²⁴ The districts are: Adraskan, Chishti sharif, Farsi, Ghoryan, Gulran, Guzara, Injil, Karukh, Kohsan, Kushk, Kushki Kuhna, Obe, Pashtun Zarghun, Sabzwar (Shindand), Zinda Jan .

lawyers in the province. In total, the Assessment Team conducted 29 interviews of individuals actively involved in relevant justice sector activities.²⁵

Overview of Current Capacity

The Assessment Team collected data indicating that, in Herat province, there are eight defense lawyers who are registered with the Ministry of Justice. Lawyers predominantly work for internationally funded NGOs, such as International Legal Foundation, Medica Mondiale, and Da Qanoon Ghush-tonkay. There are also a number of unregistered lawyers reportedly working within Herat Province, but the Assessment Team could not identify them. Nor could the Assessment Team identify more than two or three registered private practitioners.

The police in Herat reported that investigations since March of 2007 resulted in the detection of 513 episodes of criminal conduct. Of these, 299 cases were felonies and 214 were misdemeanors. According to the 2006 Tashkeel,²⁶ 70 police officers work in the criminal department. An additional ten officers are assigned duties in the districts.

There are 50 prosecutors in Herat city and assigned throughout the province. There are approximately 23 administrative employees that assist the prosecutors. Since 1 JAN 2007, there have been 1,420 persons against whom indictments were filed. Of this total 726 of those indictments were for criminal conduct in the city of Herat and the remainder for crimes in the districts. Of the indictments filed, 971 persons were convicted and 138 acquitted. The remaining 311 cases are still being actively prosecuted. Of the cases tried in primary courts, the prosecutor has appealed almost 824 matters.

There are 47 judges in the province, 16 in the city of Herat and 31 in the various districts. Four of the judges in Herat city adjudicate civil and commercial matters. Twelve judges adjudicate criminal matters.

Corrections officials indicated that, in the male detention center in Herat city, there are approximately 980 male prisoners currently held as either pre-trial detainees or convicted prisoners. Of the 980 male individuals in custody in Herat city, approximately 125 were pre-trial detainees. The remaining 855 were convicted prisoners serving sentences imposed by the primary court, secondary court, or Supreme Court.

There were 65 female prisoners and 35 children²⁷ in custody in the Herat city detention center at the time of the assessment. The corrections officials did not have specific

²⁵ The total number of interviews conducted in Herat is more specifically broken down as follows: 4 judges and court staff, 6 prosecutors, 6 police officers, 2 prison officials and staff, 4 defense lawyers, 4 inmates, and 3 students and faculty members.

²⁶ Tashkeel is the document that describes the organizational structure of the Afghan government.

²⁷ Female prisoners generally have their children with them in jail. These children have not been accused of any crime, rather they are imprisoned only because their mother has been accused or convicted of a crime.

information regarding the number of prisoners who were awaiting trial, as compared to those serving sentences.

During the Assessment interviews, all categories of respondents indicated some awareness of defense lawyers practicing within Herat province. The vast majority of respondents were familiar with internationally funded NGOs providing indigent criminal defense services and operating within Herat province. A significant portion of the respondents specifically mentioned these organizations by name.

Prison officials who were interviewed for the assessment reported defense lawyers visit the prisons daily. The prison officials interviewed reported that they previously did not document when an attorney visits the prison, but recently started doing so. No specific information was kept regarding the nature or purpose of these visits. Consequently, it is not clear whether lawyer visits reported were for the purpose of soliciting clients, trial preparation, post-conviction assistance or a combination of those reasons.

The information reported among the interviewees as to the frequency and purpose of attorney visits was inconsistent among each category of respondents. For example, the prisoner respondents reported that their lawyers seldom met with them at the prison, and described visits that did occur as short and not particularly substantive. The attorney respondents stated that they often visited their clients in prison, and provided relevant information to clients regarding their pending cases. The correctional officer respondents stated that defense lawyers frequently visited the prisons, met with clients, and would stay for long periods of time with their clients. Correctional officer respondents reported that they always stayed in the room when the attorney and client talked, and therefore had specific knowledge as to the content of these discussions.²⁸ The corrections officers believe these visits were related to trial or appellate court preparations.

The defense lawyers interviewed by the Assessment Team handled approximately 10 to 15 cases at any one time. For the most part, interviews of defense lawyers employed by NGOs had specific requirements or guidelines as to how many cases and the types of cases they should handle at any given time. Defense lawyers uniformly stated that being assigned to a case early in its development, particularly in the pre-indictment stages, increased the chance of getting a dismissal or reduction of the charges prior to indictment. All acknowledged there were not a sufficient number of defense lawyers to meet the criminal justice needs in the province.

Synopsis of the Data Collected

Police

Six police officers were interviewed in Herat as part of the assessment. Officer respondents were uniformly literate. Four of the six respondents reported that they were

²⁸ Art. 31(4) of the Afghan Constitution provides that “confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation.”

graduates of the police academy training program in Kabul. Police officers interviewed were primarily assigned to crime detection and investigation. These officers were responsible for securing crime scenes, apprehending suspects and arranging confinement, interviewing witnesses, and transferring case information to the prosecutor's office.

Only one of six police respondents interviewed in Herat province had ever encountered a defense lawyer during the course of an investigation or the search of a suspect or accused.

Police officers reported very little experience with defense attorneys in the course of their work. The respondents' answers indicated that they do not perceive their job responsibilities as intersecting with the role of defense lawyers. For example, only one of the six respondents stated that he had even seen or worked with a defense lawyer during the course of an investigation or the search of a suspect or accused. Most police respondents were not aware that Afghan law allowed a defense lawyer to be present during all aspects of a criminal investigation, including searches and interrogations.²⁹

Generally, police respondents did not know of specific defense lawyers practicing in Herat. Only two of the six respondents were even able to identify the NGOs providing criminal defense. Of those two, neither respondent had specific contact information for those organizations. Most police respondents believed defense attorneys get involved in criminal matters only after the case has been transferred to the prosecutor's office and an indictment issued. One respondent specifically stated "[p]rosecuting a case is the responsibility of the prosecutor so we don't appear [in court] very often. I understand that this is where a defense lawyer would be involved."

Five out of the six respondents generally were aware that defense lawyers protect the rights of the accused and that Afghan law includes the right to a defense lawyer. Only one respondent stated that defense lawyers are not necessary during criminal cases. This respondent, however, did add that defense lawyers are necessary during the course of civil matters.

²⁹ Article 38 of the Interim Criminal [Procedure] Code for Courts provides:

- (1) The defense counsel has the right to be present at all times during the interrogation of a suspect.
- (2) The suspect and the defense counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial.
- (3) In the investigation phase the Saranwal and the judicial police shall notify the suspect and his defense counsel of searches, confrontations, line-up procedures and expert examinations in order to allow them to be present. This duty can be waived only when there is an urgent need to conduct the said operations, which is defined as when it is a *flagrante delicto* crime or there is a fear of the loss of evidential facts.

Police respondents all stated that they were interested in learning more about the role of the defense attorney. All but one respondent stated that the role of a defense attorney is important to protecting the rights of the accused. All expressed concern about the high levels of illiteracy and poverty in Afghanistan, particularly among those suspected and accused of criminal conduct. All thought a defense lawyer would be helpful in assisting a defendant in asserting his or her rights. The respondents' answers regarding the role of the defense attorney were fairly uniform.

Answers such as “defense lawyers are the ones who defend the rights of the accused or the suspect,” “the presence of the defense lawyer is very important,” “the level of the education in this country is very low, the accused don’t know their fundamental rights,” were common. Again, these types of comments suggested that whatever training police officers receive, it only superficially touches on the role of defense lawyers. One respondent’s answer varied - the respondent stated that “defense lawyers play an important role in the criminal justice process only for those who are accused of crime but who are not guilty.”

When asked if they advise a suspect and/or the accused of their legal rights to counsel, respondents’ answers varied. Fifty percent of the respondents reported that they do not inform the accused of their right to counsel and do not perceive this as part of their official responsibilities. The 50 percent of respondents who did report informing the suspects of their right to counsel did not all convey the same substantive information to the accused about that right. A third of respondents only advised the accused of his right to a defense lawyer, while the remaining two-thirds of respondents advised the accused of both their rights to remain silent and to the appointment of a defense lawyer, if they were indigent.

As one Herat police officer explained, “the level of the education in this country is very low, the accused don’t know their fundamental rights.”

Prosecutors

The Assessment Team conducted seven interviews within the Herat Province prosecutor’s office. As with interviews in other provinces, prosecutors interviewed in Herat fell into two categories: (2) primary prosecutors, (2) prosecutors who prepare charging sheets and (3) prosecutors who file indictments and prosecute cases in court. Interviews were conducted with prosecutors who handle general criminal court cases as well as one prosecutor specializing in narcotics court matters.

All but one of the respondents reported holding a baccalaureate degree in law and politics or economics from the University of Kabul. The respondents’ answers indicated that they were familiar with the general role of a defense attorney under Afghan law. Uniformly, respondents had some contact information about defense organizations or private criminal defense lawyers in the community. Three of the seven respondents identified specific NGOs providing indigent criminal defense services, such as

International Legal Foundation-Afghanistan, Medica Mondiale, and Da Qanoon Ghush-tonky.

Respondents were aware of Afghanistan’s laws authorizing defense lawyers to be involved in investigative matters on behalf of a client. Most prosecutors interviewed stated that defense lawyers are a new phenomenon and have improved the transparency and legitimacy of the criminal justice system, but that many justice sector actors are unfamiliar with the role and responsibilities of defense counsel. Nevertheless, even these respondents could not cite specific articles of law, or specific laws which provide defense lawyers the right to be present and involved in specific aspects of the criminal case on behalf of a client.

The prosecutor respondents provided differing responses regarding the role of the defense lawyers, particularly during the investigative phases of a criminal case. Only one-third of the respondents stated that defense lawyers should come to the prosecutor’s office to discuss the case after the matter has been referred by the police for indictment, but before the indictment is issued. Five out of the seven respondents stated that defense lawyers should be present during interrogations and searches.

Only one third of prosecutor respondents in Herat thought it would be appropriate for defense lawyers to come to the prosecutor’s office to discuss a case after it had been referred by police but before an indictment had been issued.

As to frequency of seeing defense lawyers during the course of searches and interrogations, the prosecutor respondents’ answers varied from six times, to ten times (two respondents), to 15 times.³⁰ All of the respondents stated that defense lawyers are entitled to the contents of the case file in the prosecutor’s office. Only one respondent modified his answer by stating that the exception is when there are “confidentiality issues” involved in a case. However, this respondent did not

explain under what circumstances a defense lawyer would be denied access to information based upon “confidentiality issues.”

³⁰ One respondent qualified his answer by stating he did not see defense lawyers at searches but he did see them in the course of interrogations.

Herat Table 1

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM PERSPECTIVE OF 7 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Crime Scene		2		5
Suspect Interrogation	1	4	2	
Witness Interviews	1	2	4	
Prosecution Office to Discuss Case		2	5	
Courtroom for Hearings	4	1	1	
Judges' Chambers	4		1	1
For the Trial	4	2		
Sentencing	3	2		1

Prosecutors provided fairly consistent responses regarding the role of the defense attorney during the trial phase of a criminal case. The respondents stated that when an accused has a defense lawyer, the lawyer is present at the trial. Respondents reported that during trials defense lawyers routinely argued specific articles of Afghan law to support their cases, asserted their client's innocence, argued for lesser sentences, and filed appeals in cases where the accused felt he or she unfairly was found guilty by the primary court judge.

The respondents had contradictory answers regarding whether defense attorneys questioned or provided defense and prosecution witnesses.³¹ Three out of the seven respondents stated that defense lawyers seldom introduced defense witnesses during trial. The remaining respondents stated that defense lawyers usually or always introduce defense witnesses. As for the role of the prosecution's witnesses, three of the respondents stated that defense lawyers generally question prosecution witnesses and two stated that defense lawyers rarely question prosecution witnesses.

³¹ One of the interviewees responded that it was not part of his job to be at trials and therefore did not answer these questions related to trials.

Herat Table 2

PROSECUTORS' REPORTS ON DEFENSE PRESENCE DURING TRIAL (one interviewee did not answer because not part of his job)				
	Always	Usually	Seldom	Never
Introducing Defense Witnesses	1	1	4	
Question Prosecution Witnesses	1	1	4	
Quoting Specific Articles of Law	5		1	
Arguing that the Accused Was Not Guilty	5	1		
Arguing that the Accused Should Receive a Lesser Sentence	4	1	1	
File an Appeal	4	1	1	

Respondents did not provide particularly detailed responses regarding incidences of defense attorney’s involvement in acts of corruption or bribery. Only one respondent stated that he had heard that defense lawyers take fees from clients, when the lawyer was being paid a salary by an organization. However, this information could not be corroborated. Furthermore, because the Assessment Team did not investigate financial issues relating to defense lawyers, there was no reason to assume that it was inappropriate for an NGO to receive fees or costs associated with a particular matter.

Judges

The Assessment Team interviewed three judges and one judicial clerk. All judge interviewees reported having baccalaureate degrees from the faculty of law or Shari’a at Kabul University.

Uniformly, the judge respondents stated that defense attorneys play a distinct role in preserving the transparency and fairness of the criminal justice system. Of the three judge respondents, all expressed concern with the poor quality of the defense services being provided to the accused. The reasons stated for those concerns included allegations of corruption, lack of training and mentoring, lack of security in the districts, insufficient numbers of defense lawyers in the provinces, and defense lawyers being “against the accused . . . in order to highlight the most important facts in a case, it is good to have a defense lawyer present to represent his/her client. Also, the presence of defense lawyers tends to make the prosecutor act legally and properly”

A Herat judge explained his view that “in order to highlight the most important facts in a case, it is good to have a defense lawyer present to represent [his/her] client. Also, the presence of defense lawyers tends to make the prosecutor act legally and properly.”

There were no uniform answers regarding the percentages of cases in which accused are represented by defense lawyers. One respondent stated that two percent of accused people have defense lawyers during trial. Another stated that 80 to 90 percent of accused people are represented

by a lawyer. One respondent clarified his statements to the Assessment Team by adding that only in the “worst cases” does an accused have a defense lawyer, and only where the accused is a wealthy person.

Corrections Officers

The Assessment Team interviewed two correctional officers, one from the male prison and one from the female prison. Corrections officers interviewed in Herat served as prison guards who supervise prisoners. They also were generally familiar with the role of a defense attorney. One respondent stated that she understood the importance of allowing defense attorneys to speak with their clients, but reported that she was always with the prisoners when they spoke to their lawyer. This respondent stated that ten days before the date of the interview, she had created a registration for the defense lawyers visiting clients in the prison.

Corrections officers suggested that they be provided with training about the limits of confidentiality – when is conversation with an inmate an attorney-client communication and when is it an abuse of the process.

Prisoners

The Assessment Team interviewed five respondents who were incarcerated - three females and two males. The three female prisoner respondents reported that they had had their primary court trials, had been sentenced, and were awaiting their appeal trials at the time of the interviews. The two male prisoner respondents were awaiting their primary court trials. Four respondents reported that they had defense lawyers. Only one could name his lawyer. Another stated that his lawyer was from ILF. The other two respondents could neither identify the specific NGO for which their lawyer worked nor provide contact information for their lawyer. Both respondents who had had a trial reported that their lawyers were present for the trial.

Incarcerated respondents lacked knowledge about constitutional rights or other rights under Afghan law to have a defense lawyer. One respondent stated that she knew nothing about Afghan law because she is Iranian. The other respondents stated that due to illiteracy and general lack of education they were unclear about their rights. One respondent stated that he was aware of his right to have a defense attorney, but this was only because his attorney explained the law to him in the initial interview when the lawyer saw him in jail.

Post-conviction prisoners expressed notably lower levels trust in their defense attorneys than pre-trial detainees. Clearly, those who had a defense lawyer, but were convicted anyway tended to express concern that their lawyer was not much help to them. Those respondents who had not yet gone to trial held out hope that their lawyers could make a difference. The three respondents who reported having a trial conducted without the presence of their defense lawyers reported that they felt their defense lawyers were not helping them.

Defense Lawyers

The Assessment Team interviewed five defense lawyers working in Herat province. All interviewees received had specialized training focusing on defense work prior to their employment as defense attorneys. Respondents had worked as judges, prosecutors, or within a government ministry prior to becoming defense lawyers. Of the five respondents, three worked for international NGOs (International Legal Foundation-Afghanistan, Medica Mondiale and Da Qanoon Ghush-tonkay). Each received a regular monthly salary. Two respondents reported that they work in small, private law firms and therefore rely on the fees they receive from clients for income. All respondents reported that they were educated at a regional university or Kabul University. All had graduated from either a Shari'a faculty or faculty of law. Four of the respondents decided to become defense lawyers while obtaining their baccalaureate degree.

Three of the five lawyers reported that they had approximately ten to 15 cases at any given time, with an average of 12 cases. One respondent stated that his organization requires him to have 20 active cases, while another respondent stated that he handles only one case at a time. There was no uniformity among the respondents as to how often they visited their clients in jail. Two respondents stated it depended on the nature and seriousness of the case, while another stated that he met with his clients at least 20 times prior to trial. Another respondent stated that he met with clients at least once per week.

Criminal defense lawyers working for NGOs in Herat stated that the value of their salaries ranged from \$500 to \$800 U.S. per month. Each respondent thought a more appropriate salary range would be from \$1,000 to \$1,500 U.S. per month.

The respondents who worked for international NGOs described their salaries as lower than they would have liked, but adequate. The reported salaries ranged from approximately \$500 to \$800 U.S. per month. Each respondent thought an appropriate salary might range from \$1,000 to \$1,500 U.S. per month. Respondents working for international NGOs stated that they had sufficient resources and supplies to do their jobs. These respondents reported that they had access to computers, vehicles, stationery supplies and printers. In contrast, the two private lawyers interviewed reported that, on average they charge approximately \$200 U.S. per case. They expressed dissatisfaction with their income. The two private defense lawyers stated that the only resources available to them were basic tools such as pens and paper.

The NGO employed respondents stated that they received ongoing legal education and had a support network within their organizations to discuss cases. Two of the interviewees working for NGOs reported that they had weekly continuing legal education classes that were mandatory. These respondents also stated they there were actively supervised on their cases by local superiors and headquarter offices in Kabul. One respondent working within an NGO stated that, as part of his job, he interacted often with

law professors and was able to speak with the professors regarding questions of law. The respondents working in private practice reported that they had neither access to continuing legal education opportunities nor any supervision of their cases. All respondents stated that they had access to Afghan laws that they needed to reference in the course of their work, although one respondent stated that obtaining Ministry of Justice publications is difficult because they are expensive.

Respondents were asked to describe the actions they typically took in representing their clients. Respondents engaged in each activity listed below.

Herat Table 3

REPORTS OF 5 DEFENSE LAWYERS ON WORK THEY PERFORMED WHEN PROVIDING CRIMINAL DEFENSE LEGAL SERVICES				
	Always	Usually	Seldom	Never
Introducing Defense Witnesses	3	1	1	
Question Prosecution Witnesses	2	2		1
Quoting Specific Articles of Law	5			
Arguing that the Accused Was Not Guilty	3	2		
Arguing that the Accused Should Receive a Lesser Sentence	2	2	1	
File an Appeal	4	1		

Law Students and Faculty

The Assessment Team interviewed two students currently studying at Herat University, and one professor. One student respondent was studying in the department of Shari’a, and the other respondent was studying in the faculty of law. The Shari’a student respondent said that there are approximately 135 graduates per year, whereas the other student reported that they faculty of law graduates only 50 students per year. Most of the Shari’a law graduates reportedly find jobs in government offices, particularly with the judiciary or with the prosecutor’s office. Graduates of the law faculty reportedly look for employment with international organizations, defense organizations, the Ministry of Foreign Affairs or the National Assembly. Respondents stated that 70 percent of the Shari’a law graduates find jobs immediately upon graduation, as opposed to five to ten percent of graduates from the law faculty.

Respondents were asked which classes relating to defense work are currently being offered within the Shari’a and law faculties. The table below summarizes the topics covered within these faculties.

Herat Table 4

LEGAL SUBJECTS OFFERED IN HERAT UNIVERSITY'S LAW SCHOOL		
	YES	NO
The Definitions of Ta'zeeri Versus Houdoud Crimes	LP/SH	
Application of the Penal Code	LP/SH	
Interpretation of Criminal Statutes	LP	SH
How to Identify the Elements of a Crime	LP	SH
Practical Techniques of Criminal Investigation		LP*/SH
Legal Motions Practice	LP	SH
Understanding Physical Evidence	SH	LP
Oral Legal Argument		LP/SH
Techniques for Questioning Witnesses		LP/SH
Defenses to Crimes		LP/SH
Alternatives to Imprisonment		LP/SH
How to Work as a Defense Lawyer		LP/SH
How to Start a Business		LP/SH
How to Bill Clients for Legal Services		LP/SH
PS= Faculty of Law and Politics SH – Faculty of Shari'a *This is not currently being taught but one interviewee reported that this will be added to the curriculum		

The respondents stated that they would be interested in more practical instruction regarding the work of defense lawyers, and they were particularly interested in clinics and practicum experiences. The respondents stated that if there were more career opportunities for defense lawyers they would certainly be interested pursuing careers as defense attorneys.

KUNDUZ PROVINCE DEFENSE CAPACITY ASSESSMENT

Summary of Findings

The data from Kunduz province broadly validate what other reports have been saying anecdotally.³² That is:

- There are an insufficient number of registered criminal defense lawyers to support the needs of the provincial/regional population.
- The only criminal defense lawyers in Kunduz work for a small non-governmental organization which serves only the “destitute.”
- For a variety of reasons, not the least of which is a lack of familiarity with what defense lawyers do, many destitute individuals in Kunduz who need the help of a criminal defense lawyer do not request or seek representation.
- Of the small number of destitute individuals who go so far as to seek help from an available defense lawyer, only a fraction will actually receive assistance.
- Individuals who cannot qualify for the legal services of the single legal aid NGO operating in the province face significant barriers to obtaining legal defense services. Even when they seek to retain the assistance of a fee-for-services defense counsel, there are purportedly no registered defense attorneys to retain in the province. If they receive legal assistance at all, it will be from an unregistered lawyer and generally limited in scope. Consequently, a significant number of persons obtaining fee-for-services defense assistance will receive less assistance than they actually need.³³

Measures are needed to build on existing defense capacity in Kunduz province and expand capabilities of lawyers currently handling criminal defense matters.

Introduction

Kunduz province is one of the 34 provinces comprising the Islamic Republic of Afghanistan. This Northern Province encompasses an area of approximately 8,040

³² See, for example, *Report and Evaluation of the Fair Trial Workshop*, Max Planck Institute for Comparative Public and International Law, p. 46 (Heidelberg 2005)(insufficient defense capacity across Afghanistan provinces).

³³ Judicial respondents reported that it is not uncommon for illiterate or low income individuals who do not otherwise qualify for free legal services to engage lawyers for limited scope representation. These lawyers are usually retired judges and prosecutors. As a general rule, the data indicate that these lawyers are not registered with the Ministry of Justice as defense advocates. Most limit the scope of their representation to preparing a written defense statement for the accused regardless of the full extent of legal services that may be needed.

square kilometers and supports a population of about 820,000 people. Kunduz is an important agricultural province. Farmers produce wheat, rice, melons, and other produce to generate income that serves as the backbone of the local economy. Kunduz Province is divided into seven districts: Ali abad, Archi, Chahar Dara, Imam Sahib D, Khan Abad, Kunduz, and Qalay-I-Zal.

Kunduz Province



In the country's 1979 census, the city of Kunduz had a population of approximately 53,251. Since 1979, the city's population has grown to over 95,000 (2002 official estimate). The population of the province, as well as the city, is composed of several different ethnic groups, namely the Tajiks, Aimaq, Uzbek, Pashtun and Hazara.

Assessment Interviews in Kunduz

During the week of 25 AUG through 1 SEP 2007, the Assessment Team interviewed a range of justice sector actors, including police officers, prosecutors, penal system officers, and representatives of nongovernmental organizations (NGO) providing criminal defense services in the province. The purpose of these interviews was to assess the capacity of defense lawyers in the province. In total, the Assessment Team conducted 23 interviews of individuals actively involved in relevant justice sector activities.³⁴

Overview of Current Capacity

Data indicate that in Kunduz there are three full time defense lawyers who are registered with the Ministry of Justice and are actively involved in providing criminal defense assistance. These were the only registered defense lawyers of whom those interviewed were aware. The data indicated, however, that other defense services of limited scope and duration are provided by about five retired judges and prosecutors.³⁵ To determine if

³⁴ The total number of interviews conducted in Kunduz is more specifically broken down as follows: 3 judges, 1 court staff, 5 prosecutors, 5 police officers, 3 prison officials and staff, 3 prisoners and 2 defense lawyers.

³⁵ For purposes of this report, "full service" representation means providing a client will all services necessary to protect the client's interests when he or she is suspected and/or accused of criminal conduct.

the current number of defense lawyers is sufficient to meet existing need, the Assessment Team examined:

- The size of various organizations (police, prosecutors and prisons) through which individuals enter or are otherwise dealt with in the criminal justice system;
- The number of criminal cases filed in the province; and
- The kinds of cases that the police and prosecutors investigate prosecute or otherwise handle.

Police respondents reported that there are approximately 112 police officers in Kunduz province. Ninety-nine police officers are stationed in the city of Kunduz and disbursed among a headquarters building and four precinct offices. Seventy-eight of the 99 officers stationed in the city of Kunduz appear to be assigned exclusive responsibility for detecting and investigating criminal conduct in Kunduz district. The remaining officers are assigned force protection, administrative, or other duties. Thirteen police officers are assigned duties in one of the six other district offices in the province. Those district officers are organized to be responsible for the detection and investigation of crime, force protection, administrative or other matters.

Since January 2007, the police have investigated in excess of 300 matters and referred approximately 175 matters for prosecution. The chief judge of the primary court indicated that during the first six months of calendar year 2007, the prosecutor filed approximately 130 indictments in the primary court arising from criminal conduct in Kunduz district. The chief prosecutor for the province confirmed these statistics. The primary court had rendered final decisions in approximately 90 of those cases at the time of the assessment and had returned them to the prosecutor's office for further action. It appears that most, if not all, of the 90 cases were appealed by the prosecution or the accused to the secondary court for a trial *de novo*. The Assessment Team obtained a copy of a "Unified Report of Criminal Cases in Appeal Prosecutors' Office in Center and Provinces" listing appellate cases from March 2006 through March 2007. It was reported that Kunduz province had 578 cases on appeal, which appears to roughly verify the reports regarding the cases pending appeal.

Respondents employed in the prison system indicated that there were approximately 560 prisoners held in custody either as pre-trial detainees or convicted inmates. At the time of the survey, 322 prisoners in Kunduz were being held in the Kunduz city prison, and approximately 238 held in district facilities. Of the 322 individuals in custody in Kunduz, approximately 131 were pre-trial detainees. One of these pre-trial detainees was

"Limited scope" means providing representation to an accused in the form of a defense statement only, without investigation, interviewing of witnesses, litigation of pre-trial issues, bail applications, in-court advocacy before, during, and after trial, and appeals where needed.

a woman. The remaining 191 were convicted inmates serving sentences imposed by the primary court, secondary court or the Supreme Court. Ten of these inmates were women.

During the assessment interviews, all categories of respondents indicated that they were aware of only three defense lawyers in Kunduz province who were registered with the Ministry of Justice and providing full service criminal defense. These lawyers, however, limited their practice to only the destitute. There was no evidence of other registered defense lawyers providing fee-for-services criminal defense services to the wider population.³⁶ In addition to the three registered lawyers, respondents identified an additional handful of limited scope service providers – totaling no more than five – who, while not registered with the Ministry of Justice, routinely draft and submit individual defense statements to the primary court on behalf of defendants. It was reported that these providers (identified as former judges and prosecutors) only offered defense statements regardless of the criminal defense services those clients may have actually needed.

Unregistered lawyers in Kunduz province provide some limited defense services, usually limited to drafting and submitting a written “defense statement” on behalf of a defendant. A typical fee for this service is 3,000 AFN, or about \$60 U.S.

Unlike the three registered lawyers, these providers do not limit their practice to the “destitute.” Data collected during the assessment indicated that they offer their services to the wider population and charge approximately 3,000 AF (about \$60 U.S.) to prepare and submit a defense statement. These providers do not always identify themselves as the authors of the defense statements that they prepare and submit on behalf of defendants.

As noted above, providers offering limited scope services apparently do not offer criminal legal defense assistance to their clients other than the defense statement. In circumstances where a judge was aware or suspected that an accused had submitted a defense statement prepared by an unregistered provider, some of the judicial respondents indicated that such assistance was less than what they believed the clients actually needed. Nevertheless, these judges generally felt that even assistance with a defense statement was often better than nothing. The data regarding the limited service providers were verified in a number of interviews.

The information provided by the defense lawyers interviewed suggested that each lawyer carries between ten and 15 cases individually (with 12 cases being an average caseload). The average time required for case resolution was approximately 180 days. The reports

³⁶ The Assessment Team did examine the Ministry of Justice’s most recent list of registered defense attorneys in Afghanistan. The list did not identify any defense attorneys with addresses in Kunduz. The three defense lawyers who were identified as practicing in Kunduz appeared on the MOJ Registry, but were shown on the list as having addresses outside of Kunduz.

of defense counsel suggested that they handled approximately 108 cases per year³⁷ (or a total of 324 per year handled by all full-time defense lawyers in Kunduz each year).

While there are no official statistics on the numbers of such cases (or how much defense lawyer effort was expended to resolve them prior to indictment), responses during our interviews suggested that it was a significant number—perhaps as many as 50 per year for all the interviewed lawyers combined. Furthermore, it appears to be the practice in Kunduz for one indictment to charge *multiple* accused.³⁸ In Kunduz, the 130 indictments filed by the prosecutor’s ‘office actually charged more than 130 individuals with criminal conduct.³⁹ Based on the statistics, it is clear that the current number of defense attorneys in Kunduz cannot adequately meet the legal needs of the destitute accused in Kunduz, let alone the criminal justice problems faced by all other members of the community.

Synopsis of the Data Regarding Defense Capacity in Kunduz Province

Police

The sample of police officer interviewees in Kunduz primarily comprised officers assigned to crime detection and investigation. The data suggest that the officers interviewed understand well their roles in the criminal justice process. Fundamentally, they reported an understanding that police officers’ duties require them, within a 72 hour period, to be prepared to apprehend, investigate (starting at the point of capture), and arrange pre-trial confinement of detainees, as well as to coordinate transfer of the matter and evidence to the prosecutor’s office. They also reported understanding that, upon issuance of an indictment, they are required to assist in ensuring fair and transparent proceedings.

Police officers’ self-reported perceptions of their own role provide some context for their perceptions about the roles of defense lawyers, and thus are worth noting. The data suggest that police officers in Kunduz understand their duties to serve as the foundation for effective administration of the rule of law through legitimate and transparent law enforcement, and that they appreciate that they have role in building community confidence and trust.

³⁷ Assuming the accuracy of the data regarding indictments provided by the Chief Primary Court Judge, all police filings with the prosecutor’s office resulted in the prosecutors issuing 130 indictments, in Kunduz district alone. That figure can be extrapolated to approximately 260 indictments per year. Multiplying the number of cases each attorney carries for a 4 month period during a year (12) times 3 (approximately 120 days per year) suggests that each defense lawyer has the capacity to handle 36 cases a year.

³⁸ More specifically, the practice is that if multiple suspects are apprehended at or about the same time regarding commission of the same crime, they will all be named in a single indictment. If co-accused are arrested at markedly different times, even though for the same criminal event, they will be charged in separate indictments.

³⁹ Statistics were not available to determine how many persons were indicted as of the time of the Kunduz interviews.

The Assessment Team interviewed five Kunduz city police officials. Officer respondents at the command level reported that they had completed schooling through the 12th grade. Many police officer respondents indicated that they had accumulated a substantial number of hours of continuing education specifically related to police work beyond any formal education they may have received in high school. Line officers were generally less educated, but those the Assessment Team met were literate. Police officers specifically assigned to crime detection tended to report higher education levels than their peers.

The data from all interviewees suggested that defense lawyers are rarely involved in a case until after an individual is taken into custody and the first 72 hours have passed. This seems somewhat inconsistent with the reports of defense counsel that they resolved many cases before indictment and/or trial. Consequently, it is possible that either those reports of defense counsel or the police responses may be inaccurate. Nevertheless, police officers uniformly responded that they were familiar with the constitutional and other legal authorities granting suspects and those accused of crimes the right to counsel as well as the right to appointed counsel in the event the suspect or accused is destitute.

Unfortunately, without much practical experience with defense counsel, police officer respondents were often unclear about how, as a practical matter, they could arrange appointment of counsel if asked to do so by a suspect or accused person. Police respondents reported that their departments did not have any formal mechanisms to arrange for counsel if a suspect or accused asked for counsel. Some suggested, however, that they might contact superiors, the courts, prosecutors, or an NGO.

In Kunduz, police officer interviewees were uniformly familiar with constitutional and other legal authorities granting a right to counsel and to appointed counsel for destitute persons; however, they have little practical experience in actually arranging representation for suspects or accused persons.

Likewise, because of their lack of experience with defense lawyers, police officers were unsure of how routine early involvement by a defense lawyer in the detection, apprehension and investigation phases of a criminal matter might affect their individual responsibilities, the system as a whole, or their own perceptions about the utility and benefits of a defense lawyer. Despite their lack of prior exposure to defense counsel and having no clear sense of what the effects of more active defense lawyer involvement in the first 72 hours would be, the police officers did report that they would be open to the involvement of defense counsel early in the process.

Generally, all police officer respondents felt that most of the suspects and/or accused with whom they had come in contact during the detection, apprehension and investigation phase of a case needed and could definitely benefit from a competent defense lawyer. Many of the suspects and accused that police respondents encountered were considered to be ignorant of their rights and incapable of defending their rights or conceiving of or presenting a proper defense *pro se*.

Police officer respondents uniformly talked about the need for further training for police officers regarding the role of defense lawyers, the authority of the defense lawyers to be involved in criminal investigations, and how police should respond to questions about defense lawyer involvement in the early stages of a case.

Prosecutors

Prosecutor respondents generally fell into two categories: (1) primary prosecutors who received and evaluated reports of criminal conduct filed by police⁴⁰ and (2) prosecutors who file indictments in court and try cases.

Uniformly, prosecutors who spoke with the Assessment Team had at least a baccalaureate degree in law from a law and political science faculty or from a Shari'a faculty. All had attended university at a regional university or the University of Kabul.

Despite reporting relatively high levels of education and familiarity with defense counsel, prosecutor interviewees in Kunduz failed to articulate a consistent understanding of the actions defense lawyers can or should take on behalf of their clients.

Statistical data previously obtained from the Attorney's General's Office headquarters in Kabul⁴¹ suggest that the Assessment Team's sample of interviewees may not be truly representative of the educational level of all prosecutors in the province. This may be attributed to the fact that interviewees tended to be supervisors rather, than line prosecutors. Respondent prosecutors clearly had at least a basic understanding of the importance of defense counsel in the Afghan justice system. However, there were no uniform responses on the

appropriate actions a defense lawyer should take in defending the rights of his client.

Because of the role that NGOs play in providing criminal defense services to the indigent in Kunduz, prosecutor respondents had opportunities to see defense lawyers in court and

⁴⁰ These prosecutors are charged with ensuring that the detection, apprehension and investigation of the suspect is complete, conducted consistent with applicable law, and sufficient to establish grounds warranting indictment.

⁴¹ The statistical data on educational rates of prosecutors in the AGO indicated:

- (1) Headquarters: (238 prosecutors permanently assigned): 41% (98) with law faculty degrees (including 2 LL.M., 2 Ph.D.); 10% (24) with Shari'a faculty degrees; 2% (4) with miscellaneous faculty degrees (economics, etc.); remainder with madrasa, high school and lesser education;
- (2) AGO Kabul Provincial Office: (282 prosecutors permanently assigned): 32% (90) with law faculty degrees (including 4 LL.M.); 5% (13) with Shari'a faculty degrees; 2% (5) with miscellaneous faculty degrees (Police, Languages, etc.); remainder with madrasa, high school and lesser education; and

AGO provinces outside of Kabul Province: less than 20% with law/Shari'a degrees.

work with them. Without these NGO registered defense lawyers, prosecutors would have had no opportunity to interact with defense counsel in court proceedings.

Kunduz Table 1

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM THE PERSPECTIVE OF 5 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Crime Scene				5
Suspect Interrogation		3	2	
Witness Interviews		2	3	
Prosecutor's Office to Discuss Case		2	2	1
Courtroom for Hearings		3	2	
Judges Chambers				5
For the Trial	4	1		
Sentencing				

Responses from prosecutors during interviews indicated a clearly consistent perception of the value that defense lawyers bring to the criminal justice process. All prosecutor respondents believed there is a need to increase defense capacity in the province because of the requirements of law.

Kunduz Table 2

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM THE PERSPECTIVE OF 5 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Crime Scene				5
Suspect Interrogation			2	3
Witness Interviews		3	2	
Prosecutor's Office to Discuss Case			3	2
Courtroom for Hearing		3	2	
Judge's Chambers				5
For the Trial	4	1		
Sentencing	5			

Because of their interactions with defense counsel, the prosecutors in Kunduz who were interviewed did not feel that they needed any additional education or training to understand the role of defense lawyers. They felt that the registered defense lawyers served as positive role models. Prosecutors, however, were curious about the impact that the Advocates Law would have on law practice and the criminal justice process. Without a firm understanding of the Advocates Law, they were apprehensive about possible ripple effects it might have on the way in which cases are prepared and tried. They indicated that a training program to address those issues would be extremely helpful in preparing for the effects of the Advocates Law.

Judges

The judicial respondents uniformly responded that defense lawyers ensure the legitimacy and transparency of the criminal justice process. Judicial respondents expressed concern that the community lacked a sufficient number of defense lawyers to meet the needs of those persons involved in the criminal justice process. All the judicial respondents indicated that they understood the value of a defense attorney, saw defense attorneys on a regular basis, and believed that they offered value to the proceedings. Most judges reported that defense lawyers who appeared in their courts routinely:

- Interviewed relevant witnesses before trial;
- Submitted thorough and generally well-prepared defense statements;
- Articulated their client's position at trial;
- Called witnesses for the defense or produced witness statements; and
- Met appeal deadlines.

There was some uniformity among judicial respondents regarding the importance of defense lawyer in the criminal justice system, but these responses usually went no deeper than to state that the defense lawyer "must assert and defend the rights of the accused." All judges did agree that there should be more defense lawyers as well as continuing legal education that, at a minimum, should focus not just on understanding and analyzing the law, but also should address issues touching on professional identity such as the Advocates Law and ethics.

Corrections Officials

The Assessment Team interviewed three corrections officers in Kunduz. Interviewees uniformly acknowledged a responsibility to create confidence in the public that if an individual is incarcerated in connection with a criminal matter, he or she will have the full protections of the law.

Interviewees generally represented themselves as having a 12th grade education. Some of the officers had a certification in some aspect of corrections practice from a ministry program or other training. Most described themselves as literate.

Correctional officers interviewed by the Assessment Team were responsible to supervise incarcerated persons. The corrections officers were familiar with the role of defense attorneys and were able to articulate the concept that defense lawyers stand for the rights of the accused. Corrections officers interviewed reported that on more than one occasion they have had contact with defense attorneys who came to the prison. The dearth of defense lawyers might suggest that demand would be great, and lawyers would not be required to exert significant effort to find clients.

Rather than ensuring consistent demand for defense lawyers' services, the small number of practicing lawyers may have the opposite effect in some places; because so few people are aware of their role and the help they can provide, defense lawyers must expend considerable effort to find clients to represent.

Interestingly, however, so few people were aware of who they were and what they did that defense lawyers were forced to use a portion of their weekly visits to the prison to solicit and sign up clients, in addition to consulting existing clients.

Because respondent correctional officials had no experience with court proceedings, except occasionally to transport an inmate to the court, they lacked sufficient information to critique the performance of defense attorneys in any place other than the prison environment. Respondents felt, however, that the attorneys who visited the prison were doing the "right" things such as discussing witness statements with the client, evaluating evidence, and preparing defense statements.

All corrections officials responded that there was no place in the Kunduz prison facility where lawyers could meet individually and privately with clients. All respondents recognized the importance of the concept of confidentiality, and felt that some accommodation must be made for it in lawyer-client contacts. The respondents just did not have the funds or authority to create such an area. Likewise, they knew of no such facilities in the district detention centers. Even though all corrections respondents recognized the importance of confidentiality with respect to lawyer client communications, none themselves had made any particular attempt to provide a private place for lawyers and clients to engage in confidential communications.

Prisoners

During interviews with the prisoner respondents, none responded that they had a defense lawyer during their primary or secondary court proceeding. One respondent indicated that a co-defendant had been represented by counsel, and that while that lawyer was unable to help him specifically because of a conflict of interest, he did attempt to help the respondent's case when he could. That respondent indicated that he believed the attorney had done a good job, was competent, and diligent in preparing and presenting the case.

He also indicated that the co-defendant's lawyer had pursued an appeal on behalf of his client, which had been somewhat helpful in his case as well.

While the prisoner interviewees in Kunduz were not particularly helpful because none were represented by defense lawyers, their interviews are worth noting anyway. First,

The practice of writing indictments that cover multiple defendants means that researchers and others involved in estimating defense capacity must take care not to assume that one indictment equals one defendant.

they underscore the important point that not every destitute person gets representation. Second, most of the prisoners were indicted with a co-defendant. The statistical data that were provided indicating that the prosecutor had filed 139 indictments should dispel the notion that there is a 1 to 1 relationship between the number of indictments and the pool of potential clients. At least in our modest sample, all of the respondents were indicted along with at least one and, in one case, multiple co-defendants.

Consequently, in estimating capacity one needs to be careful not to equate the filing of an indictment with appearance of just one new potential defendant. Indictments often involve multiple persons and, therefore, multiple potential defendants entitled to legal services.

Defense Lawyers

Defense lawyers in Kunduz all work for NGOs, as opposed to working in private practice. All respondents were educated at a recognized regional university or Kabul University. All graduated from either a Shari'a faculty or faculty of Law and Political Science, and had been in practice for several years before assuming their position with an NGO. More likely than not, their previous work experience had been in a prosecutor's office or doing law-related work in a government ministry office. All respondents had received specific defense lawyer training as well as on-the-job training and mentoring. All respondents indicated that they were registered with the Ministry of Justice and were able to produce appropriate credentials.

Respondent defense attorneys stated that they were perceived by judges and prosecutors as being diligent and competent. This perception of the competency of the defense lawyers was supported by the data from interviews with both prosecutors and judges who had worked with these defense lawyers and who themselves had reported holding the work of respondent defense attorneys in high esteem. Respondent defense attorneys indicated that they had acquired a good reputation based on the fact that they worked diligently to prepare their cases for trial by talking to the client, the police, the prosecutor, witnesses and experts to put together the best defense statement possible for their clients.

Defense lawyer respondents indicated that they were paid a sufficient salary, had comfortable offices, and sufficient office equipment.⁴² The respondents also indicated

⁴² Their reports about the adequacy of their salaries may not be fully accurate, in light of the responses of other NGO defense attorneys interviewed for this Assessment. Other NGO attorneys with whom the Assessment Team spoke reported receiving less than adequate salaries.

that they had an adequate number of vehicles and drivers to travel to meet with clients, attend court proceedings, and meet with or arrange for the travel of witnesses. Likewise, they indicated that they had sufficient legal resources such as statute books, legal commentaries and other written legal references.

Respondents mentioned that they would welcome additional training, particularly about the new Advocates Law, the creation of a bar association, and codes of professional conduct. They would also welcome additional training on case management and trial preparation and practice.

Law Students and Faculty

Because Kunduz University has no faculty of Shari'a or of Law and Political Science, no one in this category was interviewed.

NANGARHAR PROVINCE DEFENSE CAPACITY ASSESSMENT

Summary of Findings

Assessment data from Nangarhar province establishes that:

- There are an insufficient number of registered criminal defense lawyers to support the needs of the population that faces criminal charges in the province.
- The only criminal defense lawyers in Nangarhar work for a small non-governmental organization which serves only the indigent.
- For a variety of reasons, including a lack of familiarity with what defense lawyers do and their constitutional right to a court-appointed lawyer, many destitute individuals in Nangarhar who need the help of a criminal defense lawyer do not request one.
- Of the small number of destitute individuals who go so far as to seek help from a defense lawyer, only a fraction will actually receive assistance because there are not enough lawyers available.
- Individuals who cannot qualify for services provided by the NGOs that offer legal defense in the province face significant obstacles to obtaining legal defense services. Few criminal defense lawyers registered with the MOJ are available. More likely than not, people seeking legal defense assistance will receive services from an unregistered lawyer who will provide generally less assistance than needed.⁴³

In order to provide access to justice as required by the Afghan Constitution and other right to defense laws, steps must be taken to build on existing defense capacity in Nangarhar province.

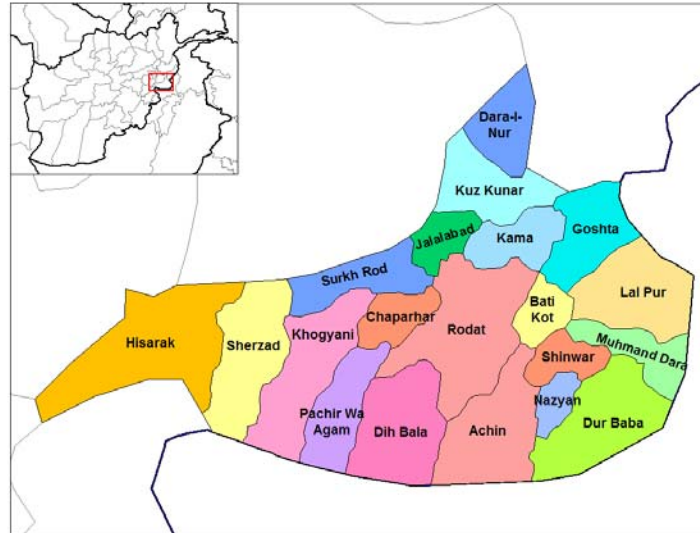
Introduction

Nangarhar Province lies in the east of the country. Jalalabad District is in the north of Nangarhar Province and contains the provincial capital, Jalalabad. The population of Jalalabad exceeds 2,000,000. Once a major center of poppy production in Afghanistan, Nangarhar had reportedly decreased its production of poppy by up to 95 percent in 2005, and in 2007 it is one of the success stories of the Afghan eradication program.

⁴³ Judicial respondents reported that it is not uncommon for illiterate or low income individuals who do not otherwise qualify for free legal services to engage lawyers for limited scope representation. These lawyers are usually retired judges and prosecutors. As a general rule, the data indicate that these lawyers are not registered with the Ministry of Justice as defense advocates. Most limit the scope of their representation to preparing a written defense statement for the accused regardless of the full extent of legal services that may be needed.

Nangarhar province consists of approximately 7,727 square kilometers divided into 23 districts.⁴⁴

Nangarhar Province



As of 2002, the ethnic makeup of the district was approximately 85 percent Pashtun and nine percent Hazara. While the assessment did not seek out any particular ethnic group as respondents, all respondents were Pashtun.

Assessment Interviews in Nangarhar

During the week of 11 AUG through 18 AUG 2007, the Assessment Team interviewed a variety of justice sector actors in Nangarhar province, including police officers, prosecutors, corrections officers, and representatives of nongovernmental organizations (NGOs) providing criminal defense services in the province. The Assessment Team interviewed a range of justice sector actors, including police officers, prosecutors, penal system officers, and representatives of an NGO providing criminal defense services in the province. The purpose of these interviews was to assess the capacity of defense lawyers in the province. In total, the Assessment Team conducted 25 interviews of individuals actively involved in relevant justice sector activities.⁴⁵

⁴⁴ The 23 districts are: Achin, Bati Kot, Bihsud, Chaparhar, Dara-I-Nur, Dih Bala, Dur Baba, Goshta, Hisarak, Jalalabad, Kama, Khogyani, Kot, Kuz Kunar, Lal Pur, Muhmand Dara, Nazyan, Pachim Wa Agam, Rodat, Sherzad, Shinwar, Surkh Rod, and Goshtah.

⁴⁵ The total number of interviews conducted in Nangarhar is more specifically broken down as follows: 4 judges, 2 court staff, 5 prosecutors, 5 police officers, 3 prison officials and staff, 4 prisoners and 2 defense lawyers.

Overview of Current Capacity

The data obtained from Nangarhar province indicate that there are approximately seven full time defense lawyers registered with the Ministry of Justice and actively involved in providing criminal defense assistance. These defense lawyers only provide assistance to the very poorest of the provincial population pursuant to some internal guidelines that were not discussed. As in other provinces, the data suggest that the work of these defense lawyers is supplemented by retired judges and prosecutors who, though not registered with the Ministry of Justice, provide limited scope services for a fee to those seeking defense assistance.⁴⁶

To determine if the current number of defense lawyers is sufficient to meet existing need, the Assessment Team examined:

- The size of various organizations (police, prosecutors and prisons) through which individuals enter or are otherwise dealt with in the criminal justice system;
- The number of criminal cases filed in the province; and the kinds of cases that the police and prosecutors refer for indictment.

The Nangarhar police interviewed by the Assessment Team reported that in approximately 528 investigations, 921 people were arrested and charged with criminal conduct. Prosecutors reported that from these referrals approximately 476 indictments were filed with the courts (351 in criminal matters and 125 regarding public security matters)

One police officer interviewed reported that there are approximately 90 police officers assigned to Jalalabad city. Another police officer indicated that the number may be 105. Regardless of the total number of officers, police officers are assigned across a number of divisions that include: personnel, education, finance, logistics, detention, criminal investigation, narcotics, anti-terrorism and traffic. Officers assigned to the criminal investigations division indicated that they go to about 20 to 26 crime scenes a month.

An officer with the criminal techniques department (crime scene investigation) reported that in the previous five months, police investigations resulted in the identification of approximately 247 suspects whose cases were referred to the prosecutor's office for indictment.⁴⁷ He was not aware of how many of those referrals actually resulted in

⁴⁶ As noted in previous sections of this report, "full service" representation means providing a client with all services necessary to protect the client's legal interests when he or she is suspected and/or accused of criminal conduct. "Limited scope" means providing representation to an accused in the form of a defense statement and necessarily, less than the full scope of criminal defense services the defendant may actually need.

⁴⁷ The information obtained during the Assessment Team's interviews was validated by statistics obtained from the provincial criminal court clerk's office and the prosecutors' office. The criminal court clerk's records indicated that between 1 JAN and 21 JUN 2007, indictments were filed in 351 cases (261 of these

indictments, but his estimates parallel the statistics obtained from the criminal clerk's and prosecutors' offices.

As noted above, it was reported that of all police investigations in Jalalabad, approximately 247 matters were referred to the prosecution for further investigation and indictment in the month just prior to the interviews. While more comprehensive statistics were not available as of this report, for the period between 30 JUN and 4 JUL 2007, the maximum number of male inmates incarcerated in Jalalabad was 416, and the minimum number 413. The number of female inmates incarcerated ranged from a maximum of ten to a minimum of eight.

Judges and court staff interviewed indicated that, on average, about 25 primary court cases were resolved each month by each primary court judge. One interviewee estimated that the cumulative total of the cases resolved by the four primary court judges approached or exceeded 110 each month.

Prosecutors noted that there were three primary sources of defense lawyers in the province: the International Legal Foundation (ILF), Da Qanoon Ghushonky (DQG), and defense lawyers in private practice. As in other provincial assessments, there was reference to a number of persons in the province (reportedly no more than five) - primarily former judges and prosecutors - who, while not registered with the Ministry of Justice, provided limited scope services such as defense statements or obtaining witness statements. It was not clear how many of the defense lawyers in private practice were registered or unregistered.

ILF and DQG each maintain a complement of four defense lawyers in Jalalabad. The NGO lawyers only serve what they described as the "destitute" who qualify for services based on an internally developed formula established by each particular organization specifically applicable to each individual province. These formulas were not requested or discussed. It was, however, clear during the interviews that these NGOs exclusively represent people who are unemployed and without any assets - essentially the poorest of the poor. Each of the defense lawyers for both ILF and DQG reportedly handle about 12 cases each at any one time. These cases involve matters in both the primary and secondary courts. Collectively, these defense lawyers represented a little over 100 clients throughout the province at the time of the assessment.

As in interviews in other provinces, defense lawyers interviewed in Nangarhar province indicated that most cases were resolved in four months, but that some cases could linger on for months or even years. Nangarhar defense lawyers indicated that they felt that many indigent persons do not receive services because their organizations are already working at capacity. The defense lawyers reported that many individuals were denied access to a free lawyer and were too poor to retain a fee-for-services registered defense lawyer. Most often these citizens went without a lawyer or retained legal assistance from

indictments involved matters occurring in Jalalabad city and 90 matters involved criminal conduct occurring in various districts across the province). Matters ranged from murder (27) to driving without a license (31).

a limited scope provider whose assistance simply involved preparing and submitting a defense statement.

Judges, prosecutors and defense lawyers agreed that the vast majority of suspects and accused went unrepresented because:

- They were not aware that they could ask for representation;
- Defense lawyers were not taking new clients because they had too many clients already;
- There was a conflict of interest for the defense lawyer;
- They did not qualify pursuant to established poverty guidelines; and/or
- There was no mechanism for the police, prosecutors or the courts to obtain a lawyer for the suspect or accused who requested one.

Consequently, it was observed by most interviewees in Nangarhar province that the vast majority of individuals needing legal defense services as a suspect and/or an accused did not receive any legal assistance or, at best received limited legal assistance. In a limited number of cases where a suspect or an accused retained legal services of a private attorney, the individuals often received less assistance than the actual legal services they needed because the defense lawyer was not registered as required by law⁴⁸ had no authority to get involved in early investigation on behalf of a client or appear in court.

During the assessment interviews in Nangarhar, all categories of respondents interviewed indicated that they were aware that there were defense lawyers in the province, but that they did not always know what the defense lawyers do, where they are located, or how to contact them. Those interviewed estimated that there were no more than ten to 12 defense lawyers. Police officers described the involvement of some defense lawyers who were registered with the Ministry of Justice (these lawyers were all described as working for NGOs) and providing “full service” criminal defense assistance. There was no evidence of other registered defense lawyers providing criminal defense services to the wider population, but some respondents suspected that if there were, there were no more than five.⁴⁹

⁴⁸ See Art. 18(2), Interim Criminal [Procedure] Code for Courts (“To this end, an official register is established in the Ministry of Justice where only persons with a university degree in law of Shari’a can be included.”)

⁴⁹ The Assessment Team did check with the MOJ’s most recent list of registered defense attorneys in Afghanistan. The list did not identify any defense attorneys with addresses in Nangarhar. The three defense lawyers who were identified as practicing in Nangarhar appeared on the MOJ Registry, but were listed as having addresses outside of Nangarhar.

Synopsis of the Data Regarding Defense Capacity In Nangarhar Province

Police

Police officers interviewed in Nangarhar consisted of officers assigned to crime detection and investigation. The data suggest that the officers interviewed understand well their roles in the criminal justice process, and the procedures outlined in the Interim Criminal Procedure Code. Fundamentally, they reported an understanding that police officers' duties require them, within a 72 hour period, to be prepared to apprehend, investigate (starting at the point of capture), and facilitate pre-trial confinement of detainees under the guidance, supervision and direction of the prosecutor's office. Interviewees described a professional relationship with the local investigating prosecutors. They also reported understanding that, upon issuance of an indictment, they are required to assist in ensuring fair and transparent proceedings.

While police officers interviewed tended to have some passing familiarity with defense lawyers and had occasionally met defense lawyers during the course of an investigation, the involvement of defense lawyers in the early stages of detection, apprehension and investigation was rare, they reported. Nevertheless, most police officers interviewed clearly understood the general role of the defense advocate and felt that they are a necessary and important part of the criminal justice process and should be more actively involved on behalf of a client in the early stages of the proceedings. When asked, however, whether instruction from a defense lawyer would have an adverse effect on an investigation, many failed to appreciate why a suspect would assert his or her right to silence. These responses suggest that police officers had little awareness of the actual impact that a defense lawyer's involvement might have on an investigation. In light of their lack of clear understanding, there is reason to suspect that police officers' acknowledgement of the value of having more defense lawyers involved in criminal justice could be subject to change after actual exposure.

Police officers in Nangarhar expressed the view that defense counsel could be helpful in explaining to suspects the reasons for their arrest.

The data suggest that police officers in Nangarhar understand their duties to serve as the foundation for successful rule of law and articulated their responsibilities to inform the prosecutor of each action undertaken and to act in accordance with the direction of the prosecutor. They did not see why such information could not and/or should not be

provided to defense counsel. They simply had no frame of reference for doing so because they had no experience working on cases involving defense lawyers.

Police officers interviewed described their duty upon arrest and interrogation of a suspect to inform the suspect about his or her right to remain silent, right to defense assistance, and the right to be present during investigative procedures. Respondents said they would welcome the intervention of a professional personal representative of suspects (who they described as usually illiterate or ignorant of the law). Police officers thought a competent

defense lawyer would expedite the investigative process and better serve the suspect because they would have someone to advocate their position early in the investigation.

With little or no practical experience with defense counsel, police officer respondents were often unclear about their responsibility, if any, to arrange appointment of counsel if asked to do so by a suspect or accused person. Most respondents thought some formalized process could be adopted, but felt they needed more training on what lawyers to contact as well as what kind of actions would be appropriate for those lawyers to undertake on behalf of a suspect once involved in an investigation.

Generally, police officer respondents felt that most of the suspects and/or accused with whom they had come in contact during the detection, apprehension and investigation phase of a case needed and could definitely benefit from a competent defense lawyer. In particular, police respondents in Nangarhar felt that defense counsel could help with their responsibility to explain to a suspect the reasons for an arrest.⁵⁰ Many of the suspects and accused that police respondents encountered were considered to be ignorant of their rights and incapable of defending their rights or putting together a proper defense *pro se*.

Police officer respondents uniformly talked about the need for further training regarding the role of defense lawyers, the authority of the defense lawyers to be involved in criminal investigations, and how police should respond to questions about defense lawyer involvement in the early stages of a case.

Prosecutors

Prosecutor respondents generally fell into two categories: (1) investigating prosecutors who took reports of criminal conduct filed by police⁵¹ and (2) prosecutors who filed indictments in court and conducted trials. Uniformly, prosecutors who spoke with the Assessment Team had at least a baccalaureate degree in law from a law or Shari'a faculty. Most, but not all, respondents had attended a regional university or the University of Kabul.

The educational profile of the prosecutors interviewed in Nangarhar seems to run counter to previous statistical information received by JSSP from the Afghan Attorney General's Office (AGO). Those data indicated that education levels in provincial prosecutor's offices were relatively low in comparison to education rates in Kabul. The Assessment Team attributed this discrepancy to the small sample size of prosecutors that were

⁵⁰ Art. 31(2) Afghan Constitution provides: "Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation...." Art. 31(1) Interim Criminal [Procedure] Code for Courts provides: "The judicial police, after having identified the person arrested on their own initiative, inform him of the reasons of the arrest...."

⁵¹ These prosecutors are charged with ensuring that the detection, apprehension and investigation of the suspect is complete, conducted consistent with applicable law and sufficient to establish grounds warranting indictment.

interviewed, rather than error in the previous statistical information provided by the AGO.

Respondent prosecutors clearly had at least a basic understanding of the importance of their roles in the Afghan justice system. For instance, all prosecutors clearly understood their responsibility for the investigation and prosecution of crimes occurring in the province. As with police officer respondents, not all prosecutors, particularly those not appearing in court, understood how they might direct and supervise prosecutorial investigations involving issues such as identification and evidence gathering if a defense lawyer over whom they had no authority was involved in these processes, as well. Likewise, there were no uniform responses on the appropriate actions a defense lawyer should take in defending the rights of his client.”

As confirmed by defense lawyer respondents themselves, prosecutors reported that defense lawyers rarely become involved in a case prior to arrest and usually only after the defendant had been arrested and indicted. Prosecutors most often encountered defense lawyers at trial and sentencing rather than during pre-trial investigation. This fact colors the way prosecutors rated the presence of lawyers in the criminal justice process.

Nangarhar Table 1

DEFENSE LAWYER PRESENCE DURING INVESTIGATION (FROM THE PERSPECTIVE OF 5 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Crime Scene				5
Suspect Interrogation			3	2
Witness Interviews		3	2	
Prosecutor’s Office to Discuss Case				
Courtroom for Hearings		3	3	
Judge’s Chambers				5
For the Trial	4	1		
Sentencing	4	1		

During trial, prosecutors had some experience dealing with defense lawyers and had the opportunity to evaluate their performance. Respondents indicated that for the most part, the actions of defense counsel mirrored the actions of the prosecutor.

Nangarhar Table 2

PROSECUTORS REPORTS ON DEFENSE PRESENCE DURING TRIAL (FROM THE PERSPECTIVE OF 5 PROSECUTORS INTERVIEWED)				
	Always	Usually	Seldom	Never
Introducing Defense Witnesses		4	1	
Question prosecution witnesses		3	2	
Quoting Specific articles of law	1	4		
Arguing that the accused was not guilty	1	4		
Arguing that the accused should receive a lesser sentence	3	2		
File an Appeal	1	3	1	

As with prosecutors surveyed elsewhere, the prosecutors in Nangarhar were aware of the passage of an Advocates Law and curious about the impact that law would have on the community and the criminal justice process. They indicated that a training program to address those issues would be extremely helpful.

Judges

Judicial respondents in Nangarhar clearly understood the responsibility of the presiding judge to ensure a legal, fair and transparent trial process. All seemed to have familiarity with defense lawyers appearing in their courts, and discussed issues relating to ruling on motions and other pre-trial proceedings brought to their attention by the defense counsel of an accused. They appeared to be comfortable with the appearances of counsel, but also had questions regarding how far a defense lawyer was entitled to go in defending a client.

The Assessment Team found that judges in Nangarhar expressed a degree of comfort with the notion of defense lawyers appearing on behalf of clients, but were unsure about the correct limits on the defense lawyer's role.

Judges interviewed indicated that defense lawyers help to ensure the legitimacy and transparency of the criminal justice process in the province, but expressed concern that the community lacked a sufficient number of defense lawyers to meet the needs of those persons involved in the criminal justice process. In assessment interviews, judges stated that defense lawyers who appear in their courts routinely:

- Interview relevant witnesses before trial;
- Submit thorough and generally well-prepared defense statements;
- Articulate their client's position at trial;
- Call witnesses for the defense or produced witness statements; and
- Meet appeal deadlines.

Law and Shari'a Faculties at Nangarhar University

Professors of the Shari'a and law faculties, as well as students at Nangarhar University, stated that the subjects taught in law school help them to understand the role of defense counsel in the Afghan justice system. Respondents reported that students graduating with a law degree from either the Shari'a or law faculties get a solid foundation in the following subjects:

- The definitions of Ta'zeeri versus Hodud Crimes;
- Application of the Penal Code;
- Interpretation of criminal statutes;
- How to identify the elements of a crime; and
- Oral legal argument.

Both students and faculty also reported that because there are so few defense lawyers in the community, many practical courses are taught in a theoretical context. For instance, classes such as:

- Practical techniques of criminal investigation;
- Legal motions practice;
- Understanding physical evidence;
- Techniques for questioning witnesses;
- Defenses to crimes;
- Alternatives to imprisonment;
- How to work as a defense lawyer;
- How to start a business; and
- How to bill clients for legal services.

Nangarhar Table 3

LEGAL SUBJECTS OFFERED IN NANGARHAR UNIVERSITY'S LAW SCHOOL		
	YES	NO
The Definitions of Ta'zeeri Versus Hodud Crimes	X	
Application of the Penal Code.	X	
Interpretation of Criminal Statutes.	X	
How to Identify the Elements of a Crime.	X	
Practical Techniques of Criminal Investigation.		X
Legal Motions Practice.	X	
Understanding Physical Evidence.	X	
Oral Legal Argument.	X	
Techniques for Questioning Witnesses.	X	
Defenses to Crimes.	X	
Alternatives to Imprisonment.		
How to Work as a Defense Lawyer.		X
How to Start a Business.		X
How to Bill Clients for Legal Services		X
LP= Faculty of Law and Politics SH – Faculty of Shari'a		

Law students – and professors – in Nangarhar expressed an interest in having more practical instruction on defense-related subjects; current instruction is more theoretical than practical, because there are so few defense lawyers with practical experience.

These classes are theory classes rather than practical hands-on courses. Law students and professors reported that there simply are not enough defense attorneys in the community with the kind of practical criminal defense expertise necessary to teach these subjects with a practical focus. Law student and faculty respondents reported that an increase in the capacity of defense lawyers might free up some time for them to serve as instructors and mentors on campus or in clinics.

Prisoners

Three out of the four prisoners interviewed in Nangarhar for this assessment were pre-trial detainees, and one female prisoner was serving a 13 year sentence after conviction for a zina crime. Two of the three pre-trial detainees were represented by a defense lawyer. One pre-trial detainee said that she did not need a defense lawyer because she

believed that her family had “connections” and could arrange a resolution of the charges. She was charged with selling medicine without a license. None of the pre-trial detainees’ cases had gone to trial at the time of the interviews. All three pre-trial detainees reported that they understood the purpose of a defense lawyer.

The two pre-trial detainees with counsel appreciated the assistance of their defense lawyers, and thought that the assistance would benefit them as they moved through the criminal justice process. These two respondents believed that their defense lawyers were taking reasonable steps to establish facts and evidence that would explain their side of the case to the judge and protect their rights. Both were concerned that they did not know as much about what was happening with their cases as they would have liked. Nevertheless, they felt that their lawyers were trustworthy and would diligently prepare their cases.

Respondent prisoners generally felt that their defense lawyers were working in their best interests with the information at hand, but expressed concern that counsel did not get involved their cases until after they had been arrested and indicted.

The two respondents with counsel reported that their lawyers did not become involved in their cases until they had been arrested and confined to jail. Consequently, they reported that they were not clear about what steps had been taken by the lawyers to talk with witnesses and family. If they could express a preference for when defense counsel should be involved in a case, they reported it should be before or immediately upon arrest.

Defense Lawyers

Defense lawyers in Nangarhar all work for NGOs. Defense lawyer respondents were educated either at a recognized regional university or at Kabul University. All graduated from either a Shari’a faculty or faculty of law and political science, and had been in practice for several years before assuming their position with ILF or QG. As in other provinces, more likely than not, when a defense lawyer had previous work experience, it had been in a prosecutor’s office or in a government ministry. All respondents had received specific defense lawyer training as well as on-the-job training and mentoring from their NGOs. All respondents indicated that they were registered with the Ministry of Justice, but were not able to produce appropriate credentials.

On average, respondent lawyers reported carrying an average of 12 cases at a time. They tried to meet with clients at least one or two times per week. While none of the respondents could give a precise response to the question of how long they carried a case, most observed that it took no less than 120 days to resolve most matters.

Collectively, the defense lawyers for both ILF and QG reportedly handle about 100 cases every four months, or about 300 cases a year. Clearly, with approximately 250 cases referred for prosecution each month to the courts, Nangarhar does not have sufficient defense capacity to ensure adequate representation of even a modest number of citizens who need it.

Matters that these lawyers handle involve them in both the primary and secondary courts. Collectively, these defense lawyers represent approximately 100 clients throughout the province at any point in time. Respondent defense attorneys stated that they were perceived by judges and prosecutors as diligent, hard working and competent. Similar views were received from prisoner respondents who saw defense counsel preparing for trial by talking to their clients, the police, the prosecutor, and witnesses to put together the best defense statement possible for their clients.

Roughly 3,000 cases are referred for prosecution in Nangarhar each year. The small cadre of defense attorneys working for non-governmental organizations has the capacity to represent only 300 defendants, or roughly one tenth the actual need.

As defense lawyer respondents in the other provinces also stated, defense attorneys in Jalalabad were not paid a sufficient salary, but reported it was adequate. Nevertheless, they reported that they had comfortable offices, and sufficient office equipment. The respondents also indicated that they had an adequate number of vehicles and drivers to travel to meet with clients, attend court proceedings, and meet with or arrange for the travel of witnesses. Likewise, they indicated that they had sufficient legal resources such as statute books, legal commentaries and other written legal references.

Like their colleagues in other provinces, respondents in Jalalabad reported that they would welcome additional training, particularly about the new Advocates Law, the creation of a bar association, and codes of professional conduct. They would also welcome additional training on case management and trial preparation and practice.

CONCLUSION

This assessment was conducted to evaluate the capacity of criminal defense services in four prominent provinces in Afghanistan. Information was acquired on the ability of defense lawyers in those selected provinces to provide a minimum level of defense services to persons suspected and/or accused of crimes. The conclusion of this survey is that there is currently a significant gap between the needs of those requiring the assistance of defense counsel and the availability of defense resources to meet those needs. In all provinces that were assessed, the gap in defense capacity is serious. In some areas, the gap is staggering.

The detailed review of the data gathered from sources across the criminal justice system yielded a number of significant findings that provide a foundation for building defense capacity across Afghanistan. The Assessment Team concludes:

- Based on information acquired during the assessment, it is a fair assumption that many persons who have been convicted of crime and who are serving criminal sentences in the provinces did not have any access to a defense lawyer.
- The Assessment Team verified that there are very few defense lawyers in the provinces who are registered with the Ministry of Justice (MOJ). In those instances where defense lawyers are registered with the MOJ, the list of registered defense lawyers does not accurately identify where those lawyers currently practice. The list of licensed defense lawyers maintained by the MOJ makes it very difficult for ordinary citizens, police, prosecutors, and court officials in the provinces to locate and retain qualified defense lawyers when they are needed.
- In most provinces, only the poorest of the poor have access to a full spectrum of criminal defense services. Those who are not destitute enough to qualify for an NGO funded defense lawyer or who are destitute but cannot get a lawyer because NGO lawyers are not available and they cannot afford the few fee-for-services private counsel must look to the small number of unregistered lawyers or go without counsel. Limited scope assistance often offers less than the criminal defense services a suspect and/or accused may actually require.
- Many of the persons interviewed during the assessment, regardless of position or occupation, felt that the few unregistered defense lawyers currently providing limited scope services in the provinces provide poor quality services.
- Many of the people interviewed for this assessment reported that the people who are generally suspected and/or accused of crime lack education about, and understanding of, their rights under Afghan law. Consequently, many persons who need the services of a defense lawyer did not know that they could request such assistance or did not make such a request because they did not know how. Equally troubling is the fact that in many instances if they had asked for defense

counsel, the police, prosecutors and courts lacked procedures or mechanisms to locate and retain counsel on their behalf.

- Police, prosecutors and judges interviewed for this assessment had only a superficial understanding of the role and responsibilities of criminal defense lawyers. Most had never worked with or even met a defense lawyer. Furthermore, they appear to have given little thought to how a fully operational criminal defense institution would impact the criminal justice process in general or their duties in particular.
- The majority of police officer and prosecutor respondents across the provinces stated that they generally inform suspects of their right to have a defense attorney appointed in their cases, despite the unavailability of such lawyers in the area. This finding suggests that despite their statement that they understand the importance of defense counsel in the criminal justice process, they often treat the right to counsel as simply a matter of form over substance.
- All respondents stated that the criminal justice processes would be greatly improved by the addition of registered defense lawyers and that they would be likely to cooperate with defense lawyers doing their duties. As noted above, however, because the concept of a defense counsel is so vague to them, they have no real idea of how to interact with defense counsel in the criminal justice process, what to expect from them and how they might respond to them during the course of real investigations and trials.
- All criminal justice actors asked for further training on the role and responsibilities of a defense lawyer.

In most provinces, the Assessment Team identified a “mixed” system of defense resources used by people – NGO funded defense lawyers, individual lawyers-many unregistered- in private practice, and non-lawyers.

The Assessment Team was acutely conscious of the fact that criminal defense practitioners are a new concept in Afghanistan precipitated by, among other things, the adoption of a new Constitution as well as updated substantive and procedural laws. Despite the numerous obstacles to practicing as a criminal defense lawyer in each of these provinces, it is impressive that any defense lawyers are practicing at all. Having found a foothold, however, defense capacity can be expanded to make the Constitutional promise of a right to counsel meaningful.

Obviously, any new system or expansion of the current system will require study. Nevertheless, additional research can be done in conjunction with building the new system while simultaneously providing training and education to build both capacity and competency of those defense lawyers in the provinces. Objectives of subsequent activities and research on building capacity might include:

- Providing relevant justice sector actors with the training and education programs they expressed interest in during the assessment interviews;
- Conducting an analysis of the cost effectiveness of a government sponsored public defender program as compared with contracting for such services to private practitioners in the provinces;
- Conducting an analysis of the quality of defense services being provided by institutional criminal defense lawyers relative to those services being provided by defense lawyers in private practice;
- Investigating how a government sponsored public criminal defender program might be implemented, including research into why clients would or would not choose the public defender over a contracted private counsel;
- Furthering existing qualitative and quantitative research related to the effect the professional independence of defense lawyers can be influenced in institutional settings, how implementation of the Advocates Law and any code of conduct may affect current and future capacity; and
- Preparing position papers on future models for building and sustaining defense capacity comparing, for instance, a government funded and operated legal defense lawyers division supplemented with a contracted-for defense service through private counsel.

To secure necessary access to justice in the provinces, there must be a partnership of the Afghan government and donor countries, the private bar, and concerned private parties. However, the government must lead in this effort consistent with its responsibilities under the Afghan Constitution to guarantee substantive and procedural due process, particularly by ensuring access to counsel for those suspected and/or accused of crime.

Most who need the help of criminal defense lawyers do not seek it, for a variety of reasons, including lack of awareness of what a defense lawyer can do for them, and the right to obtain one, and the right of the indigent to have one at government expense. Of those who ask for a lawyer, very few actually receive legal assistance, and often it will be less assistance than they need and less than what is guaranteed to them by the Constitution and laws of Afghanistan.