

## **Afghanistan**

**Justice for Children in Conflict with the Law:  
A Training Manual for Judges and Prosecutors**

*If out of difficult times  
people still believe in justice  
then justice can be done.  
(Aristotle)*

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## List of acronyms and abbreviations

AGO Attorney's General Office  
AG Attorney General  
AIHRC Afghanistan Independent Human Rights Commission  
ANDS Afghanistan National Development Strategy  
CEDAW Convention on the Elimination of All Forms of Discrimination against Women  
CNL Counter Narcotics Law  
CPC Criminal Procedure Code  
CPD Central Prison Department  
CRC Convention on the Rights of the Child  
ECHR European Court of Human Rights  
ICCPR International Covenant on Civil and Political Rights  
ICPC Interim Criminal Procedure Code  
ILF International Legal Foundation  
ILO International Labour Organisation  
JC Juvenile Code  
JDL (United Nations Rules for the Protection of) Juveniles Deprived of their Liberty  
JRC Juvenile Rehabilitation Center  
MoE Ministry of Education  
MoI Ministry of Interior  
MoJ Ministry of Justice  
MoLSAMD Ministry of Labour, Social Affairs, Martyrs and Disabled  
MoPH Ministry of Public Health  
MoWA Ministry of Women's Affairs  
NJSP National Justice Sector Programme  
NJSS National Justice Sector Strategy  
SIR Social Inquiry Report  
UNAMA United Nations Assistance Mission in Afghanistan  
UNDP United Nations Development Programme  
UNICEF United Nations Children's Fund  
UNIFEM United Nations Development Fund for Women  
UNODC United Nations Office on Drugs and Crime  
WHO World Health Organization

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The views expressed in this assessment do not necessarily reflect the policies or positions of the United Nations Office on Drugs and Crime.

## **UNODC's mandate**

The mission of the United Nations Office on Drugs and Crime (UNODC) is to contribute to the achievement of security and justice for all by making the world safer from crime, drugs, and terrorism. The rule of law is the basis for providing security and justice for all. It is therefore the cornerstone of UNODC's work.

UNODC's "Strategy for the period 2008-2011" (here in after the Strategy) lists as one of its two main objectives:

To promote, at the request of Member States, effective, fair and humane criminal justice systems through the use and application of United Nations standards and norms in crime prevention and criminal justice.

The Strategy also defines "result areas" that measure success in reaching the objectives. Result area 1.3 is "Criminal Justice Systems: more accessible, accountable and effective" Section 1.3.1 further defines this result as "[e]nhanced capacity of Member States, particularly States in post conflict or transitional stages, to develop and maintain accessible and accountable domestic criminal justice systems in accordance with international standards and norms".

UNODC's specific interest in Juvenile Justice is expressed in Section 3.7.1 which states the objective of "[e]nhancing capacity of Member States to apply international standards and norms in juvenile justice".

The framework for cooperation between the Government of Afghanistan, the United Nations and the international community has been outlined and agreed in a number of key documents and conferences including the Afghanistan Compact of 2006, the Afghanistan National Development Strategy (ANDS) and the Paris Conference of June 2008.

UNODC has a long history of assisting Member States by developing and promoting the use and application of international instruments, standards and norms in crime prevention and criminal justice, including those related to juvenile justice. Operational work in the juvenile justice sector is relatively

new to the organisation and is based on various resolutions of the General Assembly and the Economic and Social Council.

Upon request by a Member State, UNODC implements technical cooperation projects to prevent youth crime, strengthen juvenile justice systems and improve the rehabilitation and treatment of young people in conflict with the law, as well as to improve the protection of child victims.

UNODC's approach to juvenile justice UNODC has developed an integrated strategy to assist Member States with juvenile justice reform, emphasising the importance of prevention and rehabilitation. Pilot projects, based on international standards and good practices include the following type of activities:

- Promoting and advising on the drafting and reviewing of legislation, especially extra-judicial alternative measures and non-custodial sanctions for young people in conflict with the law and the protection of victims and youth at risk;
- Capacity building, including the creation of a ministerial level focal point for all matters pertaining to juveniles, including the collection and analysis of relevant data;
- Launching awareness-raising campaigns and developing national action plans for juveniles at risk and young people in conflict with the law;
- Developing training curricula and conducting training courses for all criminal justice actors dealing with young people in conflict with the law and juveniles at risk;
- Improving detention conditions for juveniles, by refurbishing specialized centres, setting up filing systems and strengthening vocational and educational training programmes;
- Establishing after-care programmes for juveniles released from closed institutions, in partnership with non-governmental community services.

The recent merger of the United Nations drug and crime programmes within UNODC offers new opportunities in the field of juvenile justice, such as integrated drug and crime prevention programmes, including awareness-raising and peer education for young people, and specialized programmes for

preventing the spread of HIV/AIDS in closed institutions. Based on lessons learned in Afghanistan, UNODC also is exploring further possibilities to integrate juvenile justice reform projects into larger criminal justice reform programmes for post-conflict countries. In cooperation with other institutions, UNODC is involved in the development of guidelines on justice for child victims and witnesses of crime, and has also compiled good practices, in particular in relation to urban crime and youth at risk.

Since 2004, UNODC Country Office for Afghanistan has supported the strengthening of the operational capacity of both the Ministry of Justice and the judicial institutions, with particular emphasis on the situation in the provinces outside of Kabul. The main priorities in the criminal justice sector set in UNODC strategy were the revision of the criminal legal procedure and national legislation, the improvement of the physical infrastructures of courts and judiciary institutions, and the provision of capacity building for professional, qualified and well-trained staff. Since programme inception, UNODC recognized that targeting the juvenile justice system was a necessary perspective. Currently, the situation of juveniles in conflict with the law still remains a critical issue, characterized by a lack of trained professional caretakers, of a necessary infrastructure and of suitable institutions for detained juveniles. For these reasons, UNODC - COAFG provides support to the Government of Afghanistan to strengthen the capacity of judges and prosecutors by developing training material in the area of juvenile justice.

UNODC participates in the interagency cooperation on justice issues between: UNAMA (rule of law officer and corrections advisor), UNICEF, UNDP and UNIFEM. On June, 18, 2005: UNODC<sup>1</sup> and UNICEF signed a memorandum of understanding: a) to assist the Ministry of Justice in establishing a working juvenile justice system; b) to do joint programming for juvenile justice capacity building in Afghanistan; c) Afghan independent human rights commission, regular consultations, involvement in training activities; d) coordination with ISAF for humanitarian support to Afghan Juvenile

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<sup>1</sup> [http://www.unodc.org/pdf/afg/presentations/donors\\_02-2006\\_final.pdf](http://www.unodc.org/pdf/afg/presentations/donors_02-2006_final.pdf)

Rehabilitation Centres and e) Consultation with international and national NGOs.

### **Manual's Objective**

Article 1 of the Afghan Juvenile Code makes clear that the Jurisdiction of the Juvenile Court extends not only to children accused of crime (i.e. children in conflict with the law) but also to "children at risk", and "children in need of care and protection". However, it seems that nearly all the cases in Juvenile Court involve "children in conflict with the law" rather than the other two categories. Therefore, the focus of this manual is upon "children in conflict with the law".

In Afghanistan, children face justice delivered by officials who have limited access to trainings to strengthen their knowledge and understanding about child rights and juvenile justice despite obligations under the CRC. Although a series of interventions aiming at increasing the capacity of the judiciary staff have been carried out by UNODC since 2003, little progress has been reported in the area of juvenile justice and protection from violence, abuse and discrimination against children.

Even if as an outcome of the several trainings one can notice that justice professionals have become more aware of the key provisions of the juvenile law and procedure, however in general they are still a long way from an effective implementation of those provisions. Given the volume of training and still vast need for change, it is self evident that many already "trained" justice officials have encountered difficulties that have stopped them from putting their training into practice<sup>2</sup>.

It is not unusual for juveniles to be convicted and punished for crimes not contained in the Penal Code. Judges and Prosecutors routinely refuse to follow the provisions of the Juvenile Code. In the current situation, where there is little accountability, corruption is presumed, and the prevailing mood

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<sup>2</sup> See UNODC, *Strategies and Tactics for Defending Juvenile Cases*, 2009.



is one of resignation, the path between awareness of the law and its' full implementation is still lightly travelled and full of obstacles.

Two immediate gaps were apparent:

- a. A lack of assessment of the current capacities of professionals, the views of children directly in contact with the justice system and the institutional capacity of training institutes and
- b. Lack of training materials to fill knowledge- and skills-gaps.

UNODC project AFG/R42 "Criminal Law and Criminal Justice Capacity Building" under which this manual has been prepared aims at supporting the Government of Afghanistan to improve systems for care and protection of children by developing of in-service training materials for child justice professionals in line with the requirements of the United Nations Convention on the Rights of Children (CRC).

The legal system in Afghanistan has many particularities and it is undoubtedly still in a state of development and modification. As a result, what seems to be an effective training material today may not be of value in the near future. The main goal of the manual is not to impose an outside way of thinking but rather to serve as a tool to justice officials to discover what they need for an efficient implementation and help them find answers within the already existing legislative framework and information that will increase their skills and confidence.

In that respect, the Afghan Judiciary should try to combine the existing variety of national norms together with the international legal framework and adapt its implementation to every day practice of national courts. The purpose of the training is to help the practitioner develop a useful approach to problems rather than to suggest specific answers.

Many persons believe that the criminal laws and procedures as written create unrealistic burdens upon the individuals and institutions within the criminal justice system and that it is simply impossible to fully implement the laws under the current political, economic, and social circumstances<sup>3</sup>. If in fact current conditions render implementation of the written law impossible there

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<sup>3</sup> See, UNODC, *ibid.*, p.6.

is little value in either trying to ignore that fact or in simply drawing that conclusion and abandoning the effort. Developing a thorough understanding of the particular manner in which current circumstances impede steps towards implementation of the written law is essential as with such an understanding the trainers and participants working together can develop specific strategies to change those circumstances.

Considering that this manual addresses mainly to members of the judiciary the aim was not to make it quick, but to make it as complete as possible containing as much information and responses in order to deal to every kind of problem in juvenile justice. In order to deal with juvenile cases members of the judiciary need not only knowledge in substantive and procedural juvenile law, but also knowledge coming from various branches of Criminal Sciences, such as: Criminology, Criminalistics, Victimology, Penitentiary Science and Judicial Psychology. The author tried to combine elements from all the above sciences in order to offer a more complete tool to judges and prosecutors of Afghanistan.

### **Limits of the manual**

It is not under the objectives of the manual to show the situation in practice, but rather how the desirable situation should be by best implementing the existing law, despite eventual shortcomings in legislation.

The manual reflects what should be the ideal implementation of juvenile justice provisions. However it should be read together with a separate publication of UNODC (*Juvenile Justice in Afghanistan. Assessment of the situation*), in order for the practitioner to have a global view of the juvenile justice system today in Afghanistan and compare theory with practice.

This manual aims at giving to the judiciary only a ruler in order to better move between what is expected from them as a professional conduct vis-a-vis juveniles and the best way to attribute justice in juvenile cases.

### **Methodology and executive summary**

The manual has been restricted to the issue of juveniles in conflict with law. It has been mainly oriented through the findings of a research conducted in the Juvenile Rehabilitation Center (JRC) of Kabul at the beginning of 2009 which is the object of a separate UNODC publication.

For the general situation of juveniles implicated in the juvenile system in Afghanistan the manual is based on one hand on bibliographical sources (such as previous researches, reports and studies of UNODC and other international organisations as well as on other relevant material, as shown in the part of bibliographical sources at the end of the manual), and on the other to information received from discussions the author held with various stakeholders such as members of the Parliament, representatives of various Ministries (MoJ, MoWA), Chief Justices, Juvenile prosecutors, the Director of JRC Kabul; agents of UN and other international organizations (UNAMA, UNIFEM, UNICEF) and of national and international NGOs based in Afghanistan known to be working on juvenile and/or human rights issues (Afghanistan Independent Human Rights Commission -AIHRC, LAOA, Rights & Democracy, Children in Crisis, Terre des Hommes, Aschiana).

The manual is composed by three parts. The first part begins by focusing to the causes of juvenile delinquency. It is important for members of the judiciary, before handling a juvenile case, to know which are the particularities of the child as a human being, but also, the differences between a child at risk, a child in conflict with the law and a child in need of protection; categories very often interconnected to each other. Furthermore, members of the judiciary should be acquainted with the factors that contribute to juvenile delinquency, which in many cases connect delinquency with victimisation since a great number of children in conflict with the law (particularly girls) are in reality victims of the crimes they are being accused of.

The next important element for judges and prosecutors is to have knowledge of the national and international framework in juvenile justice, which is being asked to be enforced by them. Before entering in the substantive and procedural part of juvenile justice, members of the judiciary should know first

all the fundamental International Principles prevailing in juvenile cases which are materialised either as substantive or procedural safeguards. This gives the members of the judiciary the exact framework inside which they are allowed to legally move in order to attribute justice in juvenile cases.

The second part of the manual is dedicated to the structure and function of juvenile justice in Afghanistan. The first section focuses to the structure of all components of the juvenile justice system; and the second to the specific responsibilities as duties or qualities a judge and prosecutor should have in order to deal with such cases. The third and biggest section of this part concentrates to the specific role of judges and prosecutors and the particularities in handling juvenile cases as per stage of trial. In this part extended importance is given to the investigation of the case (not only to the collection evidence and their quality, but also to the methods that should be used according to the law and rules of juvenile psychology to question offenders, victims and witnesses in child cases). Specific attention is also given to the need of the social inquiry report in juvenile cases from the beginning of the investigation. In the section of sentencing, the author thought best to focus more in the factors that should influence the decision on sentencing and the principles that should prevail and less to the alternatives since the third part is dedicated entirely to this issue.

The third part focuses to the methods of decompression of the juvenile (retributive) justice system. It is striking that from a series of alternatives already provided by the Juvenile Code in practice, it seems that only confinement is the almost unique solution for children in conflict with the law. Considering that confinement should be a solution of last resort for young offenders, the manual after criticising the effectiveness of correctional measures, explains the purposes of alternative (non-custodial) sentencing and analyses the alternative measures as proposed by international texts and as included in the Juvenile Code (from pre-trial to post-sentencing alternative measures). The first section ends with some recommendations from a *de lege ferenda* point of view. In this section the author has chosen to examine the alternatives to confinement in a separated section from diversion and

restorative justice measures, as the first represent a more concrete solution provided already by the existing national model of juvenile justice, regardless of the fact that in practice they do not seem to apply. In the second section, the author places prevention together with diversion and restorative justice as she believes that they all fit in a non retributive model of justice based more in the active contribution of society. As Prevention is not only aiming to the deterrence from a first offence, but also from reiteration of crime, the role of the judiciary as well as of all law enforcement agents is crucial. Key roles also in crime prevention hold the family and the local authorities. From this point on the manual passes to Diversion and Restorative Justice (practices), where the members of the formal justice system, especially prosecutors, could contribute by implementing especially in cases of minor importance under a grid of safeguards.

At the end of each section of the manual case studies and questions are added for the better understanding of the practitioner.

## Introduction

***"A magistrate is the guardian of justice  
and, if of justice,  
then of equality also..."  
(Aristotle, Nicomachean Ethics, 1132a-25)***

### **A. The Objectives of juvenile justice**

The way in which justice is attributed is one of the basic indicators of society's well-being.

As indicated in the Declaration of the Rights of the Child, *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"*.

The juvenile justice system is part of the criminal justice system of a country, however distinct with particular objectives.

The juvenile justice differs from criminal justice system mainly to the following points:

1. The Juvenile Justice system has:
  - a. Specific provisions of binding and non-binding character (hard-law/ soft-law);
  - b. Specific courts;
  - c. Specific procedure;
  - d. Specific types of sanctions and treatment of offenders;
  - e. Specific institutions for treatment and for serving the sanctions.
2. The Juvenile Justice system is child-centered or child-oriented. All actions concerning the child need to be guided by his/her best interests in a manner appropriate to the child's age and level of maturity (Art.3 of CRC). The child is subject to fundamental rights and freedoms and needs to be treated with humanity.
3. The juvenile Justice system is characterized by specialization and multidisciplinary approach that needs to involve all the actors.

4. The juvenile justice system treats the juveniles with discretion<sup>4</sup> exercised throughout the justice system.

The primary objectives of the juvenile justice system are to prevent re-offending and to support the child to become a responsible person in society educating instead of punishing the child for the harm caused by its acts. In particular:

1. Juvenile justice aims mainly to the best interests of the child;
2. Juvenile justice is not only interested to children in conflict with the law, but also to those at risk of committing a crime and to children in need of protection.

The means of Juvenile Justice for achieving its objectives do not have purely penal character.

The juvenile justice system tries to reconcile two apparently conflicting aims:

- The need to punish for the offence committed and
- The need to follow the child offender's individual (welfare) needs.

In other words **the objective of juvenile justice is to strike a fair balance between punishment and rehabilitation.**

The juvenile justice system should be:

1. Rational and humane;
2. Effective in reaching its goals;
1. Cost effective in doing so; and
2. should respect human rights; and
3. Refer to the United Nations treaties.

According to the Preamble of the Convention on the Rights of the Child: *"the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity"*.

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<sup>4</sup> Discretion is defined as: "An authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience according to the rules of equity and the nature of the circumstances". See UNICEF, Juvenile Justice Manual, 2007, Module One, 6.

The objectives and general principles of juvenile justice have been set very early by the international community. The ascertainment that childhood is entitled to special care and assistance has been stated already in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 (recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights in particular in articles 23 and 24 in the International Covenant on Economic, Social and Cultural Rights in particular in article 10 and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children.

## **B. The particularities of juvenile justice**

Childhood is considered to be one of the most important phases in a person's life, since its personality is still under development. However, a child is not a micrographic image of an adult person, but a totally different human being with its own personality and needs.

The main differences between a child and an adult are: a) that the child is still under development physically, mentally, and psychologically and b) that a child needs to make mistakes in order to learn from them. This is why all societies show more indulgence towards them.

A child needs to know that even if he/she makes a mistake he/she will not be excluded from society, but he/she will be treated with tolerance and understanding. Juveniles are considered a latent energy prepared to contribute to the future social development and economic production and therefore, society has a moral commitment: to prepare them and develop their personality during their childhood so that they can participate in social life in a positive and active manner. In addition, the State should provide equal and comprehensive opportunities and safeguard children's development in every aspect.

Regarding juveniles in conflict with the law it is important to focus on two elements that prevail: their immaturity and vulnerability due age. This is the



reason why these children should get separate and different treatment from their adult counterparts in criminal processes.

The juvenile justice system responds to its own principles and objectives. As a consequence, crimes committed by juveniles are referred to special courts, which follow a special procedure with a spirit of paternal instruction. The cases of juveniles are always heard in camera (Art.32.1 of JC) and the sanctions should always aim not to the punishment, but to the re-habilitation and improvement of its behaviour; and should therefore be adapted to the juvenile's personality and needs, ruled by the principle of proportionality and the respect of juvenile as a human being. Sanctions should always be oriented towards the minimum intervention of juvenile justice to the treatment of juvenile offenders. Therefore alternatives to confinement should always be preferred.

### **C. Children in need of protection; children at risk and children in conflict with law: Understanding the difference**

First, a distinction should be made between the above three categories<sup>5</sup>. Even if these categories may overlap with each other, there is a clear demarcation between them. The category of children in need of protection is the largest of all three.

*Stricto sensu*, children in need of protection are children who might be unaccompanied<sup>6</sup>, who live and work at the street or who live in conflict areas; or who might be victims of crimes, of violence in general, victims of exploitation of any kind<sup>7</sup> (e.g. trafficking in human beings, of forced

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<sup>5</sup> See AIHRC, "Justice for Children: The situation of children in conflict with the law in Afghanistan": [http://www.aihrc.org.af/Juvenile\\_Detention\\_eng.pdf](http://www.aihrc.org.af/Juvenile_Detention_eng.pdf)

<sup>6</sup> See the Guidelines for the Protection and Alternative Care of Children without Parental Care, developed by UNICEF and International Social Services, in collaboration with the NGO Working group on Children without Parental Care.

<sup>7</sup> A wide range of CRC child protective provisions are relevant to the position of child victims and witnesses, not the least of which is Article 19, which proscribes all forms of violence against children, whilst in the care of a parent, legal guardian or any other person having responsibility for the care of the child, and which requires the establishment of effective procedures, social programmes and follow-up in instances of child maltreatment, including where appropriate, judicial involvement. See in particular Article 34, which deals with the sexual exploitation of children; and Article 39, which requires State Parties to take all

marriages, etc.) and might be either forced to commit crimes –in the framework of their exploitation- or try to escape from an abusive situation and are treated by the system as criminals.

In the distinction between juveniles in conflict with law and children in need of care and protection, delinquency was being considered as an offshoot of neglect<sup>8</sup>.

According to Article 52 of the Juvenile Code, a child in need of care and protection is a person:

- a. Whose physical, psychological, emotional health and security are at risk;
- b. Whose interests and education conditions facilities are jeopardized;
- c. Who has been abused by elders or a person having authority over him/her; or
- d. Who has been abandoned by his/her parents.

According to reports<sup>9</sup> in many cases it appears that the juveniles are victims of child abuse and exploitation rather than having committed an offence. They are arrested and detained as offenders instead of being provided the protection and support. It should be noted that anyway all children both at risk and in conflict with law are children in need of protection.

Children in need of protection as being more vulnerable than others and become at risk of breaking the law. Children at risk have not yet expressed irregular behaviour but they are in a pre-delinquent situation especially if they already live in a delinquent environment.

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appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse, torture or other form of cruel inhuman or degrading treatment or punishment, or armed conflict. The Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2000, requires State Parties to take appropriate measures to protect the rights and interests of child victims of the practices prohibited under the Protocol. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime which entered into force in 2003 is also relevant in particular Articles 6, 7 and 8.

<sup>8</sup> See, the recommendations of the South Asia Conference on Access to Justice, PRI, *Access to Justice, 2002*, <http://www.penalreform.org/access-to-justice-and-penal-reform.html>

<sup>9</sup> UNICEF-AIHR, *Justice for children*, p.11.

Article 53.3 of JC provides that the legal representative can request the court to obtain the views of professionals and experts about a child who is sexually, physically or psychologically abused. Current information available shows that these provisions are not being applied in the case of children who have apparently been abused by adults, either sexually or physically.

Children are being held in prison charged with offences such as homosexuality, debauchery and running away from home. They are being punished, although most are almost certainly victims themselves and are in need of care and protection<sup>10</sup>. There is an urgent need for training and clarification on the application of these provisions to prevent the imprisonment of children and to provide alternative measures of protection outlined in article 55 of the Juvenile Code, if permanent damage to such victims is to be avoided.

The UN has recently focused increased attention on the position of victims of crime generally and, in 2005, the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime were adopted by the Economic and Social Council. These principles elaborate on the standards contained in other international treaties and instruments, notably the Convention on the Rights of the Child, and suggest specific principles and protections that should be afforded child victims and witnesses<sup>11-12</sup> in criminal justice systems and processes.

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<sup>10</sup> See, UNODC, *Afghanistan. Implementing Alternatives to Imprisonment*, op. cit., 2008, p.34.

<sup>11</sup> International instruments are increasingly being developed to highlight and address the special vulnerability of victims and witnesses, not the least of which are child witnesses, as the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. A further relevant document is the UN Guidelines for Action on Children in the Criminal Justice System (1997), which includes within its ambit, plans concerning child victims and witnesses. This document is, however, focused particularly on children as victims or witnesses in the criminal justice system. This was followed by the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, 2005 which provide a practical framework for achieving more child-sensitive responses to child victims and witnesses, including through legal reforms, rules of procedure and evidence, attitudes and training of professionals, and through elaborating the right to effective assistance to victims and witnesses who are aged below the age of 18 years. The Guidelines recognize and are premised on the cross-cutting principles of the child's rights to dignity, non-discrimination, recognition of the best interests of the child (which include the right to protection and the right to a chance for harmonious development), and the right to participation, which includes

Children suffer harm throughout the world as a result of crime and abuse of power, and as a result they might come into contact with the criminal justice system<sup>13</sup>. Their vulnerability in criminal justice processes, due to their age and immaturity, requires that special measures be taken to ensure the protection of their rights and the delivery of enhanced justice to them.

A number of factors play a role and influence children's behaviour and the risk of them coming into conflict with the law such as their socio-economic background as well as the family environment and the environment at school, work and in the community in general. The role of society and environment is well acknowledged in the "Beijing Rules" (Rule 5) and it is established that these factors should be taken into account in any response to children in conflict with the law<sup>14</sup>.

Specific attention should be given to the fact that violence is an important issue not only for children need protection from, but also as a factor contributing to children being at risk (especially girls<sup>15</sup>) and further to the development of children being in conflict with law.

## **PART I: Juvenile delinquency and juvenile justice: connecting causes to reaction**

*A child is like a flower. Sometimes it happens that flowers do not grow the way we have hoped they will. It may happen that the flower is affected by tares or seems weak and bends in a way that our garden looks ugly. A good gardener though, should try to find the appropriate cure for the needs of each affected flower instead of uprooting them. He should stand by this flower and follow-up its growth and cure*

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the right to express views and to contribute to decisions affected his or her own life, including those taken in any judicial processes, and to have these views taken into consideration.

<sup>12</sup> However in Afghanistan, there is no witness protection program, which means that victims can not be protected.

<sup>13</sup> See, UNODC, *Organization of the Criminal Justice Assessment Toolkit*, 2006.

<sup>14</sup> AIHRC, "Justice for Children: The situation of children in conflict with the law in Afghanistan", p.9.

<sup>15</sup> For further analysis see below, Part I, 1.5.

*it with as much affection as to the rest of his flowers, because his aim is to enjoy a nice garden...*

## **1. Juvenile delinquency: understanding the causes**

Under this section we should try to understand how a child arrives to the point of taking the decision to commit an illegal act; which are the factors that contribute to the development of a criminal behaviour and if there a connection between the growing process of the juvenile and delinquency. We should also try to understand if sometimes under the first appearance of an offender hides in reality a victim connecting this way delinquency and victimization in particular when girls are brought to the justice system.

Special attention will be brought to the role importance of the family in juvenile delinquency.

### **1.1. The different age stages of juvenile development**

When it comes to define the responsibility and appropriate punishment for the child in conflict with the law we should first take into consideration that there are different age categories of children affecting the child's responsibility against the law.

In Afghan law and according to Art.4 of the juvenile Code there are three basic categories:

1. Non-discerning child: A person who has not completed the age of 7;
2. Discerning child: A person who has completed the age of 7 and has not completed the age of 12 and
3. Juvenile: A person who has completed the age of 12 and has not completed the age of 18.

It has to be noticed that only the children between 12 and 18 years of age are criminally responsible (according to Art.5 of JC) and thus they can be punished according to the Juvenile Code.

This differentiation is not hazardous. All three categories are characterized by the *lack of maturity* of the child, which (maturity) is normally achieved with coming to age<sup>16</sup>.

The differences between all above three categories are not hazardous either. Each category corresponds to a different stage of development and maturity of the child. In criminal law this means that the above mentioned differences determine not only the type of crime a child can commit and its relevant behaviour, but also the prospective response of the juvenile justice system against this crime.

Given that most children crimes are committed by adolescents (juveniles) we should try to understand the particularities of this stage in a person's development.

Adolescence is the most important period in the juvenile's development, because it sets its entry into maturity.

It starts with puberty which matches with the end of childhood where a series of biological and psychological changes occur that prepare both genders to become apt for reproduction<sup>17</sup>. It has to be noticed that during adolescence a child's weight increases approximately 50% and its height 25% without mentioning the changes that occur to the hormonal system, which affect the shape of the body, the voice, the hair growth, etc. These changes that occur to an adolescent's body it is normal that they affect also its mind and soul. Thus, unstableness might occur to a juvenile's psychological level presenting shifts from a total indifference to an emotional burst; from joy to sorrow; from insolence to shyness; from total egoism to self-abnegation and self-sacrifice and from over-excitation to a complete slumber.

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<sup>16</sup> See, Carl Ivan Sandstrom, *The Psychology of Childhood and Adolescence*, (transl. in English by Albert Read), N.Y., Penguin Books, 1979; Peter K. Smith, Helen Cowie, Mark Blades, *Understanding Children's Development*, Oxford, Blackwell, 1998; Ken Richardson, *Models of Cognitive Development*, Hove, East Sussex (UK), Psychology Press, 1998; Diane E. Papalia, Sally Wendkos Olds, Ruth Duskin Feldman, *Human Development*, N.Y., McGraw-Hill, 2001; Pamela Cantor (ed.), *Understanding a Child's World. Readings in Infancy through Adolescence*, N.Y., McGraw-Hill, 1977.

<sup>17</sup> According to some authors in Western societies adolescence for both girls and boys starts earlier due to better living and nutritional conditions and ends later, see Diane E. Papalia, Sally Wendkos Olds, Ruth Duskin Feldman, *Human Development*, op.cit., p.410-411.

It also has to be stressed that an adolescent needs to be approved, believed and loved and that this might lead him to support extravagant ideas or to lie. There are cases of adolescents who prefer to be accused of something they have never committed just because by doing so they might seem more important to the eyes of their class-mates and friends<sup>18</sup>. Subsequently, an adolescent has many ambitions, but also he/she tends to defy and doubt whatever represents any kind of power and "authority"<sup>19</sup> making his motto the phrase: "I resist so I exist". So, it is obvious that many of the actions of an adolescent can be explained by the normal biological and psychological process of maturing. This also explains the aggressiveness of the adolescents, which of course might present a gradation depending to the family and other environment of the child<sup>20</sup>. This is to say that adults should show as much indulgence and understanding as possible towards such behaviours, because this is a transitory period in the life of adolescents and their behaviour is largely affected by the biological changes of growth.

This is also confirmed by the Riyadh Guidelines (Guideline 5-e): "*Youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood*".

Considering all the above mentioned reasons, a judge and prosecutor, while handling a juvenile case **should first assess if the defendant has really committed the crime and, if yes, then to understand why he/she has arrived to the decision of the commission.**

Normally, the personal system of values and objectives in life is gradually structured and completed at the end of adolescence (around 20 years). If the development of the juvenile is not obstructed by negative factors at the end of his adolescence he/she will be in a position to resolve any problem with an

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<sup>18</sup> Which might reach the stage of mythomania, known as the "*Munchausen's syndrome*". See, Turner J., Reid S., *Munchausen's syndrome*, Lancet, 2002.

<sup>19</sup> What is called as "civil disobedience". See, Mollie S. Smart, Russel C. Smart, Laura S. Smart (ed.), *Adolescents. Development and Relationships*, N.Y., McMillan /Collier, 1978, p.62.

<sup>20</sup> See, Jack O. Balswick, Clitos Makrides, "Parental Stimulus for Adolescent Rebellion", in Mollie S. Smart, Russel C. Smart, Laura S. Smart, *Adolescents. Development and Relationships*, p.161-172.

aptitude of adaptation and without stress; he/she can build healthy relationships with other citizens and live together with others in respect and peace.

A crucial role to the adolescent's healthy biological, psychological and moral development plays its environment (family and other).

However, it has to be noticed that from a point on the adolescent defines its own "autonomous morality" based on its own "beliefs" by accepting or rejecting the values that he/she considers important (e.g. justice)<sup>21</sup>. His/her decisions consequently are not defined forcibly by the values he/she has received from his/her environment or from the existing models of the groups he/she belongs to (e.g. class-mates) nor by the rejections or approvals he/she had in life. Of course, the behaviour of the adolescent is to great extend due to the family, social environment and cultural background he/she lives in.

*-The confrontation with juvenile misconduct:*

Considering the above mentioned elements, eventual misconduct of juveniles should be treated in a way that does not offend them personally. Any punishment should be based on the principle of proportionality (they should not be exaggerated or excessive in relation to the misconduct) and it should always be imposed after an open dialogue with the juvenile. It is better to call upon the inner principles and values of the juvenile and to activate the positive sides of its personality than to impose a harsh and repressive punishment.

It also needs to be noticed that labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons" (Riyadh Guideline 5-f).

## **1.2. Factors contributing to juvenile delinquency**

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<sup>21</sup> See Diane E. Papalia et al., op. cit., p.430-431.



It needs to be noticed as stated in the Preamble of CRC that in most countries of the world, there are children living in exceptionally difficult conditions, and that such children need special consideration. These special conditions may affect those children to become either at risk or in conflict with law. However, who could give a sufficient reply to the question why under the same conditions a juvenile becomes delinquent while another does not?

For years criminologists try to find the causes of crime. There have been many theories<sup>22</sup> trying to explain crime ranging from individualistic, community, society level causes based on:

- Biological,
- psychological,
- sociological,
- economic, or
- political factors.

Some have been based on single source and some have used a combination of theories.

However, today we can only conclude that the reasons for the commission of a crime are complex, inter-actional and cumulative.

For a crime to be committed there needs to be four elements coexisting in the same time and place:

- a motivated offender,
- a suitable target (or victim), which can include a person, an item (including drugs, cars, mobile phones, etc.) or structure (fence, rail car, bridge, etc.).
- an opportunity, and

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<sup>22</sup> See, Pierre Bouzat, Jean Pinatel, *Traité de Droit Pénal et de Criminologie* (Vol. III *Criminologie*), Paris, Dalloz, 1975; J. Léauté, *Criminologie et Science pénitentiaire*, Paris THEMIS, 1972; Maurice Cusson, *Criminologie actuelle*, Paris, PUF, 1998; Raymond Gassin, *Criminologie*, Paris, Dalloz, 1998; M. Maguire, R. Morgan, R. Reiner (eds.), *The Oxford Handbook of Criminology*, Oxford Clarendon Press, 1994; D. Olweus, J. Block, M. Radke-Yarrow (eds.), *Development and anti-social and pro-social behaviour. Research, theories and issues*, Orlando, USA, 1986; R. A. Cloward, L.E. Ohlin, *Delinquency and Opportunity: A theory of delinquent gangs*, N.Y., Free Press, 1960; E.H. Sutherland, D.R. Cressey, *Principles of Criminology*, Philadelphia, PA, J.B. Lippincott, 1955; G.M. Sykes, D. Mazda, "Techniques of neutralization: A Theory of delinquency", *American Sociological Review*, (22) 1957, p.664-670.

- absence of control by people or systems that protect the target. They may be active (e.g. guards who may be formal such as the Police or informal such as community members) or passive (e.g. alarms and surveillance cameras).

We should also take into consideration the existence of:

- **Props** (which are the items that support or enable the commission of the offence, such as knives, guns, burglary tools);
- **Audience** (which may be direct or indirect observers of the offense and sometimes it can provoke a motivated offender); and
- **Camouflage** (which may serve to hide or mask the offender or the commission of the offense. It may be physical camouflage such as hiding spots, sheltered locations, crowds, or poor lighting, or non-physical, such as poor stock-control).

By changing or removing these key factors, crime can be prevented or its results may be reduced. Providing better guardianship, stemming the supply of motivated offenders and protecting or removing targets will all help to prevent crime.

### **1.2.1. Criminogenic factors**

Criminogenic (crime producing) factors are related to the person of the offender. They do not 'cause' crime of themselves, but are closely associated with criminal behaviour. Criminogenic factors are classified as Static or Dynamic factors. Static factors are those *not susceptible to change* over time (e.g. age, gender, age of first conviction, history pattern of offending).

Dynamic factors are those that *can change over time*. The major factors identified are:

1. Anti-social personality– a wide range of personal and emotional factors, including behavioral problems, particularly those likely to result in negative consequences, such as impulsivity, risk-taking, aggression, anger, frustration. Personal Characteristics, such as personality dispositions, behavioral preferences (including inappropriate sexual attitudes or preferences) and mental status characteristics;

2. Anti-social attitudes and values– the characteristics and extent of the offender's pro-social and anti-social attitudes<sup>23</sup>. It is concerned with favorable attitudes toward crime and violence<sup>24</sup> and minimisation of the impacts of criminal behavior and disregard for convention, the justice system, and the rights of others;
3. Anti-social associates– the offender's interactions with others, particularly the offender's peer group(s). Anti-social associates and interaction patterns are of special interest. Needs indicators include the extent to which the offender interacts with and is influenced by others with a pro-criminal lifestyle, group membership, and interactions with others characterised by predation;
4. Family dysfunction– an offender's family relationships. Factors include relationships with parents and siblings, absence of parents, history of family abuse and/or criminality, parenting skills, and involvement in child abuse;
5. Poor self-control, poor problem-solving skills, cognitive defects, which include problem-solving, inter-personal relationship skills, inability to understand the feelings of others, and narrow, rigid thinking;
6. Substance abuse– problems of alcohol or drug abuse, the extent to which alcohol or other drugs interfere with the offender's pro-social experiences;
7. Lack of employment/ unstable work record, inability to earn sufficient salary to live on, having difficulty with co-workers and/or superiors; and
8. Social, economic and cultural exclusion.

We should however add some other factors that are known to western societies especially as a result of sudden urbanization of certain areas: anonymity, alienation<sup>25</sup> and lack of social solidarity. On the contrary it has

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<sup>23</sup> See, C.H. Cooley, *Humane nature and the social order*, N.Y., Schlocken books, 1964; G.H. Mead, *Mind, Self and Society*, Chicago, University of Chicago Press, 1974; H.S. Becker, *Outsiders: Studies in the Sociology of deviance*, N.Y., Free Press, 1963.

<sup>24</sup> See, Jacques Léauté, *Notre Violence*, Paris, Denoel, 1977.

<sup>25</sup> See, M. Seeman, "On the Meaning of Alienation", *American Sociological Review*, (24) 1959, p.783-791.

been established that e.g. social solidarity could be a very strong tool to crime prevention. It should be noticed that juvenile delinquency is generally related to urban areas.

In general, we could argue that in order for a juvenile to become delinquent two types of factors need to be in interaction so that the juvenile is "pushed" towards the delinquent direction:

1. Factors that are related to the personality of the juvenile: mainly the degree of his/her self-restraint as this is determined in particular by:

- his/her intellectual level; character; or eventual psychopathology;
- his/her eventual physical handicaps in relation to their impact on his/her personality;
- his/her age peculiarities;
- his/her environmental experiences and/or the way he/she was brought up; and
- his/her tendency to justify and excuse his/her actions.

2. Factors that are related to the direct environmental influences and circumstances at the time of committing the crime which could be determined by:

- the existence of props that can facilitate the commission of the crime (e.g. weapon);
- the provocative behaviour of the victim or the encouragement of the perpetrator by its environment;
- the degree of necessity to commit the act;
- the existence of opportunity;
- the expectation of material or other kind of profit from the act in contradistinction to the foreseen negative consequences;
- the possibilities to avoid the consequences for its act or to escape from justice.

Each factor presents a different degree of importance for the passing to action<sup>26</sup>. However, as in the case of a good character we can not be certain which of the factors that have modulated such a character should take the

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<sup>26</sup> See, Council of Europe, *Social Transformation and Juvenile Delinquency*, Strasbourg, 1979.

credit it is the same with a delinquent person. It is very difficult to calibrate the degree of importance of each factor<sup>27</sup> and we can only attribute the delinquent behaviour to the cumulative influence of all factors which have allowed the passing to action of the offender.

As mentioned above, anti-social behaviour of juveniles is often part *"of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood"* (Riyadh Guideline 5-e). This is why extra attention should be brought to the factors that have pushed a juvenile to action.

### **Case study**

Zubair is a 14 year old boy and a very introvert character by nature. He never had any friends and very often his class-mates were making fun of him because of his appearance. He has always been pressured by his parents to be first in his class. He feels very frustrated and disappointed. At the end of this year he failed to his courses. His father treats him of "good-for-nothing", while his class-mates have another reason to make fun of him. His class-mate Ahmed insults him in front of the class saying that he is "dumb". Zubair lifts a chair and injures Ahmed who is being sent to the hospital. Zubair is arrested for injuries and brought to the prosecutor.

*\_Should Zubair father's and/or Ahmed's provocative behaviour be taken into consideration by the court?*

*\_If yes, how should this affect punishment in this case?*

### **1.2.2. The role and importance of family in juvenile delinquency**

According to the Preamble of CRC *"The family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary*

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<sup>27</sup> For a multi-factor approach see the theory of Nigel Walker, *Behaviour and Misbehaviour. Explanations and Non-explanations*, Oxford, Basil Blackwell, 1977.

*protection and assistance so that it can fully assume its responsibilities within the community”.*

*“The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”.*

In most countries family is considered very important and is protected by domestic instruments. Afghanistan offers to the family constitutional protection as it safeguards it in Article 54 of the Constitution<sup>28</sup>.

There are a lot of research indicating the correlation between dysfunctional family and community life and childhood delinquency.

According to a survey carried out in UK<sup>29</sup> many of the children in custody are among the most vulnerable having chaotic family backgrounds and histories of neglect and abuse:

- 29 per cent of boys and 44 per cent of girls in prison custody had been in care;
- Two out of five girls and one in four boys in prison reported having suffered violence at home;
- One in three girls and one in 20 boys reported being sexually abused;
- 81 per cent of boys and 76 per cent of girls in custody had been excluded from school;
- Around 15 per cent of children in custody have statements of special educational needs, compared to 2.9 per cent of the general population;
- 90 per cent had used illegal drugs.

According to the same survey:

- Up to 1,000 young people per year are remanded to custody because they lack somewhere suitable to live. In addition, up to 800 young people receive custodial sentences because their housing is unsuitable;

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<sup>28</sup> Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.

<sup>29</sup> See, The Howard League for Penal Reform Fact Sheet, <http://www.howardleague.org>

- only 15 per cent of the children leaving custody have suitable accommodation, and
- each year, around 9,000 children in England and Wales are placed in unsuitable accommodation after leaving custody. This includes children under 16 and care-leavers.

Family plays a crucial role to a healthy, well-balanced development of the child, especially to its early childhood.

Family can be a factor of delinquency, but also of crime prevention, as well as major factor for rehabilitation and social integration of the child.

What seems to have an important impact to the child's further development is:

- The cohesion of the family. It is not a coincidence that in the Western societies especially in the USA<sup>30</sup>, there is a higher degree of children lawbreakers than in Eastern societies. 60.4% of juvenile delinquents appear to come from divorced parents. These children live in an environment of total freedom without any parental control, limits or boundaries and without any affective relations with their parents. It has been estimated<sup>31</sup> that especially to children younger than 10 years of age the lack of parental control plays a major role to forming an anti-social behaviour of the child.
- The quality of relationship between parents and child. Parental indifference to the child, oppression<sup>32</sup> or, even worse, rejection and mistreatment of the child can directly relate to delinquency;

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<sup>30</sup> See the research conducted by the Gluecks in 1950 on the relation of juvenile delinquency with broken homes.

<sup>31</sup> See David P. Farrington, in: M. Maguire, R. Morgan, R. Reiner (eds), *Oxford Handbook of Criminology*, 1994, p.543.

<sup>32</sup> For the relation between aggression and oppression, see: H.J. Konradt, *Aggression und Frustration als psychologisches Problem*, V.I, Darmstadt, Wissenschaftliche Buchgesellschaft, 1981.

- The existence of inappropriate disciplinary measures (severe, disproportionate or inexistent);
- Children living in criminal environment (criminal activities of the parents). It is estimated that 66.2% of the children who had delinquent parents presented also delinquent behaviour;
- Influence from frequency with age-mates with deviant behaviour<sup>33</sup>;
- Poor economic situation<sup>34</sup>. Children living at the streets or at very poor suburbs having to face any kind of temptations and being without parental guidance face higher risk to become delinquent.

However it should be taken into consideration that in many cases the reaction to the stimulus received is not directed back to the sender of the stimulus, as in cases of mistreatment e.g. a child that has been mistreated by his parents will not necessarily mistreat them or even kill them when he will be older, but he could eventually mistreat or kill other persons.

### **1.2.3. The profile and problems of the Afghan family**

Despite the money poured into reconstruction and development, Afghanistan still is one of the five poorest countries in the world. There is 40% unemployment – nearly 80% in some parts of the country. A third of children under five are malnourished. Life expectancy is 43 – and it is one of only three countries in the world where women die earlier than men.

However, Afghan society differs from the westerns, mainly due to the structure of the family<sup>35</sup>.

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<sup>33</sup> See the theory on “differential associations” by Edwin Sutherland, who believes that there is a higher probability in becoming delinquent if the frequency, duration and intensity of such association is stronger than the association with non-delinquent groups. E.H. Sutherland, D.R. Cressey, *Principles of Criminology*, op.cit.

<sup>34</sup> However in the research we have conducted in JRC Kabul the relation between the economic situation of juveniles and their offence has not been established. See, UNODC, Assessment of the situation: children in conflict with the law.

<sup>35</sup> On April 7, 2008, the Ministry of Women’s Affairs (MoWA) and Rights & Democracy entered into an agreement, and a drafting committee mandated to review existing family law was subsequently created. Various consultations have been held with Afghan stakeholders, including community members, to ensure a sense of ownership with respect to the ongoing reform. In addition, Rights & Democracy has convened many consultation sessions to have participants share their perceptions of the main issues related to family law reform. The



Afghan society is a closely knit, family-based society. Although variations may exist between ethnic groups<sup>36</sup> and those practicing different modes of subsistence, the family remains the single most important institution in Afghan society<sup>37</sup>. Families of virtually all Afghan groups are characterized by their patrilineal organization<sup>38</sup>, lower incidence of divorce, and relatively high birth rate. Parents and children bond closely and they exhibit much love and concern for each other.

Within families there is a tendency toward respect for age, male or female, reverence for motherhood, eagerness for children, especially sons, and avoidance of divorce. Rigorously honored ideals emphasizing family cohesiveness through extended kinship networks endow the family with its primary function as a support system.

The extended family, the major economic and social unit in the society, replaces government because of the absence of an adequate nation-wide service infrastructure.

Child socialization takes place within the family because of deficiencies in the education system. Thus, individual, social, economic and political rights and obligations are found within the family which guarantees security to each man and woman, from birth to death.

In Afghanistan extended families are characterized by residential unity be it in a valley, a village or a single compound. Extended family households may contain three to four generations including the male head of family and his wife, his brothers, several sons and their families, cousins with their families, as well as all unmarried and widowed females. No matter how they may be spaced, these multigenerational units practice close economic cooperation

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committee will complete a first draft of the family code in the first half of 2009. MoWA will then table the Code in Parliament.

<sup>36</sup> A Shia Family Planning law was adopted on April 2009. The Afghan Constitution allows Shias to have a separate family law from the Sunni majority based on traditional Shia jurisprudence.

<sup>37</sup> Peter R. Blood, (ed.) *Afghanistan: A Country Study*. Washington: GPO for the Library of Congress, 2001.

<sup>38</sup> Characteristically, the Afghan family is endogamous (with parallel and cross-cousin marriages preferred), patriarchal (authority vested in male elders), patrilineal (inheritance through the male line), and patrilocal (girl moves to husband's place of residence on marriage).

and come together on all life-crisis occasions. **This permits cohesive in-group solidarity to be maintained.**

The strength of this sense of family solidarity<sup>39</sup> has been amply evident throughout the past years of disruption.

While male authority in the family is paramount in all groups, some important differences in male-female interrelations can be noted within rural and urban environments. In the rural areas interrelated responsibilities between men and women establish a bond of partnership that builds mutual respect. Carpet making is but one example. Household management and responsibility for the upbringing of children give rural women considerable authority in their domestic sphere.

By contrast, in traditional urban lower and middle class homes men daily leave the house to work at jobs with which women are not involved and about which they have little knowledge or interest. These women are consequently more rigidly relegated to purely domestic duties<sup>40</sup> of serving husbands and caring for children.

The innate belief in male superiority provides an ideological basis for the acceptance of male control over families. Life crisis decisions about education, careers and marriage are, therefore, made by male family members.

Families gain respect, maintain status and enhance their standing in the community through exemplary behavior.

Embodied in the acceptance of the male right to control decisions on female behavior is the dual concept of male prestige and family honour. Any evidence of independent female action is regarded as evidence of lost male

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<sup>39</sup> This is not to say that no tensions exist within the extended family system. Fierce competition over authority, inheritance, and individual aspirations do develop. The violent enmity that rises between cousins, for example, particularly over the selection of brides, is so often present that it has become a favourite theme of countless songs and folktales. P. Blood, *Ibid.*; Ali Wardak, "[Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan](http://www.armans.info/afghanistan/jirga-a-traditional-mechanism-of-conflict-resolution-in-afghanistan.html)", University of Glamorgan, UK:

<http://www.armans.info/afghanistan/jirga-a-traditional-mechanism-of-conflict-resolution-in-afghanistan.html>

<sup>40</sup> Contrary to what happened during the Taliban era, remarkable changes had taken place among middle class and elite families after 1959 when the government supported the voluntary end to seclusion for women. Women sought education and moved into the public sphere in ever increasing numbers.

control and results in ostracism, which adversely affects the entire family's standing within the community.

The above mentioned characteristics of the Afghan family might explain why to great extend juvenile delinquency rates lower than in western countries and why it certainly concerns less violent crimes.

Lack of parental control and family cohesion, broken families due to divorces together with the influence of violent scenes shown at the media<sup>41</sup>, leisure time, and the internet are some of the factors that have had certainly an impact to the increase of western<sup>42</sup> juvenile delinquency. It also needs to be added that the afghan family still has common values and personal contacts within its members in contrary to many western families that have replaced love, care, communication and the teaching of values with consuming products believing that these can replace their true parental obligations. Inter-personal relations in the western world glide gradually into standardization and alienation<sup>43</sup> and juveniles lack solid socio-moral rules which could "armour" them with resistance and inhibition towards delinquency.

It also has to be noticed that in Afghanistan, in many areas, problems of delinquent behaviour of children are solved at family level<sup>44</sup>.

However, we should not disregard the asphyxiating situation of girls within the patriarchal family, which in many cases are considered as "potential

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<sup>41</sup> See, Council of Europe, European Committee on criminal affairs, *Le cinéma et la protection des jeunes*, Strasbourg, 1968.

<sup>42</sup> See the study that has been conducted in 12 western countries: J. Junger-Tas, Gert-Jan Terlouw, Malkolm W. Klein (eds.), *Delinquent behaviour among young people in the Western World. First results of the international self-report delinquency study*, Amsterdam, N.Y., Kugler & Dutch Ministry of Justice, 1994.

<sup>43</sup> See, D. Riesman, *The Lonely Crowd*, New Haven, Yale University Press, 1950; A. Inkeles, D.H. Smith, *Becoming Modern. Individual Change in Six Developing Countries*, Cambridge, Massachusetts, Harvard University Press, 1974; D. Lerner, *The Passing of Traditional Society. Modernizing the Middle East*, N.Y., 1958; Digby Anderson (ed.), *The Loss of Virtue. Moral Confusion and Social Disorder in Britain and America*, London, National Review Book, published by the Social Affairs Unit, 1992.

<sup>44</sup> For more details, see Part III, below under the section of restorative justice.

source of dishonour for the patriarchal family"<sup>45</sup>. Under this situation girls are often stigmatized as being "delinquents", while in reality very often they are the victims<sup>46</sup>.

The excess of behavioral rigidity towards morality and values can also give negative reactions in some cases<sup>47</sup>. Parents do not wish to take under their supervision children that are in conflict with the law, which leads to the impossibility for reconciliation (as considered in Art.21 of JC) or for surrendering the child for supervision to its parents (Art.35.7 of JC) and it can also lead to specific irregular behaviour in particular in cases of girls running away from home to avoid forced marriages.

We should not disregard the fact that the afghan family has received much blight during the last years due to:

- the war that has torn apart many families and left many children without guidance. Many children have grown up only having knowing war, conflict and repression (especially girls);
- the economic crisis and poverty that has followed and consequently forced many boys to displacement;
- the lack of opportunities and unemployment;
- the discrimination of women and girls.

To some extent these above mentioned factors could contribute in a cumulative way with other criminogenic factors to the appearance of a deviant or even delinquent behaviour of children.

For many criminologists, more important than the crime itself or than the offender is the reaction to crime which might predicate the offender's further delinquent behaviour<sup>48</sup>. It has been established that repressive mechanisms in justice do not have a long term effect in decreasing re-offending. On the

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<sup>45</sup> United Nations, Integration of the Human Rights of Women and a Gender Perspective: Violence against Women. Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum. E/CN.4/2006/61/Add.5. 15 February 2006, p.14.

<sup>46</sup> See also on this issue Assessment report, PART I.

<sup>47</sup> See also on this issue Assessment report, PART I.

<sup>48</sup> This is the "labeling theory". See, A.T. Turk, *Criminality and Legal Order*, Chicago, Rand McNally, 1969; William J. Chambliss, *Crime and the legal process*, N.Y., McGraw-Hill, 1969; Richard Quinney, *The Problem of Crime*, N.Y., Dodd Mead, 1970.

contrary, this might lead occasional offenders to follow the criminal paths more constantly. It has to be noticed that the majority of juvenile delinquents are considered occasional offenders since they are unlikely to continue their delinquent activities after the age of 25 years; their deviant behaviour is due mainly to the biological and psychological changes of age.

This is to say that it is not a coincidence that international trends in juvenile justice suggest to treat juvenile delinquents not with repressive measures but rather with a parental spirit of understanding adopting measures of psychological support and societal guidance.

The dangers from unreasonable and disproportionate use of repressive measures against juvenile delinquents have been established in various researches<sup>49</sup> showing that juvenile delinquents between 14-18 years do not continue their criminal activities unless they are "stigmatised" as criminals by the justice system or incarcerated to prison or any other institution.

It has been established that among juveniles that have been sentenced to confinement very few could really achieve the objectives of rehabilitation<sup>50</sup>. Many of the juveniles that are held for a long time inside rehabilitation centers become institutionalized<sup>51</sup> and consider their incarceration as normal part of their life.

### **Case study 1**

Jamal has been sentenced to 2.5 years in confinement from the Appeal's Court for adultery. However, it was established that he was only seen talking in the street to a girl several times. It is the first time that he is convicted. He claims that his punishment is unjust because he has not committed any crime. The girl's parents accused him unfairly because he is poor and they

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<sup>49</sup> See, Fr. Schulenburg, "Minderjährige als Täter von Kraftfahrzeug - Missbrauch", Berlin, Duncker & Humblot, 1973.

<sup>50</sup> See *Research in Greek juvenile institutions*, conducted by Prof. Nestor Courakis, published by Sakkoulas Publ., Athens, 1995.

<sup>51</sup> See below under Sentencing, Part II, 3.3.

didn't want him for their daughter. He believes that if he had money he wouldn't be imprisoned.

*\_Do you consider that Jamal has committed a crime according to the Criminal Code?*

*\_Do you consider this punishment appropriate for this type of misconduct?*

*\_How would you have handled this case?*

### **Case study 2**

Waheed is a 13 year old boy. His father has deceased when he was 6 years old and his mother works uninterruptedly ever since to feed him together with his 9 brothers and sisters. He does not attend school but works at the streets selling things. This month his mother could not work because of an accident. The money he is gaining is not enough to contribute to the basic needs of the family. One day the man who provides the goods he sells has given him money to buy some articles. Waheed has decided to keep the money and claim that he is being robbed. The Police did not believe him. He is prosecuted for embezzlement.

*\_Should Waheed's family history and way of leaving affect the sentence?*

*\_How would you have handled this case?*

### **Case study 3**

Zulmai is a 15 years old boy. He comes from a very poor family counting 13 brothers and sisters. Zulmai grew up in the streets after his parents were killed by the Talibans. He had to take care of his brothers and sisters as he was the eldest. He was working hard in asphaltting the roads. Now he is accused of selling drugs. His case is still in the stage of investigation for the last 4 months.

*\_Should Zulmai's family history and way of leaving affect the sentence?*

### **1.3. Connection between delinquency and victimization**

In some cases one of the most difficult issues for a judge and a prosecutor is to establish who the offender is. There are cases where:

- Victim and offender have at the same time both the qualities of "victim" and of "offender", especially when e.g. there is a scuffle and punches may be given and received at the same time;
- Victim and offender may be one and the same person, e.g. in drug use, the person who intoxicates himself breaks the law on drugs but at the same time he commits a crime against himself;
- The person who has been victimized can in the future become an offender (this is very usual in cases of children that have been mistreated or sexually abused);
- The person accused might be a victim. At this point we should distinguish two cases:
  - a) The accused person is actually the victim of the committed crime (especially in sexual crimes or in kidnappings of girls); and
  - b) The accused person is victim of a false accusation.

It needs to be noticed that children are very vulnerable persons. So, in the second case, some people might think that it is easier to accuse a child and that for many reasons: either because the child does not know how to defend himself or even because they think that if the child takes the blame it will be punished less severely than the true adult offender (for instance, a child might take the blame of a murder committed by an adult parent since there is no death penalty or life imprisonment for children). Sometimes the family accuses the child in order to "rescue" one of its adult members (e.g. the father or an adult brother). According to reports<sup>52</sup>, in many cases it appears that the juveniles are victims of child abuse and exploitation rather than having committed an offence.

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<sup>52</sup> UNICEF-AIHR, *Justice for children*, p.11.

However, the first case needs closer attention because the presumed offender comes out to be actually the victim. This is often the case of the stigmatization of girls as delinquents in sexual crimes or in kidnappings, but also in cases of non-statutory offences such as “running away from home”.

Also in cases of adultery, it might in fact involve rape<sup>53</sup>, due to the undefined lines between the two acts and the virtual impossibility to prove rape<sup>54</sup>.

It is reported<sup>55</sup> that particularly in the Southern and Eastern provinces of Afghanistan, girls who have been victims of rape or sexual abuse, risk being killed by their brothers, fathers or husbands to restore the honour of the family, since honour crimes are accepted as legitimate under the conditions set by Article 398 of the Penal Code (men who kill their wives or another of their close relatives, having seen them in the act of adultery, are considered to have committed honour crimes, and are exempted from punishment for murder, instead, they are imprisoned for a period not exceeding two years as a “*Ta’zir*” punishment).

It would appear that many of the boys are accused for homosexual acts, under charges of pederasty, although they themselves are almost certainly victims of rape or other forms of unconsensual sexual acts perpetrated by older men, similar to the way in which female rape victims may be held in detention and even imprisoned for *zina*<sup>56</sup>.

#### **1.4. The particular situation of girls**

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<sup>53</sup> Rape as a crime is not clearly defined within the Penal Code of Afghanistan. Arguably, it is covered under the crime of *zina*, pederasty and violation of honour (Articles 427 to 429). Aggravating conditions which apply to *zina* are set out in Article 427, paragraph 2, which include the crime having been committed against a person who is not yet eighteen, against a married woman, the deflowering of a maiden, or the crime having been committed by two or more persons. UNODC, *Female Prisoners and their social reintegration*, March 2007, 4.2.3.b, [http://www.unodc.org/pdf/criminal\\_justice/Afghan\\_women\\_prison\\_web.pdf](http://www.unodc.org/pdf/criminal_justice/Afghan_women_prison_web.pdf)

<sup>54</sup> UNODC, *ibid.*, 4.1.3.

<sup>55</sup> UNODC, *ibid.*, 4.1.4.

<sup>56</sup> UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation, Assessment Report*, May 2008, p.36; [http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan\\_Implementing\\_Alternatives\\_Imprisonment.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf)



In Afghanistan<sup>57</sup>, protecting the honour of the family takes precedent over protecting the rights of an individual; social tolerance to violence is very high; a woman's movements can be monitored or restricted; many areas remain off limits due to insecurity to organizations who can provide services to victims of violence; there are few shelters, legal aid clinics, counselling services; and there are serious capacity constraints with law enforcement and justice officials, including the ability to distinguish between one's personal beliefs and professional obligations.

Gender inequality is also entailing violence<sup>58</sup> against women and girls and it's mainly related to education, labour opportunities, violence and inequality of treatment by the justice system. Violence against women is characteristically under-reported because women are ashamed or fear scepticism, disbelief or further violence. In addition, the situation may be more distressing as the majority of women are not aware of their rights.

Many women in Afghanistan face multiple constraints in the social, economic and political spheres. Girls and women have no status as independent persons<sup>59</sup>. They are treated rather as objects. They are considered a workforce, assets to be used to the greatest financial or strategic benefit on the marriage market, and a potential source of dishonour for the patriarchal family<sup>60</sup>.

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<sup>57</sup> See UNIFEM's report released in May 2006 entitled "Uncounted and Discounted: A Research Project on Violence Against Women in Afghanistan", p.31:

[http://afghanistan.unifem.org/docs/pubs/06/uncounted\\_discounted\\_EN.pdf](http://afghanistan.unifem.org/docs/pubs/06/uncounted_discounted_EN.pdf)

See also: Amnesty International, *It's in our Hands. Stop violence against women*, Oxford, United Kingdom, Alden Press, 2004, p.4.

<sup>58</sup> *"No violence against children is justifiable; all violence against children is preventable"*. This is the key message of the United Nations Secretary-General's Study on Violence against Children, the aim of which was to report on the scale of violence against children in five settings: home and family, schools, care and justice systems, the workplace and the community, and to make recommendations for combating the practice within each context.

<sup>59</sup> However the principle of equality has been enshrined in Article 22 of the Afghan Constitution, which states that "the citizens of Afghanistan – whether man or woman – have equal rights and duties before the law" and expressly prohibits any discrimination of citizens. It has to be stressed that Afghanistan has adopted the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as well as other international instruments on human rights.

<sup>60</sup> United Nations, *Integration of the Human Rights of Women and a Gender Perspective: Violence against Women. Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum. E/CN.4/2006/61/Add.5. 15 February 2006, p.14.*

Statistical recording and analysis on violence against women has not been widely undertaken in Afghanistan, despite anecdotal evidence of its prevalence throughout the country. With restrictions due to insecurity, lack of communication and transportation infrastructure, and low funding priority, reporting on violence against women invariably relies on a limited number of case studies and the opinions of field workers.

Research conducted in Afghanistan has nonetheless identified a range of issues of violence against women nationwide, including forced marriage, child marriage (which is *per se* forced), domestic violence, sexual harassment, trafficking of women and children, and honour killing. Such violence not only results in serious physical, mental hardships and sometimes death, but can also lead to self-immolation<sup>61</sup>, suicide, forced prostitution, addiction to narcotics, and violent behaviour towards children<sup>62</sup>. UNIFEM's research<sup>63</sup> revealed that physical attack (22%) and forced marriage<sup>64</sup> (16%) are the 2

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<sup>61</sup> See Medica Mondiale, *Dying to be Heard; Research on Self Immolation in Afghanistan*, 2006-2007: <http://www.medicamondiale.org/en/infothek/publikationen>. Also, UNAMA – OHCHR (8 July 2009), *Silence is Violence. End the Abuse of Women in Afghanistan*, p.21.

<sup>62</sup> See the Afghan Independent Human Rights Commission, Annual Report: 2002-2003, 2003-2004 and 2004-2005. Amnesty International, Women still under attack – a systematic failure to protect. Report, 20 May 2005, AI Index: 11/007/2005. Medica Mondiale, Study on Child Marriages in Afghanistan, May 2004.

<sup>63</sup> See UNIFEM, Violence against Women Primary Database. In March 2006, parallel to the secondary research, UNIFEM in cooperation with MoWA launched a primary database on violence against women to develop a comprehensive database of cases. The format was piloted in three provinces and the feedback led to a review of the original format. In the last four months, the use of the primary database has expanded from 6 to 21 provinces. Some cases of VAW were documented by UNAMA's Human Rights Officers between January 2006 and September 2007 in six regions of Afghanistan. However, although UNAMA has Human Rights offices in South and South East, they have not been able to document any cases of violence against women. The reason is because women were unable, generally, to leave their homes so they do not have access institutions.  
[http://www.unifem.org/afghanistan/docs/pubs/08/evaw\\_primary%20database%20report\\_EN.pdf](http://www.unifem.org/afghanistan/docs/pubs/08/evaw_primary%20database%20report_EN.pdf) See also UNIFEM "Uncounted discounted", 2006.

<sup>64</sup> According to UNIFEM forced and early marriages often take the form of transactions, either in financial terms, whereby a family is able to repay its debt or resolve immediate economic hardship by contracting an engagement for their daughter. In some cases, the marriage itself is postponed until the girl reaches puberty. Other transactions are not financial in nature but rather compensatory to make amends for either a failed marriage transaction between the families where the initial marriage portion cannot be repaid or for a crime committed by a member of the girl/woman's family, also known as *Baad* (literally, "blood money," whereby a woman is given away by her family as compensation for a crime committed by one of its members to the family of the victim). See, UNIFEM, Violence against Women Primary Database. According to surveys of the MoWA under-aged forced marriages are estimated to 80%. See, also UNAMA – OHCHR (8 July 2009), *Silence is Violence. End the Abuse of Women in Afghanistan*, *ibid.*, p.10.

more common types of violence. In some cases the threat of a forced marriage leads girls and young women to run away from home<sup>65</sup>. In such situations, different types of additional violence may be experienced by the victims i.e. these girls are sexually exploited. It is reported that sometimes when children run away from home their families create false accusations to make it sound more serious, like for instance: theft.

In total 92% of the reported cases of abuse have suffered violence by a member of their family and what it is more disturbing when the women or girls seek recourse from State authorities they risk being further molested by public officials.

There are also documented cases<sup>66</sup> in which the State acts as the perpetrator of violence against women (there are reports of women who are physically or verbally abused, suffer sexual mistreatment and have died at the hands of public officials).

UNIFEM's study<sup>67</sup> shows that violence affects women of all ages without regard to marital status, education or employment. According to the study 42% of the women who have suffered violence were illiterate<sup>68</sup>. The highest number of victims seem to be below the age of 26 (54%) followed by 9% referring to girls below the age of 16.

In addition, the study shows among others that: various forms of psychological violence are used to keep women in a position of subordination and that acts of violence against women are taking place with impunity. It appears that the government, communities and families are not doing enough to prevent violence against women. Women need better access to services, particularly when they are seeking help from violence perpetrated by the family, which is almost exclusively the traditional support structure for women in Afghanistan.

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<sup>65</sup> According to Art.71 of Civil code there is prohibition to marry under the age of 15 years, however this prohibition does not amount to sanctions.

<sup>66</sup> See UNIFEM, "Uncounted and Discounted: A Research Project on Violence Against Women in Afghanistan", p.28.

<sup>67</sup> Ibidem.

<sup>68</sup> Even though according to Art.43 Const. education is compulsory, it is estimated that the literacy rate in Afghanistan reaches only 19% for the female population and 40% for the male, See Afghanistan National Development Strategy (ANDS), p. 27-29.

The most worrying is that there is no specific law on domestic violence and that prosecution of such cases is not made ex-officio. In addition to that, judges implement sharia in a selective way by applying it to some cases and not to others<sup>69</sup>.

Furthermore, a recent law adopted in April 2009 by the Afghan Parliament on the status of Shiites (in the South Asian nation) "*undermines the right to education, the principle of gender equality and the rights of the child*", as stated by the head of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 17-4-2009<sup>70</sup>. The law regulates the personal status of the country's minority Shi'a community members, including relations between men and women, divorce and property rights. It denies Afghan Shi'a women fundamental rights such as the right to leave their homes except for 'legitimate' purposes; forbids them from working or receiving education without their husbands' express permission; weakens mothers' rights in the event of a divorce; and makes it impossible for wives to inherit houses and land from their husbands, even if husbands can inherit property from their wives.

These provisions contravene protections afforded to both women and men under the Afghan Constitution and international law in relation to:

- Equality before the law of women and men;
- Equal and same rights and responsibilities between spouses within the family and with respect to the parenting of children; and,
- Equal and same rights in respect of ownership, management, enjoyment and disposition of property.

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<sup>69</sup> See information provided by the Rights & Democracy on the situation of women's rights in Afghanistan. Report of Universal Periodic Review (UPR) for Afghanistan of the Human Rights Council (HRC), fifth session of the UPR working group (4-15 may 2009): [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/Rights\\_Democracy\\_AFG\\_UPR\\_S5\\_2009\\_TheInternationalCenterforHumanRights\\_DemocraticDevelopment.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/AF/Rights_Democracy_AFG_UPR_S5_2009_TheInternationalCenterforHumanRights_DemocraticDevelopment.pdf)

<sup>70</sup> In a letter to Afghan President Hamid Karzai today, UNESCO Director-General Koïchiro Matsuura expressed concern that the draft legislation contravenes principles enshrined in the Universal Declaration of Human Rights, calling on the country's leader to prevent the law from entering into force. "This is another clear indication that the human rights situation in Afghanistan is getting worse, not better," said Navi Pillay, High Commissioner for Human Rights. "Respect for women's rights – and human rights in general – is of paramount importance to Afghanistan's future security and development". Unfortunately the law was not withdrawn; <http://www.un.org/apps/news/story.asp?NewsID=30510&Cr=afghan&Cr1=>

It seems that in Afghanistan children have enough numbers to govern the country, but not enough voice to be loudly heard. With almost half of the country's population in Afghanistan being younger than 14 years authorities should take very seriously into consideration the implementation of a comprehensive juvenile system and the respect of children's rights. The problem is, as in many countries worldwide, that adults seem to know better what is right for minors and often they speak on behalf of children and especially regarding children in conflict with law, without taking into consideration what children really need. In Afghanistan childhood can hardly be defined as the easygoing period of life without concerns. On the contrary, a child not only enters to labour life at a very early age, but also it often performs heavy duties that in western societies are unconceivable for children. Furthermore, with inequality reaching its highest point boys and girls are treated differently, this entailing the stigmatization of girls as "delinquents"<sup>71</sup>, while in reality in very often they are the victims<sup>72</sup>.

- Running away from home:

Running away from home is a typical crime for girls in Afghanistan. The prosecuted action of running away from home is not a crime that is known in the Afghan statutory law or Shari'a Law as such (unless it is followed by *zina*) and has its base in the customary laws of Afghanistan. A girl might be accused of running away from home, when she has left her family or spouse<sup>73</sup>. However, as soon as she leaves her parent's house in the presents of a man it is assumed that she has committed *zina* until proven otherwise<sup>74</sup>. The customary punishment for running away is imprisonment.

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<sup>71</sup> Medica Mondiale, *Trapped by Tradition. Women & Girls in Detention in Kabul Welayat*, 5 March 2003: <http://www.medicamondiale.org/en/infothek/publikationen/>

<sup>72</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 11, p.450.

<sup>73</sup> Amnesty International, *Re-establishing the rule of law in Afghanistan*, 14 August 2003, AI: ASA 11/021/2003, p. 40. See also UNAMA – OHCHR (8 July 2009), *Silence is Violence. End the Abuse of Women in Afghanistan*, p.21.

<sup>74</sup> Young girls (but also boys) who elope risk being killed by their families. For example, in certain provinces in Northern Afghanistan, "if a boy or a girl leaves his or her house voluntarily and moves to the house of another family, his or her own family may consider killing their "guilty" child". This presumably applies to both if they run away together, but it is reasonable to assume that the person most harshly punished would be the girl, especially if

According to a report by Medica Mondial, in most of the reported cases the accused female was trying to escape from an abusive family environment or to prevent being married against her will<sup>75</sup>.

Given that the age of the offenders in the majority of the cases is very young, it is obvious that most of these cases are likely to involve escape from domestic violence, forced marriages and non-consensual sex. Their cases would need to be examined to determine their protection needs under articles 52-57 of the Juvenile Code, rather than their being imprisoned and re-victimized.

According to UNODC report<sup>76</sup> running away is a consequence of forced marriages resulting from the marriage of a young girl with an older man, without the consent of the girl. When such girls are aware of their rights and have access to an institution which can provide legal and psychosocial assistance to them, they can avoid illegal imprisonment.

### Questions

- \_ Which are the specific problems girl children face in Afghanistan?
- \_ What may be their root causes?
- \_ How, and to what extent, does the law deal with the specific problems of girl children?
- \_ What can you do as judges and prosecutors to improve the protection of the rights of girls in the country?

### Case study 1

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extra-marital sex has occurred, since her loss of virginity would bring great shame to the family. See, UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation, Assessment Report*, May 2008, p.36, op. cit., 4.2.3.d. See also, Medica Mondiale, *Dying to be heard*, 2004, p. 10.

<sup>75</sup> Medica Mondiale, 2004, p.70, ASA 11/021/2003, p. 42.

<sup>76</sup> UNODC, *Afghanistan*, op. cit., p.38. According to the report, there have been encouraging reports of police referring such girls to MoWA, which in turn has diverted them to shelters. It is clear that awareness building and the provision of assistance before such girls come in contact with the criminal justice system, as well as increasing diversion to appropriate institutions by the police, when such girls are arrested, are areas that need attention. See also, UNODC, *Afghanistan, Female Prisoners and their Social Reintegration*, op. cit., p.26.

Rozama is a 16 years old girl. Her father is deceased and her mother has been remarried.

Her parents were arranging for her to be married to a 45 years old man. It was an economic settlement. She refused to marry but her parents insisted. She has been severely mistreated (beaten up every day for more than a week) by both her mother and her step-father in order to obey. She believed that she had no other choice than to escape from this situation.

She is sentenced by the Appeal's Court to 7 years of confinement for running away from home.

Now she is being detained already for 8 months in JRC and no one from her family has paid a visit to her, because they believe that she has disgraced family's honour.

*\_Is there such a crime in the Criminal Code and according to which text is the punishment determined?*

*\_Do you believe that this punishment is fair for this kind of behaviour?*

*\_How would you treat this case? Would you rather refer this case for a family settlement instead?*

*\_Could the fact that the parents were mistreating Rozama have an impact in her treatment before the Court? Could the Court be more indulgent in such cases?*

*\_Do you believe that a social worker should work together with the family to take her back and also to pay some visits to Rozama while in detention?*

## **Case study 2**

Deeba is 17 years old. She belongs to a very poor family. Her father died some years ago. Her mother worked as a cleaner to feed her three children. They lived with her maternal uncle. She was subjected to domestic violence in her uncle's house. Her uncle, who provided them shelter, forced her to get engaged with his son when she was only 12, although neither the girl nor the boy were willing. Later she fell in love with another boy and ran away with him to another city. They got married and received all documents registering their marriage. Her uncle, however, complained to the police and they were arrested when she was already nine months' pregnant. She is accused of having extra-marital sex, with her current husband, prior to their marriage.

Her uncle's family is not prepared to forgive her and in the meantime have requested another girl from the Deeba's family to marry their son. Deeba's husband has been already been sentenced to 5 years' imprisonment. She says that she will go to her husband after release, but her uncle's family has threatened to kill her.

*\_How would you treat this case?*



## 2. The development of models of juvenile justice

The theories on crime and punishment that have been developed through the years and influenced criminal justice have had also an impact on juvenile justice. Since the 19<sup>th</sup> century the theories on the treatment of juvenile offenders correspond respectively to the following three concepts:

1. **Retribution:** in the framework of which, punishment should be harsh –sometimes even cruel- justified by the sufferance that has been caused by the offender to the victim and subsequently to the entire society. The offender should “pay” for his crime and at the same time constitute an example for future offenders. Adults and juveniles were treated alike.
2. **Restrain:** in the framework of which both adults and minors were sent to prison, whereas the duration of imprisonment scaled according to the gravity of the offence.
3. **Rehabilitation:** is the last concept that has risen in the midst of 19<sup>th</sup> century which marks a turnover in criminal theories from the act to the person of offender resulting to a more individualised treatment. This has also influenced juvenile justice where the focus towards juvenile offenders was put more in the prevention of their future criminal behaviour<sup>77</sup>. This is the time when imprisonment -and in general institutional treatment- of juvenile offenders is vigorously criticized.

The objections on the imprisonment of juvenile offenders can be summarized in the following arguments:

1. Institutions are costly and their cost is not counterbalanced by their rehabilitative effect on juveniles;
2. Confinement can stigmatise indelibly a young person, contributing to a secondary deviation<sup>78</sup> of juvenile behaviour;

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<sup>77</sup> See, H. Hart, *Preventive treatment of neglected children*, N.Y., Charities Publication Committee, 1910.

<sup>78</sup> See, K.T. Erikson, “Notes on the sociology of deviance” in: H.S. Becker, *The other side: Perspectives on deviance*, N.Y., Free Press, 1964, p.9-22. On the concept of secondary victimisation see, United Nations, Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York, 1999). The definition of “secondary

3. Confinement of juveniles may result in increasing their opposition against authorities;
4. Confinement is anti-productive for society; on the contrary it can contribute to the increase of delinquency<sup>79</sup> rather than to rehabilitation.

The above mentioned criticism has resulted to the adoption of a series of alternative to confinement measures for juvenile offenders<sup>80</sup>.

The main models of juvenile justice that have gradually been formed under the influence of different theories are:

- 1. The model of punishment:** This model has emerged by the theories of retribution and was the only acceptable concept for criminal justice applied until the end of 19<sup>th</sup> century. Personal reasons that might have pushed the offender to commit the act, or his age, had no influence on his punishment.
- 2. The model of welfare:** Very soon the model of punishment has been criticized, because it led to excessive State intervention and also because it served only to the increase of criminality, while there was no parallel effort for the rehabilitation of the offenders. It became obvious that child-offenders had less responsibility for the crimes they committed and thus they should be treated differently. The model of welfare has been based: a) on the need to support and reinforce the process of development and maturity of the child; and b) also on the conclusion that the justice system could be destructive for the child's development. This is why it has focused mainly to the personality of the child offender and not to the criminal act as the previous model did. It has been mainly influenced by the trends that supported the concept of rehabilitation in combination with the regulation of the risk that the offender presented for society and subsequently to the need for society's protection by controlling dangerous persons.

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victimisation" or "revictimization", see point 4. of the Council of Europe's recommendation Rec (2006) 8 of 14 June 2006 of the Committee of Ministers to member States on assistance to crime victims.

<sup>79</sup> See, D. Lipton, R. Martinson, J. Wilks, *The effectiveness of correctional treatment*, N.Y., Praeger, 1975.

<sup>80</sup> See below in Section 4.3.3. for more details on this issue.

**3. The model of Justice:** By trying to be more flexible the welfare model ended up in the application of no procedural rules or minimum limits, leaving the attribution of justice at the absolute discretion of the judge. This resulted in treating as crimes behaviours that were not *stricto sensu* criminal offences and also in imposing to juvenile offenders measures of indefinite duration (confinement or other rehabilitative measures), which at the end led to the implementation of a model of justice for juveniles that offered less guarantees to the offender than the justice system for adults. The conclusion that the state did not have the right to deprive the liberty of a person without the commission of a statutory crime and that this can only lead to arbitration led gradually to the appearance of a model of justice which emerged at the middle of 20<sup>th</sup> century corresponding to the need to bring more justice to juvenile cases. The justice model is reflected to the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules of 1985). The overall idea of this model is not to reform the personality of the child offender but to re-integrate him/her to a society that respects his/her rights. Thus, the basic principles of this model are:

- punishment should be proportionate to the offence;
- punishment should be determined beforehand by the law;
- confinement should be imposed as a last resort only for very severe offenders;
- diversion should be preferred in order to avoid stigmatization and
- respect of fundamental principles of fair trial and due process.

**4. The merge of welfare and justice model:** Balancing the advantages of the two models has resulted in merging the two models of juvenile justice (welfare and justice) into one, resulting to today's model of juvenile justice. This model has been formed by multiple interventions of international organizations leading to the adoption of important instruments of juvenile justice and it also constitutes one of the objectives of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules; adopted by the General Assembly resolution 40/33 of 29 November 1985). As it is noticed in the commentary of the Rules (Rule, 17.1): "*the main*

*difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as:*

*(a) Rehabilitation versus just desert;*

*(b) Assistance versus repression and punishment;*

*(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;*

*(d) General deterrence versus individual incapacitation.*

*The conflict between these approaches is more pronounced in juvenile cases than in adult cases. It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles". So, Rule 17.1 (b) implies that strictly punitive approaches are not appropriate and Rule 17.1 (c) aims at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety.*

Other international instruments that have contributed to the **formation of the contemporary model** of juvenile justice as a combination of welfare and justice models are also:

- The UN Convention on the Rights of the Child (adopted by the General Assembly resolution 44/25 of 20 November 1989 and enter into force on 2 September 1990);
- The UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines; adopted by the General Assembly resolution 45/112 of 14 December 1990);
- The UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules; adopted by the General Assembly resolution 45/110 of 14 December 1990);

- The UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules; adopted by the General Assembly resolution 45/113 of 14 December 1990); and
- the Guidelines of the Economic and Social Council for Action on Children in the Criminal Justice System (the Vienna guidelines; adopted by resolution 1997/30 of 21 July 1997).

### **3. The legislative framework of juvenile justice**

In order to attribute justice, the judiciary officials need to know the main international instruments of juvenile justice that have influenced the national legislative framework.

Under this section we will present the main points of each international instrument on juvenile justice. Reference of the provisions of each instrument will also be made at the sections that follow in relation to the particular issue examined.

#### **3.1. International Instruments of Juvenile Justice**

International law in the area of juvenile justice is substantial and detailed, and regard may also be to more general instruments in the criminal justice and penal policy area.

The most important international **instruments which apply in juvenile justice**, (some of which have also been mentioned above) are:

- The United Nations Declaration of the Rights of the Child (Assembly Resolution 1386 (XIV) of 20-11-1959);
- The United Nations Convention on the Rights of the Child (adoption by Assembly Resolution 44/25 of 20 November 1989 and execution on 2/9/1990)<sup>81</sup>;
- The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Assembly Resolution A/RES/54/263 of 25 May 2000)<sup>82</sup>;

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<sup>81</sup> Afghanistan has ratified the Convention on the 28 March 1994.

- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Assembly Resolution A/RES/54/263 of 25 May 2000)<sup>83</sup>;
- The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (Assembly Resolution 45/112 of 14 December 1990);
- The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules) (Assembly Resolution 45/113 of 14 December 1990);
- The Guidelines for Action on Children in the Criminal Justice System (The Vienna Guidelines) (Economic and Social Council Resolution 1997/30);
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (Assembly Resolution 40/33 of 29 November 1985);
- Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (Council Resolution 1984/47);
- The United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (Assembly Resolution 45/110 of 14 December 1990);
- The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Council Resolution 2005/20);
- The implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Council Resolution 1989/57).

Other generally applicable international instruments that apply to juvenile justice are:

- The Universal Declaration of Human Rights (Assembly Resolution 217 (III) of 10-12-1948);
- The International Covenant on Civil and Political Rights and its optional protocol related to the right of individuals to file a complaint before the

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<sup>82</sup> Afghanistan has ratified the Protocol on the 24 September 2003.

<sup>83</sup> Afghanistan has ratified the Protocol on the 19 September 2002.

- Human Rights Committee for violations of any of the rights set forth in the Covenant (Assembly Resolution 2200 A (XXI) of 16-12-1966)<sup>84</sup>;
- The International Covenant on Economic, Social and Cultural Rights (Assembly Resolution 2200 A (XXI) of 16-12-1966)<sup>85</sup>;
  - The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights related to the right of individuals to file a complaint before the Committee on Economic, Social and Cultural Rights (Assembly Resolution A/RES/63/117 of 10 December 2008).
  - The United Nations Convention against Torture (Assembly Resolution 39/46 of 10-12-1984)<sup>86</sup>;
  - The Optional Protocol to the Convention against Torture (adopted on 18 December 2002 Resolution A/RES/57/199 and entered into force on 22 June 2006)<sup>87</sup>;
  - The Convention on the Elimination of All Forms of Discrimination against Women<sup>88</sup> (Assembly Resolution 34/180 of 18-12-1979) and its Optional Protocol (Assembly Resolution A/RES/54/4 of 6 October 1999);
  - U.N. Basic Principles on the Independence of the Judiciary (General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985);
  - The Code of Conduct for Law Enforcement Officials (General Assembly Resolution 34/169); and
  - The UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters<sup>89</sup>.

The basic principles and minimum standards for the administration of juvenile justice are expressed in the above mentioned international instruments. It should be noticed that in many issues there is an overlapping of their

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<sup>84</sup> Ratification by Afghanistan on the 24 Jan 1983.

<sup>85</sup> Ratification by Afghanistan on the 24 Jan 1983.

<sup>86</sup> Ratification by Afghanistan on the 1 Apr 1987.

<sup>87</sup> Not signed by Afghanistan.

<sup>88</sup> Afghanistan has ratified the Convention on the 4 March 2003.

<sup>89</sup> ECOSOC Resolution 2002/12, 24 July 2002.

provisions (as examined below). However the main considerations of the key international instruments could be summarised as follows:

a) The Convention on the Rights of the Child:

With respect to juvenile justice the Government of Afghanistan has ratified the Convention on the Rights of the Child on 28 March 1994 and has used the standards contained in the Convention as the framework for the drafting of Afghanistan's current juvenile code. It has also adopted the optional protocol of the Convention on Child Rights related to child sale, prostitution and pornography (on the 19 September 2002), as well as the optional protocol of the Convention on Child Rights related to the participation of children in armed conflicts (on the 24 September 2003).

It has to be stressed that the Convention constitutes the most complete of all recent international texts of binding character in the field of juvenile justice, in the sense that it presents the fullest legal consolidation for civil, political, social, economic and cultural rights of children. The Convention's scope of application appears to be "children" but with the definition is given in Art.1 it seems that it covers all children of less than 18 years of age, which in principle means that it addresses to all **non-adult persons**. It also applies to children who are not nationals of the country concerned (Art.2), but come under its jurisdiction.

Among the main CRC provisions relevant to juvenile justice, are:

- The best interest of the child, which should be a primary consideration in all matters affecting the child, (Article 3).
- The principle of non-discrimination, irrespective of a child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth of other status, (Article 2).
- The child's right to survival and development, (Article 6).



- The right to the child to participate in decisions affecting him or her, and in particular to be provided the opportunity to be heard in every judicial or administrative proceedings affecting the child, (Article 12).

The CRC contains principles guiding the development and application of systems of juvenile justice, requiring among other things:

- That no torture or other cruel, inhuman or degrading treatment or punishment is imposed to children and that includes death penalty and life imprisonment (without possibility of release) (Article 37 (a)). The provision against corporal punishment is also in line with Article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- That deprivation of liberty is used only as a last resort, and then only for the shortest period of time, (Article 37(b)).
- That children are kept separately from adults (persons 18 years or older) whilst deprived of liberty (Article 37(c)).
- That children in conflict with the law are treated in a manner consistent with the promotion of a child's sense of dignity and worth, in a manner which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society, (Article 40(1)).
- That due process guarantee is observed in juvenile justice processes and proceedings, (Article 40 (2)).
- That the overarching requirements that separate laws, procedures, authorities and institutions specifically apply to children accused of infringing the penal law, (Article 40 (3)).
- That measures are established for dealing with children without resorting to judicial proceedings (diversion), provided that human rights and legal safeguards are fully respected, (Article 40 (3)(b)).

There are also rules and guidelines that are of non-binding character, but which they present however an international consensus on minimum standards and best practice for juvenile justice. A particular attention should be given to the main considerations of the following instruments:

b) The UN Guidelines for Action on Children in the Criminal Justice System (The Vienna Guidelines):

According to the UN Guidelines for Action on Children in the Criminal Justice System of 1997<sup>90</sup>, in the process of implementation of the Guidelines consideration should be given to the following:

- Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child;
- A rights- based orientation;
- A holistic approach to implementation through maximization of resources and efforts;
- The integration of services on an interdisciplinary basis;
- Participation of children and concerned sectors of society;
- Empowerment of partners through a developmental process;
- Sustainability without continuing dependency on external bodies;
- Equitable application and accessibility to those in greatest need;
- Accountability and transparency of operations;
- Proactive responses based on effective preventive and remedial measures.

c) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules):

The Beijing Rules constitute a fine example of combination between the “welfare” and “justice model” of juvenile justice. This can be clearly seen in Rule 5 which refers to two of the most important objectives of juvenile

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<sup>90</sup> See UNICEF - UNODC, *Manual for the Measurement of Juvenile Justice Indicators* (April 2006).

justice: the promotion of the well-being of the juvenile and the principle of proportionality.

The Rules give special consideration to:

- Prevention; pointing the important role that a constructive social policy for juveniles can play, in the prevention of juvenile crime and delinquency, and suggesting the adoption of measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law, (Rule 1.3.).
- Basic procedural safeguards, such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings, (Rule 7).
- Diversion processes; implying that juvenile offenders' cases should not resort to formal trial by the competent authority, (Rule 11.2).
- Application of alternative measures to confinement (Rule 18.1) and the least possible use of institutionalization, (Rule 19). Institutionalisation should be seen as last resort. The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period, (Rule 19.1).

d) UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines):

Among the main considerations of the Riyadh Guidelines special focus is given to issues such as:

- Prevention (G.9) with creation of community-based services and programmes (G.32-39)

- Socialisation process (G.10) and the family (G.11-19). The family should be assisted to form a stable and settled environment for children (G.13)
- Social policy. Institutionalisation of young persons should be a measure of last resort and for the minimum necessary period and the best interests of the young person.
- Status Offences. In order to prevent further stigmatisation, victimisation and criminalisation of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalised if committed by an adult is not considered an offence and not penalised if committed by a young person, (G. 56).
- Establishment of an ombudsman for ensuring in order to ensure the rights and interests of young persons and that a proper referral to available services is made (G.57).

### **3.2. Domestic sources of law**

Under this section we would like to draw the main lines of the national framework in juvenile justice in general, before we enter to a more detailed analysis of the provisions as per each stage of the trial (under Part II).

#### **3.2.1. The Afghan Constitution**

The Afghan Constitution guarantees basic human rights which had been systematically violated under the Taliban regime. The new Constitution was developed and adopted by the Grand Council on 4 January 2004 and became effective on the 27 January 2004 (amending the 1964 Const.) and sets forth the guiding principles by which every law and government entity must adhere to. The Constitution precises that the State is obliged to create a prosperous and progressive society based on social justice, protection of human dignity,

protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes, and to provide for balanced development in all areas of the country (Article 6).

With regard to Shari'a law the Afghan Constitution in Article 3 states that "*no law can be contrary to the beliefs and provisions of the sacred religion of Islam*". Further, in Article 130, the Afghan Constitution states that Article 1 Criminal Code refers directly to Shari'a "***if there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner***". According to Article 1 of the Criminal Code "*crimes of hadd, qisas and diyat shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence)*"<sup>91</sup>.

### **3.2.2. The Juvenile Law**

In 2004, the **Afghan Juvenile Code** was adopted. For its major part, this Code is in accordance with the recognised international principles and standards of Juvenile Justice.

However, efforts to reform the legal system and provide a framework for the protection of children's rights guaranteed under Afghan and international law have not been met on the ground with the necessary human capacity and infrastructure making the implementation of these statutory guarantees impossible. The Provincial Justice Coordination Mechanism (PJCM) found that the requirement for criminal proceedings involving juveniles to be processed by trained juvenile judges and prosecutors cannot be met in 25 out of 34 provinces, as neither juvenile judges nor prosecutors have been appointed in those 25 provinces. Further, the statutory requirement to detain juvenile offenders in rehabilitation detention centers can only effectively be met in two provinces that have dedicated juvenile rehabilitation centers; in another 24

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<sup>91</sup> See also Max Planck, *Fair trial manual*, 3<sup>rd</sup> Edition, p. 123.

provinces juveniles are detained in rented houses which are in very poor condition, while in six provinces there is no accommodation for juveniles.

The Juvenile Code<sup>92</sup> was adopted on 14th February 2005 by the Afghan Cabinet, signed on the 9th March 2005 by President Kirzai. The Juvenile Code is a key step in reforming the legal system and provides a framework for the protection of the rights of children and introduces many of the principles and rights contained in the Convention on the Rights of the Child.

The Juvenile Code addresses all juveniles who are accused, have infringed the law, have demonstrated irregular behaviour, or are in need of supervision and protection (Article 1). It consists of sixty six articles divided into eight main sections (chapters) which contain general provisions for dealing with children in conflict with the law, regulations on the detection and investigation of children's crimes, and procedural regulations concerning children's trials. The Juvenile Code provides for protocols regarding juvenile correctional facilities and rehabilitation centres and designates social services institutions for juveniles in conflict with the law. The last part of the Juvenile Code articulates regulations on the code of conduct for children with irregular behaviours, procedures for assistance to children in need of care and protection, and guardianship.

The Afghan juvenile system focuses on the rehabilitation, re-education and reintegration of juvenile offenders, so that he/she can become a viable member of the society (Article 2). Therefore, the juvenile justice system is not only aiming to the nature of the offence committed, but also to the root causes of the offence that should be assessed focusing on the juvenile's needs for development. Juvenile justice should take place in a child friendly environment, juveniles should not be arrested, investigated, prosecuted and adjudicated in the same way as adults and in accordance to their age, the best interests of the juvenile should be the primary consideration.

The Juvenile Code foresees separate courts for juveniles with particularly trained personnel, and social service institutions involved and assisting the

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<sup>92</sup> Published in the Official Gazette issue No. 846 of 23 March 2005.

court closely<sup>93</sup>. Furthermore, it provides for separate institutions for the rehabilitation of juveniles having to be kept separately from adult prisoners<sup>94</sup>.

An important provision in the new Juvenile Code regards the increase in the age of criminal responsibility from 7 to 12 years, as well as recognizing the definition of a child as being anyone under the age of 18.

**Under the new definition minors who have not yet completed the age of twelve do not have criminal responsibility<sup>95</sup>.** Determining and fixing the juvenile's age is based on the date the crime was committed. All forms of physical, humiliating, and severe punishment against juveniles even if applied for the purpose of correction or discipline are prohibited. Life sentence or death penalty for juveniles is prohibited and corporal punishment is unlawful as a sentence. Juveniles have the right to immediate entrance to legal assistance and to an immediate decision in their case. Their right to privacy has to be protected.

Arrest and detention of a juvenile are, wherever possible, to be avoided and should take place only if all other possibilities are exhausted and also then only for as short as possible. Under the Juvenile Code juveniles awaiting trial should, wherever possible, remain in the care of their families or guardians. Confinement of a juvenile is considered to be the last resort for rehabilitation and re-education. Wherever possible the re-education shall take place in a family environment. The Juvenile Code provides a broader range of measures for juveniles convicted of offences, including probation as an alternative to custodial punishments. Accordingly courts are required to consider the minimum possible duration for confinement based on the provisions of the Juvenile Code. According to Article 8: *"Confinement of a child is considered to be the last resort for rehabilitation and re-education of the child"*.

The length of sentence imposed by the court will be limited by the maximum penalty for that offence. Regarding this sanctions the Juvenile Code makes a

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<sup>93</sup> Article 26 of the Juvenile Code.

<sup>94</sup> Article 10 (4) of the Juvenile Code.

<sup>95</sup> Article 5(1) of the Juvenile Code.

distinction between younger juveniles (12-16) and older juveniles (16-18)<sup>96</sup>. Sanctions for juveniles between 12 and 16 years of age cannot exceed one third of the maximum sentence stipulated in the Criminal Code for those above 18 years of age for the same offence<sup>97</sup> and sanctions for juveniles between 16 and 18 years of age cannot exceed half of maximum sentence stipulated in the Criminal Code for those above 18 years of age for the same offence<sup>98</sup>.

When detained or in confinement juveniles must be accommodated separately from adult prisoners. The detention authority is obliged to provide access of the detained juvenile to social, educational, vocational, and psychological and health services considering the age and gender requirements of the juvenile. The juvenile correction and rehabilitation centres and designated social services institutions, while executing sentences on juveniles in detention under their supervision, are duty bound to submit report to the prosecutor's office and the relevant court every three months or as requested otherwise. The prosecutor and special juvenile judge shall visit the place of detention at least once in a month<sup>99</sup>. The legal representative has the right to visit the juvenile in places of detention provided that the rules of those places are respected<sup>100</sup>.

Further the Juvenile Code places restrictions on the use of handcuffs; they shall not be used for persons who have not completed 18 years of age, unless there is a risk of flight or if they pose imminent threat to themselves or to others<sup>101</sup>. Police are duty bound to report the arrest and place of detention of a child to child's legal representative and social services institutions within 24 hours from the time of arrest<sup>102</sup>. If this information is not provided within the time limit, the police are obliged to provide written report explaining reasons for the delay to the relevant prosecutor's office. If the police fail to present

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<sup>96</sup> The length of sentence imposed by the court will be limited by the maximum penalty for that crime.

<sup>97</sup> Article 39 (1) a of the Juvenile Code.

<sup>98</sup> Article 39 (1) b of the Juvenile Code.

<sup>99</sup> Article 43 of the Juvenile Code.

<sup>100</sup> Article 46 of the Juvenile Code.

<sup>101</sup> Article 10 of the Juvenile Code.

<sup>102</sup> Article 11 of the Juvenile Code.



logical reasons for the delay, the issue shall be prosecuted. The police have the authority to immediately release juveniles on bail into the custody of their parents or also into the care of some other fit person or organization<sup>103</sup>.

The Juvenile Code provides for time limits for each stage of the process, requiring that proceedings be terminated within two months from the date of arrest. When arrested *in flagrante delicto* the police have 24 hours (extendable to 48 hours) from the arrest to submit the case to the prosecutor for investigation<sup>104</sup>. The prosecutor has one week (extendable to three weeks) to complete the investigation and one week for preparation and submission of the indictment to the Court (extendable for three more weeks, provided the juvenile is not kept in detention)<sup>105</sup>. The court has 10 days after receipt of the file for the Court to issue its decision<sup>106</sup>.

The Decree No. 141 of 11/01/2009 (22/10/1387HS) of the President of the Islamic Republic of Afghanistan on Endorsement of the Law on Juvenile Rehabilitation and Correction Centers has been also adopted in relation to Chapter IV of the Juvenile Code.

It should be noticed that the general principles of justice contained in the first articles of the Criminal Code are also applicable to juvenile justice cases as we will see below.

### **3.2.3. Other sources of Law**

Not every legal question pertaining to the criminal law can be answered solely with reference to the Juvenile Code. Further legal research is often needed. While it is not a fully exhaustive list, would be useful to consider those sources recommended in the past to judges who have participated in previous internationally funded judicial training course:

- The Constitution;

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<sup>103</sup> Article 11 (4) of the Juvenile Code.

<sup>104</sup> Article 11 of the Juvenile Code.

<sup>105</sup> Article 14 (1), and 15 of the Juvenile Code.

<sup>106</sup> Article 30 of the Juvenile Code.

- The Judicial Reference Set, 2nd Ed. (a 17 – volume set containing the important statutes and regulations that is being distributed to all judges);
- The Official Gazette;
- The Koran and texts on Sharia Law;
- Legal dictionaries;
- Legal Manuals and Textbooks;
- University law journal articles;
- Qaza Magazine (Supreme Court);
- Mizan Newspaper (Supreme Court);
- Adalat Magazine (Ministry of Justice);
- Sarwanwal Magazine (Office of Attorney General);
- Huquuq Law Journal (Law Faculty, Kabul)
- Judicial training materials prepared by national and international NGOs and other organizations supporting judicial training programs.
- [www.afghanistantranslation.com](http://www.afghanistantranslation.com) (links to the Constitution, laws, regulations, decrees, international covenants, conventions, and treaties, and training materials)
- [www.supremecourt.gov.af](http://www.supremecourt.gov.af)
- [www.nationalassembly.gov.af](http://www.nationalassembly.gov.af)
- [www.moj.gov.af](http://www.moj.gov.af)

#### 4. International Principles of Juvenile Justice

*"..judges are charged with  
the ultimate decision over life, freedoms,  
rights, duties and property of citizens..."*

(UN Basic Principles on the Independence of the Judiciary)

***"Making a law is one thing; but implementing it, is more important..."***<sup>107</sup>

Knowledge of the law alone does not necessarily lead to justice if the judge does not apply the basic principles that form the concept of justice. According to the Greek Philosopher Aristotle it is not enough for a judge to be fair in order to attribute justice; he still requires the knowledge of the science of the law to be called a judge.

Under this section we will examine the main principles of Juvenile Justice as they have been safeguarded by international instruments and endorsed by national texts of Afghanistan, such as the Criminal Code of 1976, the Interim Criminal Code for Courts of 2004 and the Juvenile Code of 2005.

It is important to have a view first on all the principles that apply in juvenile justice gathered together in one section before we enter the substantial and procedural part of juvenile law.

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<sup>107</sup> Sabrina Saqib, Member of the Afghan Parliament.

## **4.1. Basic Principles**

As we have already mentioned, the general principles prevailing in the system of Juvenile Justice the majority of which constitute the aims of the system are:

1. The best interest of the child;
2. The principle of treatment against punishment;
3. The principle of individualised treatment; and
4. The principle of specialization of authorities and bodies dealing with juvenile justice.

### **4.1.1. Best Interest of the Child**

The best interest of the child should be considered as a guiding principle that shows how to treat a juvenile case from its initial stage to the very end of it (from the moment the child is brought before the prosecutor throughout the trial stage and up to the last stage of sentencing).

For the Convention of the Rights of the Child the best interest of the child, should be a primary consideration in all matters affecting the child, (Article 3). According to the Havana Rules, it means that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. As a consequent, imprisonment should be used as a last resort (Rule 1).

This also means that the juvenile justice system should reduce its negative intervention<sup>108</sup> and thus, the harm that may be caused by any intervention<sup>109</sup>, and by doing so, it should act mainly as a juvenile's "protection law".

In other words at every stage of the trial the competent authority should set a sort of gradation in its choices towards the juvenile starting always with what should cause the less damage to the juvenile in relation at the same

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<sup>108</sup> The minimisation of intervention for some authors can reach the radical form of "non-intervention". See, E. Schur, *Radical non-intervention: Rethinking the Delinquency Problem*, New Jersey, 1973.

<sup>109</sup> See Beijing Rules, Commentary on Rule 1: Fundamental perspectives.

time to what should be appropriate for the juvenile's rehabilitation. So, in the event that there is enough evidence to bring the case to the court:

- The prosecutor should choose between prosecuting the case which would certainly have a traumatising impact for the juvenile and a stigmatising effect and finding a solution of reconciliation (as foreseen in Article 21 of the Juvenile Code). He should then send the case to the court only as a last solution (e.g. if the juvenile has re-iterated the offence depending on the danger the juvenile represents for society through his/her crime<sup>110</sup>).

In the event that the case is finally referred to the Court and the crime has been established:

- the Court at the moment of adjudication and sentencing should balance its decision between diversion and various alternatives to confinement and only as a last resort should impose confinement to the juvenile, scaling always its decision from the less to the most burdensome for the juvenile keeping as last option the confinement.

The competent authority has also the power to discontinue the proceedings at any time if the complete cessation of the intervention appears to be the best disposition of the case, (Beijing rules, 17.4).

This is a characteristic inherent in the handling of juvenile offenders as opposed to adults.

Of course, the principle of the best interest of the child relates to the principle of proportionality (which is examined below), as "any response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions", (Beijing Rules Official Commentary on Rule 5.1).

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<sup>110</sup> It needs to be noticed that surveys show that the vast majority of juveniles are first time offenders.

Both prosecutors and judges should keep in mind that the best interest of a child is to become a productive member of society and by choosing confinement they only exclude him/her for a certain period of time which might be in the interests of the protection of society, but certainly it has negative effects on the development of the juvenile's future behaviour and vital role into society.

We could say that the Juvenile Code in its Article 2 (2) incorporates this principle since it stipulates that among the objectives of the Code is the "respecting of the vital role of children in society construction and protecting their physical, moral, intellectual and social welfare".

Finally, it should be noticed that this principle should be regarded as a prerequisite of all other principles. In other words, all other principles -of general or of more specific character- applying in the juvenile justice system have as a final aim: the best interest of the child.

#### **4.1.2. Treatment against punishment**

This principle implies that it is preferable to impose a specific treatment to a juvenile offender than to choose punishment. In other words, it means that strictly punitive approaches are not appropriate. Whereas in adult cases just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person (Rule 17.1 (b) of the Beijing Rules). This implies that a judge should consider any other treatment or alternative to confinement. Confinement should be seen only as the *last resort* of the judge if the merits of the case call for.

The Convention of the Rights of the Child (Art.40.3.b) as well as the Beijing Rules (Rule 17.1 (b)) encourage the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young person. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be

granted to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions.

In that spirit the Juvenile Code (Article 35) gives several options<sup>111</sup> to the judge other than to impose confinement, depending on the situation of the juvenile offender, such as:

- Performing social services;
- Sending the child to special social services institutions;
- Issuance of warning;
- Postponement of the trial;
- Conditional suspension of punishment;
- Home confinement; or
- Surrender of child to his/her parents or those who have the guardianship rights.

Confinement of a child is considered by the national legislator to be the **last option** for the rehabilitation and re-education of the child and **not just another option** of the judge while adopting his/her decision.

#### **4.2.3. The principle of individualised treatment**

Related to the previous principle, the principle of individualised treatment of the juvenile offender applies also in criminal justice for adult offenders. In particular, in juvenile justice, this principle means that the court in order to issue its decision does not take into consideration only the gravity of the offence irrespectively of other elements, but it also needs to adapt its decision to the merits of each case. On that purpose, the court other than the gravity of the offence, should also take into consideration the specific circumstances of the commission of the crime, the personality and the specific needs of the juvenile offender and, of course, the interest of the society so that it fulfils the requirement of CRC *"that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence"* (Article 40.4).

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<sup>111</sup> These options will be examined below under the section on Alternatives to confinement, Part III, 1.

As we have mentioned above the law offers to the judge a large discretion for the treatment of the juvenile offender. The judge is not constrained to apply only confinement. On the contrary he has a wide range of options.

The principle also means that since each case is examined on its own merits, the judge is not obliged to impose the same punishment to each offender for the same type of crime. The law only sets a general frame inside which the judge is allowed to move at the stage of sentencing. Thus, *"contemptuous and harsh punishment of the child, even if for correction and rehabilitation purposes"* is not allowed according to Art.7 of JC, which keeps pace with Article 37 of CRC<sup>112</sup>. In that sense, the Juvenile Code interdicts life imprisonment or death penalty for children (Article 39.1.c) and sets **only the maximum sentences** for juveniles<sup>113</sup>. As it will be examined below (under the section on sentencing) in case of confinement, the Juvenile Code sets a limit according to the age of the juvenile offender, providing that *"the sanctions for children who have completed 12 years of age and have not completed 16 years of age cannot exceed one third of the maximum sentence stipulated in the Penal Code for those above 18 years of age for the same crime"* (Article 39.1.a). It also provides that *"the sanctions for children who have completed 16 years of age and have not completed 18 years of age cannot exceed half of maximum sentence stipulated in the Penal Code for those above 18 years of age for the same crime"*.

Thus, the judge will have to individualize the punishment for the specific juvenile offender making his/her choice between a wide range of non-custodial sentences or confinement (as a last resort) which in any event will have to remain under the maximum set by the law.

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<sup>112</sup> Article 37(a) of CRC provides that: *"No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age"*.

<sup>113</sup> The sanctions for juveniles are calculated on the basis of sanctions for adults. According to Article 97 CP *"Principal Punishments are: 1. Execution; 2. Continued imprisonment; 3. Long imprisonment; 4. Medium imprisonment; 5. Short imprisonment; 6. Cash punishment."*



#### **4.1.4. The principle of specialization of authorities and bodies dealing with juvenile justice**

According to Article 40.3 of CRC: "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children..."<sup>114</sup>.

Taking as a starting point the assumption that children have specific needs different from those of the adult persons, we can understand the necessity for the creation of specialised authorities and institutions for children.

The specialization of professionals dealing with juveniles is underlined also both by the Riyadh Guidelines (G. 9.i) and by the Beijing Rules (Rule 22) which call also for the training<sup>115</sup> of all personnel dealing with juvenile cases in order to establish and maintain the necessary professional competence (Beijing Rule 22.1 and Riyadh Guideline 58). A minimum training in law, sociology, psychology, criminology and behavioural sciences is considered by the Beijing Rules as important as the organizational specialization and independence of the competent authority (Rule 22.2 and its commentary). Professional qualifications are an essential element in ensuring the impartial and effective administration of juvenile justice<sup>116</sup>.

The principle of specialization of authorities and bodies dealing with juvenile justice can be considered as a corollary to the principle of "*treatment against punishment*", but mainly as a *conditio sine qua non* of the existence of provisions of juvenile law of substantial and procedural character which demand specific knowledge on juvenile law for their implementation.

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<sup>114</sup> This need for a specific treatment of children is reflected in the Preamble of CRC (and also in the Declaration of the Rights of the Child), stating that "*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection...*"

<sup>115</sup> See also points 204, 205 of the Commentary on the Bangalore Principles of Judicial Conduct, UNODC, Sept. 2007.

<sup>116</sup> According to the Beijing Rules it is necessary to improve the recruitment, advancement and professional training of personnel and to provide them with the necessary means to enable them to properly fulfill their functions. All political, social, sexual, racial, religious, cultural or any other kind of discrimination in the selection, appointment and advancement of juvenile justice personnel should be avoided in order to achieve impartiality in the administration of juvenile justice. Furthermore, a fair and equal treatment of women as criminal justice personnel is recommended suggesting that special measures should be taken to recruit, train and facilitate the advancement of female personnel in juvenile justice administration (Beijing Rules, Commentary to Rule 22.2).

## Questions

- \_ Which are the basic principles of juvenile justice?
- \_ What does the notion of the "best interests" of the child mean, and how is it applied?
- \_ Does confinement fit in the notion of the "best interests" of the child?

### 4.2. Principles of justice prevailing in juvenile cases

In the criminal justice system the accused is usually the least powerful person and in the absence of rules it is the powerful that thrive.

Fundamental principles of both substantial and procedural character retained by the above mentioned international instruments (and articulated in the provisions of national law mainly the Criminal Code, the ICPC and the Juvenile Code) safeguard the juvenile justice system and the defendant from abuses of discretionary power ensuring that justice will be done.

The principles of juvenile justice constitute at the same time the rights of the juvenile offender which apply from the time of his/her arrest and throughout the trial until the adjudication and his/her eventual sentencing by the court.

As highlighted by the Universal Declaration of Human Rights, *"...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"*<sup>117</sup>.

It is a fundamental obligation of the judiciary to monitor the violations of the rights of the defendant. According to Article 16 of the Regulation of Judicial Conduct: *"Whenever it is noticed by a judge while considering a case that the basic rights of the accused were violated during the investigation and detection of the crime, upon the conclusion of the case, the judge shall be required to issue a decision identifying the violation and forward the decision to the appropriate authority for further proceedings and possible prosecution"*.

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<sup>117</sup> Universal Declaration of Human Rights, third preambular paragraph.

#### 4.2.1. Substantial safeguards

Among the main substantial guaranties without which a trial can not take place (and even if it does it can only be described as a mockery) can be classified:

- The Principles of independence and impartiality of the judiciary;
- The Principle of confidentiality;
- The Principle of legality of crimes and sanctions with its corollaries: the principle of non-retroactivity and of strict interpretation of criminal law; and
- The Principle of proportionality.

##### 4.2.1.1. Principles of independence and impartiality of the judiciary

One of the main objectives of justice is to ensure to everyone the right to be heard in public by an independent and impartial authority<sup>118</sup>.

The judicial system of a country is sustained by "*the public confidence in the independence of the courts, in the integrity of its judges, and in the impartiality and efficiency of its processes*"<sup>119</sup>.

In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of ***separation of powers***, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources.

Only an independent Judiciary is able to render justice ***impartially*** on the basis of law, thereby also protecting the human rights and fundamental

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<sup>118</sup> OHCHR (2008), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Prosecutors and Lawyers*, Addendum Major recent developments (2003-07), Professional Training Series No. 9/Add.1.

<sup>119</sup> UNODC (2007), *Commentary on the Bangalore Principles of Judicial Conduct*, p.29.

freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be *seen* to do so<sup>120</sup>.

The principles of independence and impartiality of the judiciary are safeguarded by many provisions of international instruments, such as Article 14 of the International Covenant on Civil and Political Rights, Article 10 of the Universal Declaration of Human Rights<sup>121</sup>, by the United Nations Basic Principles on the Independence of the Judiciary<sup>122</sup>, by the Bangalore Principles of Judicial Conduct (Values 1 and 2) and particularly for prosecutors by the International Association of Prosecutors Standards<sup>123</sup>.

However, very often there is a confusion regarding these two principles. The concepts of "independence" and "impartiality" are very closely related, yet separate and distinct. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived. The word "independence" reflects or embodies the traditional constitutional value of independence<sup>124</sup>. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.

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<sup>120</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 4, p.115.

<sup>121</sup> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" (Article 10, Universal Declaration of Human Rights).

<sup>122</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>123</sup> Annexed to the UN Resolution adopted at the 17th session of the U.N. Commission on Crime Prevention and Criminal Justice on "Strengthening the rule of law through improved integrity and capacity of prosecution services". ECOSOC Resolution, E/CN.15/2008/L.10/rev.2, E/2008/30, Resolution 2008/5, 17-4-2008.

<sup>124</sup> See, Commentary on the Bangalore Principles of Judicial Conduct, point 24.

The two principles are closely interrelated to each other but the one is not an automatic consequence of the other. An independent judge is not necessarily an impartial one, but a judge who is not independent can not easily stay impartial.

a) The concept of independence:

Independence of the judiciary is safeguarded by the international instruments as mentioned above, and at national level by the Afghan Constitution (Article 116 paragraph 1); by Article 3 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan (adopted by the Supreme Council of the Judiciary on the 14 June 2007); and by Article 2 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851). However, the adoption of constitutional proclamations of judicial independence does not automatically create or maintain an independent judiciary. A member of the judiciary should be independent from all branches of government. Judges and prosecutors are not beholden to the government of the day<sup>125</sup>.

The principle generally means that the judiciary in order to reach its judicial decision should not take orders or suggestions by any person or other authority and should be free of all kind of pressures (hierarchical, financial, political, etc.)<sup>126</sup>. According to the Bangalore Principles of Judicial Conduct "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate (Principle, 1.2) and he/she should not only *"be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom"* (Principle, 1.3). In performing judicial duties, a judge should also be *"independent of judicial colleagues in respect of decisions which the judge is obliged to make independently"* (Principle, 1.4). This means, that judicial

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<sup>125</sup> Ibid, point 25.

<sup>126</sup> R. Koering-Joulin, "La notion européenne de "tribunal indépendant et impartial" au sens de l'art. 6 §1 de la CESDH", *RSC*, 1990, (4), p.765.

independence requires also judges being independent from each other (Commentary, 39).

Independence is considered to be the first of all other guarantees existing in the judicial process, in the sense that if the deciding authority is not independent the rest of existing guarantees are neutralised in practice. Independence thus, serves also as the guarantee of impartiality.

*"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects"* (Bangalore Principles, Value 1). This means, that judges should enjoy functional and personal independence and that any *"inappropriate or unwarranted interference with the judicial process"* should not take place (UN Basic Principles on the Independence of the Judiciary, Principle 4).

As provided by the UN Basic Principles on the Independence of the Judiciary, the judicial decisions by the courts are not subject to revision other than *"to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law"* (Principle 4).

It also *"entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected"* (Principle 6). Independence is better safeguarded when the deciding authority is not represented only by one person, but is formed by several members so that the decision is taken in a collective way<sup>127</sup>.

According to the Bangalore Principles of Judicial Conduct a judge should depend only on the facts in accordance with a conscientious understanding of the law (Principle, 1.1). In other words, a judge's duty is to apply the law as he or she understands it, on the basis of his or her assessment of the facts, without fear or favour and without regard to whether the final decision is likely to be popular or not (Commentary, 27).

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<sup>127</sup> See the case law of the European Court for Human Rights: *Viera Sramek v. Austria*, 22/10/1984, Collection Series, no 84; *Belilos*, 29/4/1988, Series, no 132; *X v. U.K.*, 5/11/1981, Series, no 46. Gilles Dutertre, *Key Case-Law of the European Court for Human Rights*, Council of Europe Publishing, 2003.

Sometimes, a case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family. A judge must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence (Commentary, 28).

Three minimum conditions for judicial independence are set in the above mentioned Principles (Commentary, 26):

- (a) Security of tenure: i.e., a tenure, whether for life, until an age of retirement, or for a fixed term, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner;
- (b) Financial security: i.e., the right to a salary and a pension which is established by law and which is not subject to arbitrary interference by the executive in a manner that could affect judicial independence; and
- (c) Institutional independence: i.e., independence with respect to matters of administration that relate directly to the exercise of the judicial function. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution.

### **Case study 1**

A judge in one of the judicial districts asks for advice from colleagues about the interpretation of an unclear law. The judges in the province discuss the

law at a conference, and reach a conclusion on how the law is to be interpreted. That conclusion is communicated to all the judges in the province.

*\_Should all the judges accept the conclusion, and interpret the law in the same way?*

*\_Must all the judges accept the conclusion?*

*\_Can anyone tell a judge how to interpret or apply a law in a particular case?*

### **Case study 2**

The Minister of Interior asks his friend who is Chief Justice to intervene to the closing of a case of a juvenile accused for terrorist acts which is about to be examined by the Primary Court claiming that this case may disturb the public order.

*\_Does the Minister have the right to do so?*

*\_Would you see any difference if instead of the Ministry of Interior was the Minister of Justice?*

### b) The concept of Impartiality:

It is not at random that in Greek antiquity the Goddess of Justice was shown always equipped with three symbols: a sword symbolizing the court's coercive power; a balance weighing competing claims; and a blindfold indicating impartiality.

As we mentioned above independence is a necessary precondition for impartiality and a prerequisite for attaining impartiality. Impartiality may be more important than independence, because it has to do mainly with human emotions. A judge and a prosecutor could be independent but not impartial (on a specific case by case basis), but a judge or prosecutor who is not independent cannot, by definition, be impartial (on an institutional basis)<sup>128</sup>.

Impartiality is the quality of a person who decides according to his/her consciousness, without giving advantage to any of the parties to the

<sup>128</sup> UNODC (2007), Commentary on the Bangalore Principles of Judicial Conduct, p.57.



detriment of the other. In other words impartiality is equality, equity and, justice. It is to judge giving the impression to the parties of an irreproachable character of their judgment<sup>129</sup>.

Principle of impartiality is guaranteed by Article 15 of Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan as it states that *"Impartiality of the judge is the best guarantee for the administration of justice and a judge shall be required to exhibit neutrality and impartiality in all his or her work as a judge, and to avoid any discrimination for reasons related to race, gender, ethnicity, sect, language, religion, or disposition while carrying out his or her judicial duties"*.

Principles of impartiality and equality are safeguarded by Article 14 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851) providing that:

*"Resolving a case and issuing an order by the courts shall be based on the principle of the parties' mutual equality before the law and the court and obeying justice and impartiality"*.

Article 23 of ICPC requires from the Primary Saranwal in conducting the investigations *"to evaluate incriminating and exonerating circumstances equally and to respect the interest of the victims"*.

The International Association of Prosecutors Standards (Rule 3) requires also that Prosecutors should perform their duties *"without fear, favour or prejudice"*. *In particular they should: 'carry out their functions impartially; remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity; have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect"*.

However, Judges and prosecutors are humans too, their judgement depending on several factors of internal or/and external nature. Nevertheless, they should behold their emotions not to interfere with their judgments. Some lawyers know very well how to play with psychology and "gain impressions" at the court.

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<sup>129</sup> ECHR, Langborger v. Switzerland, 22/6/1989, Collection Series, no 155.

Further, members of the judiciary should perform their duties without favour, bias or prejudice<sup>130</sup>.

Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case (Bangalore Principles Commentary, 57).

The bias or prejudice may be directed against a party, witness or advocate. Bias may manifest itself either verbally or physically.

Some examples are:

- epithets,
- slurs,
- demeaning nicknames,
- negative stereotyping,
- attempted humour based on stereotypes (such as related to gender, culture or race),
- threatening,
- intimidating or hostile acts that suggest a connection between race or nationality and crime, and
- irrelevant references to personal characteristics.

Bias or prejudice may also manifest themselves in:

- body language,
- appearance or behaviour in or out of court.

Physical demeanour may indicate disbelief of a witness, thereby improperly influencing a jury. Facial expression can convey an appearance of bias to parties or lawyers in the proceeding, jurors, the media and others (Commentary, 58).

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<sup>130</sup> See, Bangalore Principles of Judicial Conduct, Value, 2.1 and IAP Standards, Rule 3.

**However, the actual bias must be personal and directed towards one of the parties either individually or as representative of a group** (Commentary, 92).

A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable. Judicial rulings or comments on the evidence made during the course of proceedings do not fall within the prohibition, unless the judge appears to have a closed mind and is no longer considering all the evidence (Commentary, 60).

According to the Bangalore Principles impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made (Value 2).

*"Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench, or his or her associations and activities outside the court"* (Commentary, 52).

In that sense, impartiality implies a double process: a) *subjective*: trying to determine what where the judge's internal thoughts in each particular circumstance, et b) *objective*: trying to check if he/she offers sufficient guaranties that exclude any legitime doubts in his/her person<sup>131</sup>.

Prosecutors are required *"when giving advice"...* *"to remain impartial and objective"*<sup>132</sup>.

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<sup>131</sup> European Court for Human Rights, Piersack v. Belgium, 1/10/1982, Series, no 53; ECHR, De Cubber v. Belgium, 26/10/1984, Series, no 86; ECHR, Saraiva de Carvalho v. Portugal, 22/4/1994, Series, no 286; ECHR, Procola v. Luxembourg, 28/9/1995; ECHR, Castillo Algar v. Spain, 1998, Rec. 827.

<sup>132</sup> IAP standards, rule 4.2.b.

A judge<sup>133</sup> should also ensure that his or her conduct, *"both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary"* (Bangalore Principles, 2.2). In particular, *"A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue"*(Bangalore Principles, 2.4).

As an example of an improper statement the Bangalore Principles Commentary refer to an announcement by judges that they have agreed to sentence to prison all offenders convicted of a particular offence (without making any distinction between a first offence and a subsequent offence), would, depending on the circumstances, usually entitle a defendant to disqualify a judge on the ground that he or she has announced a fixed opinion about the proper sentence for the offence with which the defendant is charged. This remains true even if the judges state that the length of the sentence would be left to the individual judge's discretion and depend on the facts and the law applicable to that offence. The announcement would appear improper because it suggests that judges are swayed by public clamour or fear of public criticism. It would also be an impermissible public comment about pending proceedings (Commentary, 71).

A fine balance has to be drawn by the judge, who is expected both to conduct the process effectively and to avoid creating in the mind of a reasonable observer any impression of a lack of impartiality. Any action which, in the mind of a reasonable observer, would (or might) give rise to a reasonable

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<sup>133</sup> The principle of impartiality is also directly guaranteed by the oath-taking upon appointment of a judge, according to Article 59 of the Law on the Organisation and Jurisdiction of the Courts requiring that: *"before occupying the position as judge, a person must swear in front of chief and members of Supreme Court as follows:*

*'I swear by the name of the Almighty Allah that I perform my duty with full trust and dignity and impartiality, respect and implement provision of Islamic Shari'a, constitution of Afghanistan and other laws of the country, respect confidentiality of my duty, will not commit any crime, violation of other rights, injustice, and bribery directly and indirectly'."*

suspicion of a lack of impartiality in the performance of judicial functions must be avoided. Where such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally (Commentary, 61). Everything -from a judge's associations or business interests, to remarks that he or she may consider to be nothing more than harmless banter- may diminish the judge's perceived impartiality.

In that case, a judge can be disqualified from the hearing or deciding cases. Thus, **impartiality seems to be safeguarded by the right of the defendant to seek the disqualification (recusation) of a judge or prosecutor or even the replacement of the entire synthesis of the court if there is a reasonable suspicion of lack of impartiality.**

The ICPC (Article 10) foresees the possibility of abstention from investigations of the prosecutor (primary Saranwal) and the right of the suspect to request his or her disqualification if "there are grounded reasons to do so".

The same possibility foresees ICPC for judges. In particular, Article 11 (1) ICPC states: "*A judge cannot handle the case if:*

- a. the crime was committed against him or his relatives<sup>134</sup>;*
- b. he has performed the duties of the judicial police, of the Saranwal or has given witness or functioned as an expert in the same case;*
- c. he has been defense counsel of the accused".*

Article 12 ICPC gives expressly the right to the accused or to the Saranwal to request the disqualification of a judge or a President of the court on one of the above mentioned reasons<sup>135</sup>. The Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan also requires that a judge disqualifies alone from the case if he/she believes that he/she may not decide a case impartially (Article 6).

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<sup>134</sup> Other than husband/wife relation as relatives are considered members of the family up to second degree of relationship (: brother/sister; mother/father; mother-in-law/father-in-law; uncle/aunt (from both sides: mother's and father's family); nephew/niece). See, USAID, Training Course on Regulation of Judicial Conduct, Oct. 2007, p.20.

<sup>135</sup> According to the Bangalore Principles, there might be also ground for disqualification if the judge or a member of his/her family has an economic interest in the outcome of the case (Principle, 2.5.3) or if he/she has served as a lawyer or was a material witness in the case (Principle, 2.5.2).

In a case brought before the European Court of Human Rights<sup>136</sup>, the applicant, a lawyer, was held in contempt for challenging the behaviour of judges at a trial in which he was an advocate. In his contempt hearing, he faced the same judges whose behaviour he had challenged. The Grand Chamber of the European Court of Human Rights found that this raised objectively justified doubts as to the impartiality of the judges. The Court explained that, since the contempt in issue was directly aimed at the judges' behaviour, there was a breach of the principle of impartiality when the same judges heard the contempt matter, on the basis of both the objective and subjective tests.

According to the Bangalore Principles there might be grounds for disqualification of the judge on grounds of bias in the following cases (Commentary, 90):

- (a) If there is personal friendship or animosity between the judge and any member of the public involved in the case;
- (b) If the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case;
- (c) If, in a case where the judge has to determine an individual's credibility, he or she had rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on the judge's ability to approach that person's evidence with an open mind on a later occasion;
- (d) If the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind; or
- (e) If, for any other reason, there might be a real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and the judge's ability to bring an objective judgment to bear on the issues.

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<sup>136</sup> European Court of Human Rights, *Kyprianou v. Cyprus*, No. 73797/01, Judgement of 15 December 2005.

Other things being equal, the more time that has passed since the event that allegedly gave rise to a danger of bias, the weaker the grounds for the objection.

However, according to the Bangalore Principles frequent disqualification may bring public disfavour to the bench and to the judge personally, and impose unreasonable burdens upon the judge's colleagues (Commentary, 66).

### **Questions**

*\_Who must the judge and prosecutor be independent from?*

*\_Why are independence and impartiality required?*

*\_If a judge gives his/her opinion over another's colleague's case is that considered to be "influence" on his/her independence or impartiality?*

*\_How can impartiality be safeguarded?*

*\_By which instruments are the principles of independence and impartiality safeguarded?*

### **Case study 1**

Hashmat is a 17 year boy of Tajik origin accused of stealing two bikes. He has been sentenced by the Primary Court to 2.5 years confinement. His case is now being examined by the Appeals Court.

In the course of the hearing the judge turns to the colleague sitting next to him and loudly says: "From a Tajik what do you expect? It is well known that they are all thieves".

*\_Do you see any risk for the judge being recused in this case?*

*\_Would it make any difference if the judge instead of his colleague he was addressing directly to Hashmat?*

### **Case study 2**

Esmat is 15 years old. He is accused of fighting in the streets with another boy. The prosecutor who investigates his case had some disputes over land in the past with Esmat's father.

*\_Do you believe that this could affect Esmat's case?*

*\_If yes, what could Esmat do to protect himself?*

#### **4.2.1.2. Principle of legality of crimes and sanctions**

Article 40.2 (a) of the Convention of the Rights of the Child provides that *"No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed"*. This is also safeguarded by Article 11.2 of the Universal Declaration of Human Rights (1948), and by Article 15 of the United Nations Convention on Civil and Political Rights (1966).

The principle is also safeguarded by the Afghan Constitution in Article 130 which clearly states that: ***"In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws.***

***If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner"***.



The Constitution makes an exception for the Shia minority but only for cases involving personal matters (e.g. marriage, heritage, etc.) and states in Article 131 that: *"The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect"*.

The principle generally means the law has to be precise and non ambiguous<sup>137</sup>.

The principle of legality has two components and two corollaries:

a) Components of the principle:

- *Nullum crimen sine lege = no crime without a law*
- *Nulla poena sine lege = no sanction without a law*

The first component means that incriminations should be precise in the law. In other words, the judge can not consider as crime a **behaviour that is not precisely described in the law** and the second that **the judge can not impose a sanction which is not prescribed by a law in force**.

At national level, the two components of the principle of legality of crimes and sanctions are safeguarded by the Afghan Constitution and the Criminal Code. Article 27 paras (1) and (3) of the Afghan Constitution clearly contain the *nullum crimen, nulla poena sine lege* concept as it states that: *"1. No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense" and "3. No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of offence"*.

The principle is also incorporated in Articles 2 and 3 of the Criminal Code of 1976 providing respectively that: *"No act shall be considered crime, but in accordance with the law"* and that: *"No one can be punished but in*

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<sup>137</sup> ECHR, *Malone v. U.K.*, 2/8/1984 *Series*, no 82; *Sunday Times v. U.K.* 26/4/1979, *Series*, no 30; *Kokkinakis v. Greece*, 25/5/1993, *Series*, no 260; *X v. France*, 8/6/1995 and also *X v. France*, 27/9/1995.

*accordance with the provisions of the law which has been enforced before commitment of the Act under reference”.*

Regarding the legality of crimes Article 1 of the Criminal Code of 1976 underlines that: “The law regulates the ‘Ta zeeri’ crime and penalties. Those committing crimes of ‘Hodod’, ‘Qessass’ and ‘Diat’ shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence)”.

***Running away from home does not per se constitute a crime either under the criminal code or under sharia law unless it is related to zina. In that case, only the running away from home should not be punished.*** Of course, as behaviour, running away from home is not socially acceptable and shows that the child might be at risk. In that case, (and after due consideration of the personality of the child and the reasons that led the child take such a decision), social measures should be applied, but in no case this child should be considered as being in conflict with law and punished with confinement.

#### **Case study**

Hazrat is a 13 year old boy accused of stealing two breads. He is first time offender. After his arrest a new law has been promulgated providing that minor thefts for first time juvenile offenders will only be punished by warning.

*\_ Given that the law was adopted after the commission of the crime by Hazrat, what would be the outcome of the case? Which provision should apply in his case? The provision already in force at the time of the commission of the crime or the new one?*

#### b) Corollaries of the principles:

- *i) The principle of non-retroactivity of the criminal law:*

The principle means that no law can have retroactive effect in order to punish crimes that have been committed before its entry into force. It means that this law (describing the precise act as a crime and foreseeing its sanction) should be already enforced before the commission of the alleged act.

However, it is considered that if the new criminal law is **more indulgent** than the previous, (e.g. it decriminalises the precise crime, or it foresees less heavy punishment) we should accept the retroactivity of the new provisions. The retrospective application of the criminal law can only take place where it is not to the accused disadvantage<sup>138</sup>.

The principle of legality of crimes and sanctions belongs to a more general frame: that of the **principle of legality**. This general principle requires that **the law should be respected**, and in particular, the Administration should always act within the frame of the law.

It should be noticed that the Law on the Structure and Authority of the Attorney General's Office<sup>139</sup> requires that the prosecutors are duty bound to monitor the respect of the principle of legality. In particular, according to Article 22 of the law, the prosecutors:

- *"Demand explanation regarding the causes of law violations from the responsible officials and citizens (Article 22.5);*
- *Make decisions and present them to the competent organizations in order to settle violation of law and explain administrative responsibility to the violator (Article 22.6);*
- *Monitor and assess the complaints of the citizens and notification of the responsible authorities about the violation of law (Article 22.7);*
- *Monitor the legitimacy of the orders and instructions of the responsible authorities of detention centers and prisons. If the order or instruction is in conflict with the law, the monitoring prosecutor can suspend and object it ((Article 22.16);*
- *Demanding explanations from the authorities responsible for the detention and prison facilities if the provisions of law are violated (Article 22.17);*
- *Release people kept under detention or custody unlawfully (Article 22.18);*
- *Make decision in order to abolish unlawful order or instruction of the responsible authorities of prisons and detention centers (Article 22.19).*

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<sup>138</sup> ECHR, *Kokkinakis v. Greece*, 25/5/1993, Series A No 260-A, p.22; *G v. France*, 27/9/1995, Series A, no 325-B, para 24.

<sup>139</sup> Official Gazette no 738, of April 1991.

This means that the Prosecutors should monitor in particular the Police and detention centers in order to detect and redress any unlawful activities and illegal detention.

***Exercise:***

*Suppose that a crime has been committed which, under the law in force at the time the crime took place, it was considered as felony and for which the law foresaw life imprisonment. After the amendment of criminal code which took place while this case was introduced to the court this crime is no longer considered as a felony but as a misdemeanour and the legislator foresees only 5 years of imprisonment. What punishment should the accused receive?*

- *ii) The principle of strict interpretation of the criminal law:* The second corollary of the principle of legality implies: a) that all the elements of the criminal provision should be fulfilled (proved) in order for the defendant to be sentenced; and b) that there should be no wide interpretation of the criminal law<sup>140</sup>. The defendant should therefore be afforded the benefit of any ambiguities in the language of the text.

For example, in order to convict somebody for burglary the prosecutor has to prove each element of the crime and in particular the breaking and entering a house belonging to another with the intent to commit theft. However, in the case of a boy who broke into a house and claimed that he only wanted to get some sleep, if the prosecutor is not in a position to establish the theft, then he should release the accused boy from the charges of burglary.

Of course, the meaning of provisions is not always clear and, even if it is, interpretation is often needed to reply to questions that might arise in practice. If the wording of a provision is unclear, ambiguous or

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<sup>140</sup> ECHR, 1/7/1961, Lawless v. Ireland, Series A, No 3, p.54; ECHR, De Wilde, Ooms & Versyp v. Belgium, 18/6/1971, Series A, No 12, para 87.

vague this **does not mean** that the judge is free **not to apply the law or to apply a rule of his/her own**. On the contrary, in that case, the judge should seek the intent of the legislature. If the judge can not understand the intent of the legislator, then he/she should release the defendant<sup>141</sup>. It needs to be noticed that **in case of unresolved doubt on the meaning of a provision the judge should always opt for an interpretation which is in favor of the defendant**<sup>142</sup> (: "*in dubio pro mitiore*" or "*in dubio pro libertatae*").

The idea behind the principle is that since only the legislator has the right to define a crime and prescribe a specific penalty, the judge – under the process of interpretation of the law- has no power to construe extensively the law<sup>143</sup>, **or to apply reasoning by analogy in the detriment of the accused person**. A case that is not precisely foreseen by the legislator cannot be treated by analogous reasoning just because it has similarities with another. **For instance, acceptance of reasoning by analogy would allow the judge to simulate to theft the fact to leave from a restaurant and not pay for a meal.**

It has to be noticed that a **large interpretation of the law is considered as acceptable only in case of laws and provisions that are in favour for the defendant**<sup>144</sup>. Generally are considered as *unfavourable to the accused* person the laws that rule the substance of the case (incrimination, culpability, sentencing, etc.) and *favourable to the accused* the laws that rule the procedure. However, there might be laws of substance that could be favourable to the accused as those that introduce e.g. causes of non-culpability, or more mitigating

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<sup>141</sup> See, Gaston Stefani, Georges Levasseur, Bernard Bouloc, *Droit pénal général*, 13th édition, Paris, Dalloz, para 148.

<sup>142</sup> See, Gaston Stefani, Georges Levasseur, Bernard Bouloc, *Procédure pénale*, Paris, Dalloz, 14th édition, para 13. ECHR, Telfner v. Austria, 20/3/2001, Application No 33501/96, para 15-20. See also, ECHR, Lawless v. U.K., 1/7/1961; ECHR, Sunday Times v. U.K., 26/4/1979; ECHR, Welch v. U.K., 9/2/1995, Series A, No 307-A; ECHR, Jamil v. France, 8/6/1995.

<sup>143</sup> See, Gaston Stefani, Georges Levasseur, Bernard Bouloc, *Droit pénal général*, op. cit., para 146.

<sup>144</sup> An extensive interpretation is acceptable if it stays within reasonable limits, ECHR, Enkelman v. Switzerland, 4/3/1985.

causes. In that case, these laws can be extended outside their scope of application, because they are favourable to the accused.

Interpretation of the law is one of the major and most difficult tasks a judge is supposed to accomplish. In addition, it is also a very frequent task, considering that it is rather rare that a law is very clear and precise. However, if a judge arrives to interpret an imprecise, vague or ambiguous law, then it is correct what the Greek philosopher **Platon** has said, that:

***"With a good magistrate a bad law can be endured..."*** (and certainly not the opposite).

***Practice case from other countries :***

Saudi Arabia has one of the highest execution rates in the world, both in terms of number of persons executed and in relation to its population. The Saudi Anti-Drug and Mental Effects Regulation stipulated the death penalty for drug traffickers, manufacturers and recipients of any narcotic substances. However, in 2005, Saudi Arabia redefined its drug trafficking laws, giving discretionary powers to judges and allowing them to hand down jail sentences instead of awarding the death penalty.

Judges could ever since exercise discretion to reduce the death penalty to a sentence of imprisonment for a maximum of 15 years, sessions of 50 lashes, and a minimum fine of 100,000 Saudi riyals [more than 26,000 US dollars].

*\_In your opinion how should a judge treat the cases of persons who were under trial at the time the new law was enforced?*

*\_Which principles apply in this case?*

#### 4.2.1.4. Principle of proportionality

***"Justice is to give what is equal in accordance to proportion. Unjustice is excess and defect. Justice relates to an intermediate amount while unjustice relates to the extremes. The unjust is what violates proportion [...] So, the judge by attributing justice tries to restore inequality which occurred by the crime".***

***Aristotle, Nicomachean Ethics, [1132a-5]***

The principle of proportionality is based on the three sub-principles of **equity, adequacy and necessity.**

Within law, the principle of [proportional justice](#) is used to describe the idea that the punishment of a certain crime should be in proportion to the severity of the crime itself. However, in practice, systems of law differ greatly on the application of this principle. This has led some legal systems to accept as interpretation of the principle the idea of restoration of the damage caused by the perpetrator by causing the same damage to the defendant (*lex talionis*: an eye for an eye). In others, it has led to a more restrictive manner of sentencing. For example, all European Union countries have accepted as a treaty obligation that no crime warrants the [death penalty](#), whereas other countries in the world still use it.

This principle -set as one of the objectives of juvenile justice in Beijing rules<sup>145</sup>- is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the **gravity of the offence**, but also of **personal circumstances**. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

**In other words, the principle of proportionality implies that there should be a balance between the act (of the crime) and the person (of the offender).**

In juvenile law this balance is obtained (according to Rule 17.1 of the Beijing rules) if the reaction for the crime committed is taken **in proportion not only to the gravity of the offence, but also to the circumstances<sup>146</sup> and the needs of the juvenile as well as of society's**. We should never forget that the guiding factor in the consideration of a juvenile's case is the **well-being of the juvenile** (Beijing Rule 17.1.d).

Therefore, in the case of detention for example, it results from the principle of proportionality that: ***"Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offenses and unless there is no other appropriate response"*** (Beijing Rules 17.1 (c)) and not simply because alternatives can not be easily implemented.

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<sup>145</sup> See commentary of Rule 5 of Beijing Rules.

<sup>146</sup> Specific circumstances determine each time the choice of the appropriate sanction or measure to take and often put in second position the objective gravity of the offence. ECHR, 27/2/1980, Deweer v. Belgium, Series, no 35.



It should also be noticed that the principle should also apply at the stage of investigation for the preparation of the indictment by the Prosecutor. Article 5 of the Law on the Structure and Authority of the Attorney General's Office expressly requires from the prosecutors that:

*"In all instances related to violations of law, the prosecutor offices are duty bound to take all necessary measures in order to eliminate it and considering the **principle of proportion** of crime with punishment, attribute the criminal responsibility to the perpetrator of the crime and to seek punishment pursuant to guidelines set forth by law"*(emphasis added).

### **Case study 1**

Frozan is a 15 year old girl. Her mother has been deceased and her father has been remarried to another woman who was rich. Her stepmother was always mistreating her. Her step-mother accused her for stealing two rings from her. Frozan is sentenced by the Primary Court to 5 years for theft.

*\_In case you have concluded that Frozan has committed the crime do you believe that this sanction is proportionate to her crime?*

*\_Do you believe that the Court has balanced correctly the gravity of the crime, together with the personality of the defendant and the circumstances of the crime?*

### **Case study 2**

Fatima is a 16 years old girl. Her parents were arranging for her to be married with a 40 year old man she did not want to marry. She ran away from home. Now she is being sentenced by the Appeal's Court to 7 years of confinement for running away from home.

*\_In case you have concluded that Fatima has committed a crime do you believe that this sanction is proportionate to her crime?*

*\_How would you treat this case?*

### **Case study 3**

Ashraf is an 18 years old boy. His family has 13 members. He is being accused for the theft of two mobiles. The Primary Court sentenced him to 2.5 years of confinement. He believes that the punishment is long and that if he had money he wouldn't be imprisoned.

*\_Do you believe that this sanction is proportionate to Ashraf's crime?*

#### **4.2.2. Procedural safeguards**

No legal process could be considered fundamentally fair without affording an opportunity for the parties to participate in a meaningful and effective manner. The right to meaningful participation, covered under **the Principle of Due Process of Law**, is the recognised right of any person accused of an offence to benefit from a fair trial, which has a wide variety of aspects including both substantial and procedural safeguards. It has to be stressed that all of the procedural guarantees can be protected only with competent legal guidance. The principle of due process is considered to have the status of a peremptory norm made up of components of the principle of equality (with its sub-principles of Equal Access to the Courts and to Justice; Equal Treatment by the Courts; and Equality of Arms) and the rule of law itself.

**Many of the elements of due process come into force at the moment of arrest as guarantees of the defendant: presumption of innocence, right to be informed of exact charges, right to legal assistance, the right not to be forced to confess or to give incriminating evidence, etc.** The trial is not deemed to be fair if these rights are violated<sup>147</sup>.

The Afghan Constitution (Articles 29-31); and ICPC (Articles 5(5-7), 31, and 53.g), guarantee the major procedural rights for the accused person.

In particular regarding proceedings of child offenders the CRC lays down a minimum cluster of guarantees that should be safeguarded. In particular, Article 40.2 (b) of CRC provides that:

*"(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

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<sup>147</sup> UNICEF-AIHR, *Justice for children*, op.cit., p.13.

- (i) To be presumed innocent until proven guilty according to law;*
- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;*
- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;*
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;*
- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;*
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;*
- (vii) To have his or her privacy fully respected at all stages of the proceedings.*

The above mentioned rights are also included and guaranteed by other international instruments, such as the Beijing Rules (Beijing Rules 7.1, 8, 15). However, in practice, reports<sup>148</sup> show that police, prosecutors and judges persistently and consistently do not respect, or at times are not aware of, procedural rights, even when explicitly provided for in Afghan law.

Procedural protections are frequently viewed as unnecessary, or hindrances to investigations and convictions, rather than as protections against injustices, such as prolonged detention of innocent people. UNAMA<sup>149</sup> reports that

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<sup>148</sup> UNAMA-OHCHR, *Arbitrary Detention. A call for action*, (Jan.2009), Vol. I, p.13.

<sup>149</sup> *Ibid.*, p.16.

police, prosecutors, and judges who are aware of detainees' rights on many occasions wilfully chose to ignore the detainees' rights in pursuit of a confession, indictment, or conviction. As explanation they assert that "*human rights hinder their work*".

Under the present section we will examine: a) the Presumption of innocence, (even if it is included in the cluster of rights which compose the concept of a fair trial we examine it separately because of its importance); b) The different aspects of the concept of the right to a fair trial; c) The obligation for the court to motivate its decision which is considered serious enough to render it into a principle (of motivation); and d) The right of the defendant to have his case examined by a higher court, that is the right to form a recourse.

#### **4.2.2.1. Presumption of innocence**

The presumption of innocence is considered to be one of the major guarantees for juveniles safeguarded, as mentioned above, by Article 40.2.(b) (i) of CRC stating that **a child alleged as or accused of having infringed the penal law should be: "*presumed innocent until proven guilty according to law*"**. The principle is also safeguarded by Article 11 para 1 of the Universal Declaration of Human Rights, Article 14 para 2 of the International Covenant of Civil and Political Rights as well as by other international instruments. It needs to be noticed that in some international instruments it is expressly referred to as a right (as this is the case of Article 11 of the Universal Declaration of Human Rights and of Article 14 para 2 of the Covenant on Civil and Political Rights), while in others it is not expressly mentioned (as for example in Article 6 para 2 of the European Convention on Human Rights and in the Article 48 para 1 of the Charter for Human Rights where there is no such reference).

The principle applies also even if the crime is considered not punishable by effect of a mitigating fact or a legal excuse that leads to acquittal or if there is a filing of the case<sup>150</sup>.

Article 25.2 of the Afghan Constitution states that: “[a]n accused is considered innocent until convicted by a final decision of an authorized court”. Additionally, Article 4 (1) of the Criminal Code provides that: *“Innocence (acquittal) is the original state. The accused shall be considered innocent as long as he is not convicted by a final verdict of a competent court”*. In the same spirit also Article 4 of ICPC is more detailed in the safeguard of the principle precisating that: *“From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth”*.

As indicated in a study conducted in 1993<sup>151</sup> sixty-seven countries of the world then included a right to presumption of innocence in their national constitutions.

The presumption works in practical ways to allocate burdens of proof and to guarantee protection of the defendant’s liberty rights before trial. In a criminal trial, the presumption of innocence is given force through the obligation of the prosecution to produce evidence of guilt, the defendant’s right to stand mute in the face of such accusations, and the prosecution’s burden to prove guilt beyond a reasonable doubt.

Presumption of innocence means that a person is presumed innocent **until proven guilty** upon formal findings (legal evidence). This means that **presumption (assumption) of guilt is unacceptable**<sup>152</sup> until the precise criminal act is proven beyond any reasonable doubt. Unfortunately this

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<sup>150</sup> The case law of ECHR considers the presumption of innocence as element of the general concept of fair trial as safeguarded in Article 6 para 1 of the European Convention of Human rights. ECHR, 6/12/1988, Barberà, Messegué et Jabardo v. Spain, Collection Series, no 146.

<sup>151</sup> See, M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions”, DUKE Journal of Comparative & International Law, (3) 1993, p.235.

<sup>152</sup> See the case law of the ECHR, Minelli v. Switzerland, 25/3/1983, Series A, No 62; ECHR, Salabiaku v. France, 7/10/1988, Series, No 141-A, para 27-28.

principle is very often violated in practice in favour of an easy establishment of guilt or of the rapidity of the process. Partly, presumption of innocence overlaps with the principle of impartiality.

**For example:**

If a girl has run away from home this fact alone does not allow the court to come to the assumption that she has committed *zina* until specific legal evidence has been established.

However, prompt provision of competent legal assistance, a lawyer where required or possible, is one of the best means to honor the presumption of innocence.

Presumption of innocence will be violated if without the accused having previously had the opportunity to exercise his/her right to defence a judicial decision concerning him/her reflects an opinion that he/she is guilty.

The greatest obstacle to the realization of an operative presumption of innocence lies in the extensive use of preventive detention or other forms of pre-trial incarceration. **Normally, according to the principle preventive detention should be avoided.** The Juvenile Code (Art.10) foresees the detention of the juvenile only in case of risk of flight, alteration of documents and evidence or risk of repetition of a new crime.

Unfortunately, various researches show that pre-trial detention in juvenile cases in Afghanistan rates 50% and sometimes it exceeds two-thirds of all accused persons<sup>153</sup>. Massive pre-trial incarceration makes it almost impossible for preparation of a defense, in that access to the defendant may be limited in prison or jail. The defendant is unable to effectively contribute to the

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<sup>153</sup> See, UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation, Assessment Report*, May 2008; AIHRC-UNICEF, *Justice for Children. The situation of children in conflict with the law in Afghanistan*, p.9; UNAMA-OHCHR, *Arbitrary Detention in Afghanistan. A call for action*, Vol. I & II, Jan. 2009.

development of a defense strategy without access to witnesses and evidence that he may be the most capable to find<sup>154</sup>.

-Scope of the principle:

The principle covers every person residing in the country (third nationals too) accused for the commission of any type of offence and **extends especially to those not yet formally charged with a crime but without the funds to hire a counsel**. So, that means that it extends from the moment of police arrest throughout the entire procedure and until the issuance of an irrevocable decision on the case.

It implies also that the proof of guilt should be established upon **legal evidence** taken by **legal means** and relying on **legal rules** of national law.

**For example:**

Confess of the defendant taken by the use of force, violence and other means that constitute inhuman or degrading treatment<sup>155</sup> are not allowed and violate the principle. As a consequence they render the process null.

It should be noticed that **the principle binds all persons participating in trial under any quality: judges, prosecutors, state officials, lawyers, social workers or clerks. The principle binds also reporters of the media. The media have the obligation according to the Juvenile Code** not to reveal information about the child's personality or information that can result in identification of the child (Art.32 para 3).

Corollary to the presumption of innocence is the **right not to incriminate oneself**. This is actually the consequence of the presumption of innocence. It means that since the "burden" of proof falls in the obligations of the prosecuting authority the defendant has the right to remain silent. So, he has

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<sup>154</sup> The Inter-American Court of Human Rights has found that prolonged pre-trial detention violates the presumption of innocence. See, *Suárez Rosero v. Ecuador*, reported (in English) in: *Inter-American Court of Human Rights (IACourTHR), Costa Rica, Judgment of 12 November, 1997: Suárez Rosero Case, Human Rights Law Journal*, (19) 1998, p.229, 238.

<sup>155</sup> On the issue of questioning the defendant see below under the section of investigation for more details.

the right to refuse the charges against him and not confess any fact that would incriminate him. The silence of the defendant should not be taken as an evidence for his guilt (even if this is what happens in practice for the majority of cases).

### **Case study 1**

Zafar is a 14 year old boy who is accused of stealing a bike. It is the first time that he is accused. He was only seen near the bike. However after some beating from the Police he confessed that he was the one who stole it. The court has issued an order for pre-trial detention and he is now being detained at JRC. Zafar has not been examined yet by the prosecutor. His case is under investigation for the last 6 months.

*\_Do you believe that Zafar should be detained?*

*\_If yes, which are the elements that could support this position?*

*\_Do you see any principle (s) violated in this case?*

### **Case study 2**

Mohammad is a 15 years old boy. He is the youngest of a family of twelve members which is very poor. He used to work hard to assist his family. He did not have time to go to school. He is illiterate. Now he is detained in JRC for murder. It is the first time that he is convicted. The Appeal's Court has given him 5 years for the murder of a relative.

He claims innocent. It was an accident he says. He had an argument with his cousin. His cousin insulted him. Mohammad pushed his cousin who fell and hit his head and as a consequence of that he died. The Court didn't believe him because he didn't have any witness.

*\_Do you believe that the Court should let Mohammad speak even if he had a lawyer who represented him?*

*\_Do you think that this sentence is fair for the accidental cause of Mohammad's cousin death?*

*\_Does Mohammad's way of living should play a role to his sentencing?*

*\_Should any one inform him of his rights during his confinement?*



### **Case study 3**

Ali is a 14 years old boy who is accused of injuries.

During investigation the Prosecutor examines Ali and asks him to give his explanation about the facts. Ali instead of presenting himself he sends a letter to the prosecutor saying that he does not intend to appear and explain anything to the prosecutor because he is presumed innocent and it is the prosecutor's obligation to prove that he is guilty.

*\_Even if the prosecutor does not have any real evidence on the case will the attitude of Ali affect the prosecutor's decision on the indictment?*

*\_Will the attitude of Ali affect the prosecutor's decision for pre-trial detention?*

### **Case study 4**

Sahar is 14 years old and sentenced to 3 years in confinement from the Appeal's Court for adultery. She claims that her punishment is unjust because she has not committed any crime. She only ran away from home to escape from her violent father. She went to the house of her cousin to ask for help but she got arrested because her father had called the police. There was no evidence that she had committed adultery; only the fact that she left her father's house and got to her cousin's.

*\_Do you see any contradiction with the presumption of innocence?*

#### **4.2.2.2. The right to a fair trial<sup>156</sup>**

The notion of a "**fair**" hearing is contained both in article 14(1) of the International Covenant on Civil and Political Rights (as well as in regional

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<sup>156</sup> See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, Chapter 7 - The Right to a Fair Trial: Part II. For a comparative analysis of the jurisprudence on the right to a fair trial, see Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, pp. 478-594.

instruments such as Article 6(1) of the European Convention on Human Rights, while article 8(1) of the American Convention on Human Rights speaks of “*due guarantees*”). Sometimes the concept of “fair trial” is confused with the concept of “due process of law” as referred to above.

The “minimum requirements for a fair trial<sup>157</sup>”, according to the Bangalore Principles of Judicial Conduct consist in the observance by the judge of the following rights to the parties:

- (a) Adequate notice of the nature and purpose of the proceedings;
- (b) Be afforded an adequate opportunity to prepare a case;
- (c) Present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means;
- (d) Consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings;
- (e) Consult an interpreter at all stages of the proceedings, if he or she cannot understand or speak the language used in the court;
- (f) Have his or her rights or obligations affected only by a decision based solely on evidence known to the parties to public proceedings;
- (g) Have a decision rendered without undue delay. The involved parties should be provided with adequate notice of, and the reasons for, the decision; and
- (h) Appeal, or seek leave to appeal, decisions to a higher judicial tribunal, except in the case of the final appellate court”.

From the above mentioned rights we will examine under this section the following:

- i. The right to defence;
- ii. The right to be heard in person;
- iii. The right not to testify against oneself, including the

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<sup>157</sup> By its resolution 1994/35 of 26 August 1994, the Sub-Commission on Human Rights of the Economic and Social Council recommended to the Commission on Human Rights to consider at its fifty-second session the establishment of an open-ended working group to draft a third optional protocol to the International Covenant on Civil and Political Rights aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. (E/CN.4/Sub.2/1994/24, annex II); [http://www.bayefsky.com/reform/e\\_cn4\\_1995\\_81.php](http://www.bayefsky.com/reform/e_cn4_1995_81.php)

- right to remain silent;
- iv. The right to a trial without delay and to a decision within a reasonable time; and
- v. The right to an interpreter.

The right to appeal will be examined in a separated section below.

It should be noticed that a prerequisite of a fair trial is the implementation of the **principle of equality and non-discrimination**<sup>158</sup> as enshrined in Art.14 of the International Covenant on Civil and Political Rights and safeguarded by Article 10 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan. The principle recognizes that "*all persons*" are "*equal*" before the courts and they are entitled to a "*fair and public hearing*" in the determination of any "*criminal charge*" or of "*rights and obligations in a suit at law*" by a "*competent, independent and impartial*" tribunal "*established by law*".

The term of 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, **and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms**<sup>159</sup>.

However, as noted by the Human Rights Committee of the International Covenant on Civil and Political Rights, "the enjoyment of rights and freedoms on an equal footing ...**does not mean identical treatment in every instance**". In support of this statement, it points out that certain provisions of the Covenant itself contain distinctions between people, for example article 6(5) which prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women.

The Principle of equality before the courts refers to: **equality of access to the courts; equality of treatment before the courts** and **equality of**

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<sup>158</sup> See, OHCHR, *Human Rights in the Administration of Justice*, op. cit., Chapter 13.

<sup>159</sup> Ibid., p.651.

**arms** (: weapons)<sup>160</sup> as safeguarded by Art.6 and 7 of the Regulation of Judicial Conduct<sup>161</sup>.

Perhaps the most easily recognized conception of the right of equality lies in the notion that people should not be discriminated against because of their poverty. Both the International Covenant on Civil and Political Rights (Article 2.1) and the International Covenant on Economic, Social and Cultural Rights (Article 2.2), prohibit discrimination based on "*property... or other status*". This explicit prohibition against discrimination based on property ownership or status, which certainly includes one's financial means, provides also the basis for the right to legal assistance (in both civil and criminal cases)<sup>162</sup>.

a) The Principle of Equal Access to the Courts and to Justice<sup>163</sup>: There is no explicit provision in human rights treaties discussing "access" to courts as a principle of international human rights law. The concept is implicit in the statement that "all persons shall be equal before the courts and tribunals," found in all major human rights treaties. Thus, establishing separate standards for access to courts by men and women (hereupon: boys and girls) violates this principle, as does the giving of different weight to the evidence provided by different gender, or according to the status as witness<sup>164</sup>.

b) The Principle of Equal Treatment by the Courts: There are two ideas at play in the principle of equal treatment by the courts: i) the basic idea that the opposing parties will be given an equal opportunity to prepare and present their cases before the court (: known as the principle of equality of

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<sup>160</sup> See, Richard J. Wilson, "Principles, Sources and Remedies for Violation of the Right to Assigned Legal Assistance in International Human Rights Law", February 5, 2002; Electronic copy available at: <http://ssrn.com/abstract=1028900>

<sup>161</sup> Article 6 states that: "*A judge, while considering a case, shall pay solemn attention to the litigants and shall carry out the proceeding on the basis of equality of both parties before the law and court, and shall not grant any kind of distinction or privilege to any of the parties. A judge shall not hear a party or representative of a party on a matter that might influence his or her ruling in the absence of the other party or the party's agreement*".

Article 7 al.1 requires that: "*Every litigant shall have the right to freely attend a court proceeding; hence, a judge shall not allow any type of limitation in the enjoyment of this right upon any litigant*".

<sup>162</sup> See, UNODC, (2009), *Strategies and Tactics for Defending Juvenile Cases*.

<sup>163</sup> Carol Harlow, "Access to Justice as a Human Right: The European Convention and the European Union", in: *The EU and Human Rights*, 1999, p.187.

<sup>164</sup> Amnesty International, *Fair Trials Manual*, 1998, Section 11.2.1.

arms, as referred to below) and ii) that persons charged with similar offenses will be prosecuted in a similar fashion. So long as the cases are objectively similar, a court will treat them equally, **regardless of *who the defendant*** is or whether the case is “politically” motivated or not<sup>165</sup>.

c) The Principle of Equality of Arms: This principle means that in civil or criminal proceedings, “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”<sup>166</sup>. In criminal cases, however, “*where the very character of the proceedings involves a fundamental inequality of the parties*”, the principle is even more important<sup>167</sup>.

The principle applies in civil as well as in criminal cases. In criminal cases it appears whenever there are criminal “charges” against a person. The “charges” according to the case-law of the European Court for Human Rights are defined as: “*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*”<sup>168</sup>.

It should be noticed that Article 15 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan<sup>169</sup> requires that:

*“Whenever it is noticed by a judge while considering a case that the basic rights of the accused were violated during the investigation and detection of the crime, upon the conclusion of the case, the judge shall be required to issue a decision identifying the violation and forward the decision to the appropriate authority for further proceedings and possible prosecution”.*

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<sup>165</sup> See Article 10 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan, as mentioned above.

<sup>166</sup> European Court of Human Rights, *Dombo Beheer v. The Netherlands*, 27/10/1993, Series A, No 274. It can be found at: <http://www.echr.coe.int>.

<sup>167</sup> P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d Ed. 1998, p.430.

<sup>168</sup> ECHR, *Deweere v. Belgium*, 27/2/1980, Series A, no 35, p.22; ECHR, *Foti v. Italy*, 10/12/1982, Series A, no 56, p.18; *Minelli v. Switzerland*, 25/3/1983, Series A, no 62, p.15.

<sup>169</sup> See the Commentary of the Regulation, USAID, *Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan Training Course*, October 2007, p.41.

***i. The right to defence<sup>170</sup>:***

The right to defence expresses a principle of superior protection of the accused person which is common in every civilised nation. It is very closely related to the presumption of innocence and it is considered to enclose the right to legal assistance, but also the right to be promptly informed of all charges<sup>171</sup>; the right to have enough time for preparing ones defence<sup>172</sup>; the right to be informed of all information contained in the file; the right to defend oneself; and the right to examine witnesses<sup>173</sup>.

There are several important international human rights treaties and declarations that deal with the right of legal assistance, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As mentioned above the CRC in Article 40.2.b (ii) expressly enshrines the right to every child alleged as or accused of having infringed the penal law: "to have legal or other appropriate assistance in the preparation and presentation of his or her defence". Also during each stage of the trial the child is entitled to have the presence of legal or other appropriate assistance (Article 40.2.b (iii)).

This guarantee is endorsed in Article 22 of JC that provides that:

*1. "In all stages of investigation and trial, the child shall have the right to a defence counsel and interpreter.*

*In case the parents or legal representative cannot afford a defence counsel or interpreter, the juvenile court shall appoint a defence counsel and interpreter on government costs.*

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<sup>170</sup> See, UNODC (2009), *Strategies and Tactics for Defending Juvenile Cases*.

<sup>171</sup> ECHR, Brozicek v. Italy, 19/12/1989, Series, no 167.

<sup>172</sup> ECHR, Deweer v. Belgium, 27/2/1980, Series, no 35.

<sup>173</sup> According to the ECHR a State should enable the accused to examine or have examined witnesses against him. See, ECHR, Barbera, Messegué and Jabardo v. Spain, 6/12/1988, Series A, no 146, p.33-34; ECHR, Sadak v. Turkey, 10/7/2001, Applications no 29900 and 29903/96, para 67; ECHR, Luca v. Italy, 27/2/2001, Application no 33354/96, para 41.

2. *The legal representative, defence counsel or the interpreter of the child has the right to be notified and participate in all stages of legal proceedings carried out by the prosecutor or the court.*
3. *Absence of child's legal representative during investigation can not stop the investigation process unless the prosecutor deems his/her presence necessary".*

The right to the **presence of a defence council**, according to the interpretation of this international guarantee, means that an accused person should first have the possibility to have **access to a lawyer** from the initial stage of the criminal proceedings<sup>174</sup>; so even from the time the person is only considered as suspect and at the moment of police arrest<sup>175</sup>. The right to a defence attorney from the time of arrest is safeguarded by Article 11 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851) as it foresees that: *"Each person shall be entitled to a defense attorney immediately after the person's arrest to remove the accusation charged against. In criminal cases, there shall be assigned defense attorneys for the destitute in accordance with the relevant legislation".*

It needs to be noticed that in juvenile law this right seems to face some restrictions. Paragraph 3 of Article 22 of JC provides that: *"Absence of child's legal representative during investigation can not stop the investigation process unless the prosecutor deems his/her presence necessary".* However, this does not mean that the prosecutor has the right to refuse the appointment of a defence council, nor to refuse to give information contained in the file, but only to consider if the presence of a council during the entire investigation should be necessary according to the best interest of the child.

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<sup>174</sup> Article 5 of ICPC clearly provides that: *"7. The police, the Saranwal and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defense counsel, and right to be present during searches, line-ups, expert examinations and trial. 8. The words or terms "suspect" and "accused" also include in their definition his/her defense counsel".*

<sup>175</sup> ECHR, John Murray v. U.K., 8/2/1996, Reports of Judgments and Decisions, 1996-I, p.54, where the Court has accepted violation of the right to legal assistance because the accused has been refused legal assistance during his detention by the police. For a similar approach, ECHR, Goedhart v. Belgium, 20/3/2001, Application No 34989/97.

It is necessary to examine in each case if the restriction (initially for a good cause) has deprived the child of the right to a fair trial<sup>176</sup>.

However, the European Court for Human Rights is of the opinion that *"it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation"*<sup>177</sup>. This is also related to the right of the accused to remain silent as we will see below.

As for the defence council it should be noticed that legal assistance can only be properly offered by a **qualified professional**, as required by **Article 18 (1) of ICPC**<sup>178</sup>.

It is common in Afghanistan that in juvenile cases the child is not represented by a lawyer<sup>179</sup>, but from his parents or elders in the family. In many areas assumptions exist that an innocent person does not need a lawyer and so that only the guilty person hires one<sup>180</sup>.

However, being represented by a member of the family is not always appropriate and efficient, because:

- a) Parents are not qualified with the legal knowledge a criminal case calls for (unless they are lawyers themselves) and
- b) Children might feel unable to reveal certain truths if their parents are present. Besides, in many cases parents are responsible for their children being in conflict with law, either because they have neglected them or, on the contrary, because they might have been very harsh to them, or even because they have not given them the values they should.

As for the right to be promptly informed of all charges, we should first notice that it is very crucial for the defence of the accused. *"An indictment plays a crucial role in the criminal process, in that from the moment of its service that*

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<sup>176</sup> ECHR, Murray v. U.K., 8/2/1996, Reports, 1996-I, p.14.

<sup>177</sup> Ibid.

<sup>178</sup> According to Article 18 (1) ICPC: *"Legal assistance to the suspect and the accused requires the service of a qualified professional"*.

<sup>179</sup> Reports show that Afghans generally are not informed of their right to a defense counsel or to present their own defense, nor do they generally enjoy access to defense counsel or the ability to present their own defense. See, UNAMA-OHCHR, *Arbitrary Detention. A call for action*, (Jan.2009), Vol. I, p.13.

<sup>180</sup> UNAMA-OHCHR, *ibid.*, p.16.



*the defendant is formally put on written notice of the factual and legal basis of the charges against him/her*<sup>181</sup>. Its important role comes especially during the detention where it is not only important to be informed of the charges, but to be **promptly** informed.

The meaning of Article 40.2.b (ii) of CRC is that the child should be informed of the charges without delay which might result to a long period of informal detention.

In addition, the right to be promptly informed of all charges includes also the right to be informed in a language that the accused can understand, and in that sense it relates to the right to have an interpreter (see below).

Sometimes the question of redefinition of charges might arise. The right to be informed includes not only the right to be informed of the cause of accusation (: meaning the acts the accused is alleged to have committed and on which the indictment is based), but also, **in detail, the legal qualification of these acts**<sup>182</sup>. It also includes the right to have **enough time for preparing ones defence**<sup>183</sup>.

### **Example**

In the *Sadak and Others v. Turkey*<sup>184</sup> case, the applicants complained that the characterisation of the charges against had been altered at the last hearing of their trial. They had initially been charged with separatism and undermining the integrity of the State. On the day on which the judgment was delivered, however, the National Security Court asked them on the spot to prepare their defence to a new charge, namely belonging to an illegal armed organisation, but then dismissed their application for further time to prepare their defence against the new charge. The applicants maintained that they had not been able to defend properly themselves and to adduce evidence against this new charge. The ECHR retained a violation of the right

<sup>181</sup> ECHR, *Kamasinski v. Austria*, 19/12/1989, Series A, no 168.

<sup>182</sup> ECHR, *Pelissier and Sassi v. France*, Application no 25444/99.

<sup>183</sup> ECHR, *Deweert v. Belgium*, 27/2/1980, Series, no 35.

<sup>184</sup> ECHR, *Sadak and Others v. Turkey*, 10/7/2001, Application no 29900/96 and 29903/96. For the meaning of "adequate time" see also, ECHR, *Campbell and Fell*, 28/6/1984, Series A, No 80, p.45.

to a fair trial, in particular the right to have adequate time for the preparation of their defence (as safeguarded in Article 6-3.b of the European Convention for Human rights).

There are several situations in the course of trial proceedings that may amount to a violation of the right to defence. The right to defence and furthermore to a fair trial was violated in a case where the trial court failed *"to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present" the author's defence*<sup>185</sup>.

### **Case study 1**

Aziz is 15 years old. He is detained in JRC for murder. He is sentenced from the Appeal's Court to 10 years of confinement. He is accused of killing a relative during a fight. He would like to appeal to the Supreme Court but he does not have a lawyer. The previous one left at the middle of the hearing when he heard that his parents did not have enough money to pay him.

*\_In the above case what should the judge do about it?*

### **Case study 2**

Abdullah is 17 years old and he is sentenced by the Primary Court to 4 years for selling drugs. On his demand to see a lawyer the police told him that he is entitled to have a lawyer after the official issuance of the indictment. They told him that the fact that he asks for a lawyer speaks for itself about his guilt.

*\_Do you agree with the arguments of the Police? Yes or no? Explain why in both cases.*

## ***ii. The right to be heard in person:***

<sup>185</sup> Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), in UN doc. *GAOR, A/55/40* (vol. II), p. 176, para. 8.2. The author alleged inter alia that the court room was crowded with people who were screaming that he should be sentenced to death; *United Nations Compilation of General Comments*, p. 173, para. 3.5.

According to the CRC the child has the right to express its views freely in all matters affecting its person (Article 12.1). In particular, the child should be provided the opportunity to be heard in any judicial or administrative proceedings affecting him/her, either directly, or through a representative or an appropriate body<sup>186</sup>, in a manner consistent with the procedural rules of national law (Article 12.2).

According to the Bangalore Principles of Judicial Conduct the principle means that the accused can present arguments and evidence, and meet opposing arguments and evidence, either in writing, orally or by both means.

However, enjoyment of freedom of expression and opinion, (as well as other freedoms such as conscience, religion, freedom of association and assembly), is in many instances fragile, even in countries with an otherwise largely acceptable human rights record. It is therefore essential that judges, prosecutors and lawyers in every society be made aware of the importance of their efficient protection<sup>187</sup>. Although the exercise of some freedoms may be subject to limitations when necessary for certain legitimate purposes, the legal professions are well placed to strike an indispensable –but fair– balance between, on the one hand, the individual’s interest in maximizing the enjoyment of his or her freedoms and, on the other, society’s general interest in enabling all human beings to enjoy respect for the same freedoms. The large body of international jurisprudence in this area offers valuable guidance in this regard.

Restrictions to the child’s right to freedom of expression can only take place according to Article 13 CRC only if they are provided by law and are necessary:

- (a) For respect of the rights or reputations of others; or
- (b) For the protection of national security or of public order, or of public health or morals.

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<sup>186</sup> In practice many children are not informed of their right to defend themselves or to call for a defence council, See UNODC, Assessment report. Also, UNAMA-OHCHR, *Arbitrary Detention. A call for action*, (Jan.2009), Vol. I, p.13.

<sup>187</sup> See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, p.629.

The Juvenile Code sets as an objective of the Code in Article 2: "*Hearing children's view or their legal representative during investigation and trial*".

**This should not mean that if a juvenile is represented by a lawyer he/she does not have the right to speak.** On the contrary, **even if the juvenile is represented it is preferable that the prosecutor and the judge examines and ask him/her questions in order to assess its level of maturity and understanding of the case.**

For example: The child might be in urgent need of therapeutic measures (if suffering of mental disorder). Unfortunately, in practice and mainly for reasons of acceleration of the procedure, judges and prosecutors rarely ask the juvenile to express his/her views. This, together with the fact that often the legal representative might not be a lawyer or might be appointed by the State at the very last minute drive the juvenile offender into a situation where there is no fair trial for his case.

### **Case study**

Frozan is a 15 year old girl. Her mother has been deceased and her father has been remarried to another woman. Her stepmother was always mistreating her. Her step-mother accused her for stealing two rings from her and she is now sentenced by the Primary Court to 5 years for theft.

She claims that she's been wrongfully accused and that she never stole that jewelry, but the police and the Court believed her stepmother. The Police forced her to confess by beating her every day during her 3 days arrest.

She tried to say all that during her examination by the Prosecutor and at the Court but no one has let her speak. They told her that since she has a lawyer she does not have the right to speak. Her lawyer did not say anything about that at the Court.

*\_Do you believe that Frozan had the right to be heard in person even if she had a lawyer?*

*\_What are the elements that should be taken into consideration by the court before reaching the decision?*

*\_Do you believe that the Court has balanced correctly the gravity of the crime, together with the personality of the defendant and the circumstances of the crime?*

*\_Do you believe that the Court has been impartial on its judgment?*

***iii. The right to not testify against oneself, including the right to remain silent***

As already mentioned, the right not to incriminate one self is the consequence of the presumption of innocence. It means that since the prosecuting authority has the "burden" to collect all the evidence that prove the commission of the crime, the defendant has the right to remain silent. Thus, he has the right not only to refuse the charges against him, but also not to confess any fact that would incriminate him.

This right is safeguarded in national law by Article 5 of ICPC requiring (among other things) from the police, the Saranwal and the Court *"to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent..."*

The silence of the defendant should not be interpreted as element for his guilt, even if in practice this is what happens in the majority of cases. Unfortunately, forced 'confessions' are regularly reported<sup>188</sup> during pre-trial detention, which is often used as an interrogation tool rather than as a protective or preventative mechanism. It appears that the Courts also are not consistently upholding these rights nor have they disqualified evidence obtained by coercion, thereby casting doubt on the veracity of a charge or conviction<sup>189</sup>.

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<sup>188</sup> UNAMA-OHCHR, *Arbitrary Detention*, op. cit., p.13.

<sup>189</sup> Ibid.

*"The presumption of guilt creates the conceptual foundation for many arbitrary detentions in Afghanistan. Presuming guilt prejudices the criminal justice system towards detaining the accused pre-trial, corrodes respect for the detainees' rights, and renders ineffective many procedural protections. It is compounded by a general attitude that those guilty of crimes, even after having completed their sentence, are not entitled to dignity and justice"<sup>190</sup>.*

It is very often that conclusions might be drawn from the accused's silence. According to the European Court for Human Rights<sup>191</sup> *"the national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is 'guilty'. Conversely, if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt"<sup>192</sup>.*

For that reason *"it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation"<sup>193</sup>. The Court believes that "at the beginning of police interrogation an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him... On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him"<sup>194</sup>.*

## Case study

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<sup>190</sup> Ibid., p.15.

<sup>191</sup> ECHR, Murray v. U.K., 8/2/1996, Reports, 1996-I, paras 51-54.

<sup>192</sup> Ibid. Also in the same direction, see ECHR, Averill v. U.K., 6/6/2000, application no 36408/97.

<sup>193</sup> ECHR, Murray v. U.K., ibid., p.14.

<sup>194</sup> Ibid.

Faisal is 16 years old and he is sentenced by the Primary Court to 4 years for selling drugs. During his arrest by the Police he was mistreated to confess but he did not say anything. They told him that by his silence he aggravates his situation. He asked to see a lawyer before he says anything. Faisal claims innocent. The only evidence against him was the confession by another boy that he bought drugs from Faisal. He did not confess, but his silence and the testimony of the other boy were enough for the Court to sentence him.

\_ *What do you think about the silence of Faisal?*

\_ *What should the Court do before sentencing Faisal?*

#### ***iv. The right to a trial without delay and to a decision within a reasonable time***

Article 40.2.b (iii) of CRC provides that every child alleged as or accused of having infringed the penal law has the right *"to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance"*.

First of all this guarantee means that the accused has the right to be brought promptly before a judge. It should be noticed that in criminal matters time begins to run as soon as the person is charged. Thus, the starting point of this guarantee is at a time prior to the case coming to court, such as the date of arrest, the date when the person concerned was notified that he would be prosecuted or the date when preliminary investigations were opened<sup>195</sup>.

The right to a fair trial without delay, which is complemented by the right to be tried within a reasonable time or released, is designed to minimize deprivation of liberty to that which is strictly necessary and reasonable. It also helps ensure that there are lawful grounds for detention. **The right to be released if not tried within a reasonable time ensures that unnecessary delays do not infringe on the detainee's right to liberty.** Both flow directly from the presumption of innocence and the principle that

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<sup>195</sup> ECHR, *Eckle v. Germany*, 15/7/1982, Series A, no 51, p.33.

detention should not be the general rule and be for the shortest period possible<sup>196</sup>.

According to the Bangalore Principles "A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness"(Principle, 6.5).

'Prompt' disposition of the court's business requires a judge to be punctual in attending court and expeditious in determining matters under submission and to insist that court officials, litigants and their lawyers cooperate with the judge to that end. Irregular or non-existent hours contribute to delay and create a negative impression of the courts. Thus, in jurisdictions where regular sitting hours are prescribed or expected, judges should observe these punctiliously, while also ensuring the expeditious despatch of out-of-court business<sup>197</sup>.

A judge should deliver his or her reserved decisions, having due regard to the urgency of the matter and other special circumstances, as soon as reasonably possible, taking into account the length or complexity of the case and other work commitments. In particular, the reasons for a decision should be published by the judge without unreasonable delay<sup>198</sup>.

A judge should also institute transparent mechanisms to allow lawyers and litigants to know the status of court proceedings. Courts should introduce publicly known protocols by which lawyers or self-represented litigants may make enquiries about decisions that appear to them to be unduly delayed. Such protocols should make allowance for complaints to an appropriate authority within the court where the delay is unreasonable or seriously prejudicial to a party<sup>199</sup>.

The right to a fair trial without delay or to be tried within a reasonable time is expressly provided as main responsibility of each judge by Article 38 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic

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<sup>196</sup> UNAMA-OHCHR (Jan. 2009), *Arbitrary Detention in Afghanistan. A call for action*, Vol. II, p.72.

<sup>197</sup> UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, Sept. 2007, p.138, point 208.

<sup>198</sup> *Ibid.*, point 209.

<sup>199</sup> *Ibid.*, point 210.



of Afghanistan of 21/5/2005 (Official Gazette No. 851), which foresees that: *"The head of each Court of Appeals and each judge and head of each Dewan shall be responsible for deciding cases in a **timely manner** according to the law, correct application of the law, and for explaining the ground for their decision"* (emphasis added).

**Timeliness, promptness and diligence** is also expressly required by Article 13 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan which considers that judges are not only duty bound to maintain official business hours and work hard, but they manage individual cases in a way that precludes unnecessary delays for any reason. Furthermore, it requires that courts, administer their calendars efficiently in order to complete all the cases in a timely frame. *"...for the public to have confidence in the judicial branch and the courts, it must see that the work of the courts is being done in a fair and expeditious manner. Unnecessary delays in the proceedings of cases is expensive and harmful to the people involved and severely undermines the public's trust and confidence in the judicial branch"*<sup>200</sup>.

This right can also be constructed from other articulated rights safeguarded by the Afghan Constitution. These include the right to not be detained without due process of law<sup>201</sup>, to appear before the court within legal time limits<sup>202</sup>, to be presumed innocent<sup>203</sup>, and the right to liberty<sup>204</sup>.

The juvenile Code clearly requires timeliness, promptness and diligence by all components of the judicial system dealing with juvenile cases. Depending on the stage of the case the Code requires the following:

First, the preliminary investigation conducted by the police has to be concluded **within 24 hours**<sup>205</sup> (48 hours at the most) and the suspect be brought before the prosecutor (Article 13 JC).

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<sup>200</sup> Comment on Article 13 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan. See, USAID Training Course, p.34.

<sup>201</sup> Article 27(2) of Afghan Constitution.

<sup>202</sup> Article 31 of Afghan Constitution.

<sup>203</sup> Article 25 of Afghan Constitution.

<sup>204</sup> Article 24 of Afghan Constitution.

<sup>205</sup> Article 11 JC.

Then, the prosecutor has only **one week** for the issuance of the indictment and for its official submittal to the court. If completion of the indictment is not possible within the mentioned period, the prosecutor can request **three more weeks** from the relevant court provided that the child is not kept in detention (Article 15 JC).

Articles 30 and 31 of JC regulate the issue of time limits for issuing court decisions. In particular, Article 30 requires an extreme expedition of the court in the issuance of decision. It foresees that from the moment the court receives the file from the prosecutor it has only **3 days to study the case**. In case the file needs to be completed, the court can return the file to the juvenile prosecutor for additional investigation. In that case, the prosecutor is obliged to notify the legal representative of the accused about the issue **immediately**. The Juvenile Code expects that the prosecutor will be able to resolve the shortages (:"defects") of the file **within one week** and then resend the file to the relevant court (Article 30.2). Then, the juvenile court is obliged to issue its decision **within 10 days from the receipt of the file**.

However, in practice these time frames are unrealistic, and this unfortunately results (as reported)<sup>206</sup> to very long pre-trial detentions for the juveniles. Monitoring by international organisations shows that, the right to a fair trial without delay is not respected throughout Afghanistan. Unreasonable delays regularly occurred, many times well beyond the legally established timeframes<sup>207</sup>. Prosecutors regularly fail to comply with legally established time limits to both interview detainees and file indictments against them and the judges as well to reach their decisions<sup>208</sup>. Lack of resources is not considered a justification for delays<sup>209</sup>.

The guarantee added in Article 31 of JC for the obligation of juvenile judges to report the pending cases **every 15 days** to the head of the court together

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<sup>206</sup> See UNODC, Assessment Report and UNAMA-OHCHR, *Arbitrary detention in Afghanistan: A Call for Action*, Vol.I, p.12 and Vol. II, p.73.

<sup>207</sup> See UNODC, *ibid.* and UNAMA-OHCHR, *ibid.*, p.73.

<sup>208</sup> *Ibid.* The delays in issuing a court's decision may reach 2 years. At pre-trial stage a juvenile might also stay in pre-trial detention from several months to 2 years waiting for a trial.

<sup>209</sup> UNAMA-OHCHR, *ibid.*, p.75.

with the reasons for the delay does not help much the backlog of cases, nor offers any precise solution the next paragraph by foreseeing that the head of the court (after reception of the report on pending cases) is obliged to take necessary measures in this regard **“as soon as possible”**.

While Afghan law has defined “reasonableness” by establishing timelines, international standards do not<sup>210</sup>. Instead, they require procedures to be put in place in order to ensure that the trial, including the issuance of decisions, will proceed without delay at all levels (primary and appeals).

In fact, while international standards require all cases, particularly those involving detention, to be dealt as expeditiously as possible, the question whether a delay is unreasonable or unjustified can be answered on a case-by-case basis taking into account factors including the complexity of the case.

International instruments establish that delays should be reasonable and justified at all stages of judicial proceedings<sup>211</sup>.

### **Case study**

Rahmattulah is 17 years old. He is accused of robbery. During his arrest he spent three days at the Police station before he was brought to the Prosecutor. His case is at the stage of investigation. He is being detained for the last 10 months in JRC waiting for a hearing to be set by the Court. He was been examined by the Prosecutor 8 months ago where he confessed his crime. He claims that nobody has visited him to explain what is happening with his case.

*\_What is the reasonable time according to the Juvenile Code in which a case should be treated by the Police, the Prosecutor and the Court?*

*\_Does Rahmattulah have the right to appeal against this situation and to whom?*

### ***v. The right to an interpreter***

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<sup>210</sup> UNAMA-OHCHR, *Arbitrary detention in Afghanistan: A Call for Action*, Vol. II, p.72.

<sup>211</sup> Ibid.

Among other rights safeguarded by the CRC, Article 40.2.b.iv of CRC enshrines this guarantee stipulating that a child prosecuted should be entitled:

*"To have the free assistance of an interpreter if the child cannot understand or speak the language used".*

The right to have an interpreter is expressly endorsed by Article 135 of the Afghan Constitution for all persons brought to justice, providing that:

*"If a party in lawsuit does not know the language, the right to know the materials and documents of the case as well as conversation in the court, shall be provided in the party's mother tongue through a translator appointed by the court".*

The right is expressly provided as an obligation of the Courts by Article 12 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851), as it foresees that a person has the right to speak his native language before the Court.

In addition, under article 20 of the ICPC an interpreter is to be provided for an accused *"who does not know the language used during the investigations and the trial or who is deaf, dumb or deaf and dumb"*. The language of the article could be understood to mean that an interpreter is not needed for every phase of the trial and investigation but only for explaining the charge and indictment and during interrogations and confrontations. However, such a reading would be contrary to article 22.1 of the Afghan Constitution which prohibits *"[a]ny kind of discrimination and privilege between the citizens of Afghanistan..."*

In order to be treated equally an accused person should be given the opportunity to understand and participate fully in the proceedings on an equal basis with speakers of the language followed by the Court.

The International Covenant on Civil and Political Rights (ICCPR) article 14 also requires that *"All persons shall be equal before the courts and tribunals..."* and ICCPR article 14.3(f) specifically provides that the accused shall have access to *"free assistance of an interpreter if he cannot **understand or speak** the language used in court"*.

Afghan court proceedings take place in either Dari or Pashto or a mixture of both depending upon the location of the court. Nearly, everyone residing in

Afghanistan understands one or both of these languages to some degree. However, **understanding a little bit of a language is insufficient to defend one's self in court.** It is possible to learn quite a bit of any language and still be **entirely ignorant of technical legal vocabulary and the kind of complex wording favored by many prosecutors, judges, and advocates.** If, for example, an accused is a native speaker of Uzbek and he knows only enough Pashto to buy something in a shop or ask for directions he will quickly be completely confused by a court proceeding in Pashto<sup>212</sup>.

Once an interpreter is present judges, prosecutors, advocates and the accused often begin to act as though they have forgotten that translation needs to take place. The very best simultaneous translators will still sometimes need clarifications or time to catch up with a speaker. Unless all speakers speak slowly, pause occasionally, and avoid speaking at the same time as other speakers, the interpreter's job will quickly become impossible.

According to the interpretation of the European Court for Human Rights<sup>213</sup>, *"the interpretation assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the courts his version of the events... In view for this right to be practical and effective, the obligation of the competent authorities is not only limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided"*.

Other important principles have also application to criminal procedures, such as **the principle of "non bis in idem"** and **the principle of "non reformatio in pejus"**.

**i) The principle of "non bis in idem"** is related to the *res judicata* referred mainly as cause of extinction of the prosecution. The principle safeguarded by Article 14 of the Covenant on Civil and Political Rights as well as from other

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<sup>212</sup> See, UNODC (2009), Strategies and Tactics for Defending Juvenile Cases, p.39 and s.

<sup>213</sup> ECHR, Kamasinski v. Austria, op.cit., p.35.

regional instruments (e.g., Art.4 of Additional Protocol no 7 to the European Convention on Human Rights) presents two aspects:

- a) the first means that punishment from different procedures concerning the same cause and person<sup>214</sup> can not take place and
- b) the second aspect means that in case of failure of the first action in justice a new one can not be initiated (*res judicata*). The justification of the principle is related from one hand with the interest of the accused person to know that there is no risk to be prosecuted a second time for the same act (even by a foreign court); and from the other hand, this contributes to the reinforcement of the "undisputable image" of criminal justice that does not allow to raise doubts on the value of criminal procedure.

This principle is also closely related to the interdiction of deterioration of the status of the accused known as **the principle of "non reformatio in pejus"**.

**ii) The principle of "non reformatio in pejus"** -which prevails at all stages of the trial- is relatively common in Continental legal systems and it means that an individual bringing an action before justice cannot be placed in a less favourable position than if he had not brought the action in the first place. In the criminal procedure it means mainly that the position of the defendant can not deteriorate at the second instance either by being more severely punished or by any measure that could worsen his status. The principle is related mainly to the sentence and meaning that the defendant can not face at second instance more severe sentences than at the first. The principle in question is considered to stand as a fundamental guarantee for the protection of the defendant during trial.

In Afghanistan the principle is guaranteed by Article 42.5 of the Juvenile Code which clearly states that **"...the punishment in decision of the higher court cannot be more severe than the decision of the primary court"**

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<sup>214</sup> ECHR, Bendenoun v. France, 24/2/1994, Series, no 284.

However, in practice it seems that the principle applies only when the defendant appeals against the decision. In case the prosecutor files an appeal the sentence given from the first instance Court can be doubled. This would be inconceivable in Continental legal system as contradictory to the principle of *non reformatio in pejus*.

#### **4.2.3. The motivation of the decision**

Under the concept of "fair trial" the European Court for Human Rights includes also the obligation for the judges to **motivate** their decisions<sup>215</sup>. This obligation is expressly required in national law by Article 129 of the Afghan Constitution which obliges the Court (while issuing their decisions) "*to state the reason for its verdict*". The same obligation is expressly provided as main responsibility of each judge by Article 38 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851), which foresees that: "*The head of each Court of Appeals and each judge and head of each Dewan shall be responsible for deciding cases in a timely manner according to the law, correct application of the law, and for explaining the ground for their decision*".

The **motivation** of the judicial decision is necessary in order to better control the process of sanctioning, mainly to verify if the punishment is proportionate to the gravity of the crime. Article 61 of ICPC requires that the decision other than the identification of the accused and the verdict should contain: "*...the description of the facts and of the circumstances included in the accusation*" and also "*A terse exposition of the reasons of the same decision with reference to facts and law provisions*".

A decision has to be **precisely motivated in a detailed and complete way**. A **properly motivated** decision should include:

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<sup>215</sup> ECHR, H. v. Belgium, 30/11/1987, Series, No 127-B.

- all the facts that have been presented during the investigation process and at the hearing, which establish both the objective and subjective elements of the crime;
- all the evidence from which the court has been convinced for the commission of the crime and for the intention of the perpetrator; and
- the reasoning on the basis of which the Court has reached its decision (the adjudication process).

If instead of a precise and detailed motivation of the decision, the Court makes only a simple reference to the facts **this decision is not considered as properly motivated and has to be annulled.**

For example:

The following reasoning: *"from the examination of witnesses, the documents brought before the court and in general from whole evidential process the charges have been established and the crime has been proved"*, can not constitute a complete motivation.

#### **4.2.4. The right to recourse**

The main purpose of the appeal is to provide a mechanism for the remedy of errors by the Primary Court. Any witnesses, experts, documents, or proofs rejected by the Primary Court can be reintroduced along with any additional ones that have since come to light. It is therefore, necessary to give a precise and thorough motivation of the decision in order to avoid the decision of Primary Court to be annulled.

Article 40.2.b (v) of CRC requires that the child should have the right *"If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law"*. The right to appeal is also guaranteed by the Covenant on Civil and Political Rights and its existence is thus not in theory dependent on domestic law. Article 14(5) of the Covenant provides that *"everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal"*



*according to law*". The reference to "according to law" refers here exclusively to *"the modalities by which the review by a higher tribunal is to be carried out"*.

According to the European Court for Human Rights<sup>216</sup> it is not enough that a person is entitled to remedies for his case, but these **remedies should also have to be effective**. Article 6 of the European Convention does not, *per se*, guarantee a right of appeal, but this right is contained in article 2 of Protocol No. 7 to the Convention, although it *"may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in first instance by the highest tribunal or was convicted following an appeal against acquittal"* (art. 2(2) of the Protocol)<sup>217</sup>.

#### **4.2.4.1. The right to full review**

The Human Rights Committee has made clear that, regardless of the name of the remedy or appeal in question, *"it must meet the requirements for which the Covenant provides"*, which implies that the review must concern both the ***legal and material aspects of the person's conviction and sentence***. In other words, in addition to pure questions of law, the review must provide *"for a full evaluation of the evidence and the conduct of the trial"*<sup>218</sup>.

#### **4.2.4.2. Preservation of evidence**

In order for the right to review to be effective, the Court should preserve the evidential material to allow for an effective review of the child's conviction.

The Committee of Human Rights has recognized *"that in order for the right to review of one's conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for"* an effective review of one's conviction.

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<sup>216</sup> ECHR, *Soumare v. France*, 24/8/1998, Application 23824/94, Reports, 1998-V, paras 38-44. See, also *R.M.D. v. Switzerland*, 26/9/1997, Application no 19800/92, Reports 1997-VI, paras 48-49.

<sup>217</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 7, p.305.

<sup>218</sup> *Ibid.*, p.306.

However, the Committee does not see "*that **any** failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of*" article 14(5), but only "*where such failure prejudices the convict's right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review*"<sup>219</sup>.

#### **4.2.4.3. Remedies against court decisions**

*i.)* The Juvenile Code foresees an Appeal against the decision of the primary court (Article 42.1) and describes with detail the procedure in the next paragraph. According to Article 42.2 the appeal should be submitted to the administrative office of the court that has issued the order or to the administrative office of the relevant appeal court **within 21 days**. This period is calculated as per the following circumstances:

- a. The Court has read out the verdict and its reasons at the conclusion of the trial in presence of the accused child or his defence counsel;
- b. In case the court has not read out the reasons of the verdict with the verdict and re-announces it to the accused child and to his/her defence counsel, the date of the second notification will be considered as the beginning of the term;
- c. When in the same decision more than one child has been sentenced the date of the last notification is considered the beginning of the term for all sentenced.

*ii.)* In case of dissatisfaction, the child, his/her legal representative or prosecutor can contest the decision of the juvenile court by filing an **appeal within 21 days** from the date the verdict was read (Article 42.3).

The child cannot wave his/her right of appeal without the consent of his/her legal representative (Article 42.4).

According to Article 68 ICPC, when the appeal is filed by the Primary Prosecutor the Court can either impose a punishment in the case the accused

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<sup>219</sup> Ibid., p.307.

was found not guilty in the Primary Court; or increase the punishment in the case the decision was founded on an error in the interpretation or application of the law. **When the appeal is filed only by the accused the Court can in no case increase the punishment inflicted by the Primary Court.**

The Juvenile Code enshrines the principle of *non reformatio in pejus*, as examined above, since it requires that: “...**the punishment in decision of the higher court cannot be more severe than the decision of the primary court**” (Article 42.5). However, it should be noticed that this is not the case in Afghanistan, because in practice juveniles are punished with much more severe sanctions after their case is being assessed by the Appeal’s Court<sup>220</sup>.

The right to appeal against a court’s decision is also safeguarded by Article 5 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851), stipulating that: “*The parties to the case may appeal against decisions issued by the lower courts in accordance with law. The final decisions of the courts shall be considered exception to this provision*”<sup>221</sup>.

iii.) The Juvenile Code foresees also a third instance’s recourse since it allows to the child, his/her legal representative or the juvenile prosecutor to submit recourse before the **Supreme Court within 30 days** against the sentence of the appeal court (Article 42.6)<sup>222</sup>.

In principle, the Supreme Court is not a third instance’s recourse. In contrast to the Court of Appeal only considers legal errors not factual ones<sup>223</sup>. If new

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<sup>220</sup> See UNODC, Assessment Report; UNAMA-OHCHR, *Arbitrary detention*, op. cit., Vol.II. For the modalities of the review before the Supreme Court, see also Art.73 ICPC and Art.75 for the Supreme Court hearing.

<sup>221</sup> For the content of the appeal against the decision of the Primary Court see also Art. 63 and 66 of ICPC.

<sup>222</sup> According to Article 80 ICPC the protested decision can be quashed in full or in part.

<sup>223</sup> According to Art. 78 ICPC the Supreme Court quashes without referral the protested decision when: a) The accusation does not constitute a crime, statute limitation has occurred or the prosecution was not permitted; b) The decision concerns matters which are beyond the jurisdiction powers; c) The sentence was adopted against a wrong person; d) Results that for the same person and the same facts a previous decision was already adopted; and e) The same Supreme Court deems superfluous to refer the decision or can amend it on the basis of the already existing documentation. In any other case, the Supreme Court has to refer the case to the Court of Appeal different from the one which made the decision or to the same

evidence is discovered after the conviction and after the Court of Appeal has taken a decision or the deadline for appealing has passed that evidence can only be raised in a petition for revision<sup>224</sup>. The Supreme Court amends directly the protested decision when law provisions are more favorable to the accused, even if supervened after the filing of the recourse.

However, it should be add that, even if in most countries of Continental system the Supreme Court is considered to examine only the legality of the case and not its substance, in Afghanistan it acts, in practice, as an instance of third degree going to the merits of the case.

A **revision** of the trial is possible according to Article 81 of ICPC.

The revision is permitted, at all times in favor of the person sentenced for misdemeanors or felonies, of the final decision in the following cases:

- When the facts on which the sentence is based cannot be reconciled with the facts established in another final decision;
- When a judgment drawn up by a civil Court upon which the sentence is grounded has been quashed;
- When facts, circumstances or documents, demonstrating the innocence of the sentenced person, which were not known before the sentence, are newly disclosed or emerged;
- When it turns out by means of judicial assessment that the sentence was based on false testimonies, forged documents or any other fact of criminal nature which have been assessed by a final judicial decision;

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Court composed by different judges. In its referral the Supreme Court gives directions to be followed in reviewing the case (Art.79 ICPC).

<sup>224</sup> Articles 81, 82 & 83 ICC. See also Article 77 ICPC stating that "*Wrong interpretations of the law or wrong references to law provisions contained in the reasons of the verdict of the Court of Appeal do not bring about the annulment of the protested decision if they have not had a decisive influence on the verdict. In this case, the Supreme Court makes the amendments on its own and informs the Court which made the protested decisions about the errors*".

- When after a sentence for murder new evidentiary elements supervene or emerge according to which results that the death of the person did not occur;
- When the sentence was adopted at the end of a process conducted without informing the accused by regular notifications or not giving him the possibility to appear so to deprive him of the right of defense or when a real impediment for appearing was not known or disregarded by the Court.

The revision can be requested by the Prosecutor, the sentenced person, or his or her defense counsel, or a close relative (Article 82 of ICPC)<sup>225</sup>.

The review is conducted according to the rules applicable for the normal hearings and the decision adopted replaces the previous one, remaining subject to protests which were allowed against the latter (Article 83 ICPC). Whenever a revision petition is rejected it is not allowed to file a new one on the same grounds.

#### **4.2.4.3. Remedies against orders**

*i.)* Article 11.2 of the Juvenile Code gives the accused the right to recourse during the preliminary phase of the trial if the police and prosecutor do not issue their decision on release request within 24 hours. *"If the decision is not taken in the given time, the legal representative can complain to the higher prosecutor"*.

*ii.)* Article 14.2 of the Juvenile Code foresees also the possibility of recourse against a pre-trial detention order as it provides that the child himself/herself, his/her legal representative or the child's attorney can complain to the court against the order of pre-trial detention **"at any given time"**.

*iii.)* Finally, according to Article 18.1 of the Juvenile Code if, after the beginning of the investigation or of the trial, the juvenile prosecutor or the juvenile court realize that the age of the accused juvenile was above 18 years

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<sup>225</sup> For the procedure of the revision see Article 83 ICPC.

at the time he committed the crime, they are obliged to refer the case to the relevant authorities. However, paragraph 2 of the same provision foresees the possibility of the accused if he/she does not agree to appeal to a higher authority. The Code does not fix a deadline for this appeal. The higher authority should refer the issue to a medical team (as provided in paragraph (3) of article (6) of the Juvenile Code), as a result of which the final decision should be postponed. Only if the accused is under detention, the medical team is obliged to give their opinion **within one week**.

**Questions:**

- \_ What kinds of remedies are available to challenge the decision of a Court?*
- \_ Are there any recourses during the preliminary phase of the trial?*
- \_ What kinds of remedies are there against a pre-trial detention order?*

**Case study**

Faisal is accused of killing with intention his employer with a knife. At the primary Court he was sentenced to 7 years of confinement. During his defendant's plead at the Appeal's Court Faisal is claiming that he did not wish to kill his employer (the victim). He claimed that he was working for six months as a tailor but the victim although having promised that he would pay him 200 Afs per day for his work, he had never paid him a single penny up to now, but instead he was keeping postponing the payment. Faisal was desperate because his family was waiting from him to bring money in house. He thought that by using a knife he would scare his employer and make him give the money that he owed to him. Faisal claimed that the victim in his effort to take the knife from him fell and stubbed himself. He also claimed that the incident witnessed Serzad who was also employed as a tailor two days ago.

The judges asked him why he did not say all that at the Primary Court. Faisal replied that no one has let him speak, and that he did not even have a council. The Court is thinking hard how to deal with this case given that the

decision of the Primary Court does not make reference to any of the arguments Faisal is presenting now to the Appeal's Court.

*\_Do you see any procedural flaws in the way the Primary Court has handled the case?*

*\_In your opinion how should the Court deal with this case?*

### **4.3. Principles related to the person of the juvenile**

There are specific rules prevailing in juvenile cases some of which are important enough to be considered as principles, such as:

- Discretion should apply in juvenile cases;
- Children cannot be convicted to continued imprisonment (life imprisonment) or death penalty (Art.39.c of JC);
- Confinement of a child is considered to be the last resort for his/her rehabilitation and re-education.

#### **4.3.1. Discretion in juvenile cases**

According to the Beijing Rules: *"Appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation"* (Beijing Rules 6.1 & 6.2). The principle of discretion in juvenile cases has three direct consequences or sub-principles that should be respected at the same time:

a) The **Hearing in camera**: it means that the juvenile Court should hear all juvenile cases behind closed doors without audience (Art.32.1 of JC)<sup>226</sup>. This constitutes a derogation from the constitutionally safeguarded principle of the

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<sup>226</sup> The Article is entitled "confidentiality".

public hearing of the trial (Article 128)<sup>227</sup>, but it is necessary in order to protect the juvenile from the traumatization of the public hearing and the stigmatization that might provoke to him/her the entire process; and

b) The **Respect of the juvenile's privacy**: is expressly safeguarded by the CRC in Article 40.2.b.(vii) for all the stages of the proceedings. According to the Beijing Rules the juvenile's right of **privacy** should be "*respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published*", (Beijing Rules 8.1 and 8.2).

Further, the Beijing Rules require that "*records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorised persons*", (Beijing Rule 21.1).

Privacy is also safeguarded by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules, Rule 87-e).

**The respect of privacy is more general than the concept of confidentiality and less general than the concept of discretion.** The Juvenile Code endorses this guarantee under the respect of confidentiality of all elements related to the case, entailing also the interdiction of the Publication of documents related to proceedings of children's trial in the mass media (Article 32.2 of the Juvenile Code). In para 3 of Article 32 of the JC is provided that: "*Under no circumstances, revealing information about the child's personality or information that can result in identification of the child is not allowed*". It needs to be added that the Juvenile Code demands expressly in Article 17 paragraph 3 from the Prosecutor to keep the investigation documents and details confidential (and only the relevant courts and the child's attorney can have access to criminal records). The essence of this prohibition is principally the concern for the protection of the personality of

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<sup>227</sup> Article 128 of the Constitution stipulates: "*In the courts in Afghanistan, trials shall be held openly and every individual shall have the right to attend in accordance with the law*".



the accused child and also the general concern for improper use of undisclosed evidence<sup>228</sup>.

This principle is also safeguarded by the UN Basic Principles on the Independence of the Judiciary which state that:

*"The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters"* (Principle 15).

In addition, according to the Bangalore Principles of Judicial Conduct: *"Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties"* (Bangalore Principles, 4.10). This means that the use of such information by a judge should be avoided for personal gain or for any purpose irrelevant with judicial duties.

#### **4.3.2. Interdiction of death penalty, corporal punishment and life imprisonment to juveniles**

In Afghanistan death penalty and life imprisonment to juveniles is prohibited by the Juvenile Code (Art.39.1.c.). The Code also forbids any corporal or other harsh punishment (Article 7) as it provides that: *"Contemptuous and harsh punishment of child, even if for correction and rehabilitation purposes, is not allowed"*.

The provision prohibiting capital punishment and life imprisonment is in accordance with Article 37(a) of CRC, which states that: *"Capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age"*.

The provision prohibiting capital punishment is also in accordance with other international instruments such as Article 6, paragraph 5, of the International Covenant on Civil and Political Rights or Rule 17.2 of the Beijing Rules.

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<sup>228</sup> Bangalore principles, Commentary, point 155.

The provision against corporal punishment (such as whipping, etc.) is in line with Article 37 (a) of CRC and with article 7 of the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child.

Life sentence would *ipso facto* be contrary to this rule and also to the notion of the best interest of the child, which implies that a child shall be given a chance of psychological recovery for the purposes of social reintegration<sup>229</sup>.

#### **4.3.3. Confinement as last resort for rehabilitation**

Deprivation of liberty in general can have very negative psychological and physical effects to persons. Contrary to its objective, which is rehabilitation confinement actually cuts off the convicted person from his family, professional and social environment and make reintegration after liberation a very difficult task.

In the case of juveniles deprivation of the liberty poses a serious problem in the sense that the child, who still is at a very sensitive stage of development, may suffer serious and even irreversible adverse psychological effects if removed from his/her family for purposes of detention. For this reason, international human rights law prohibits life imprisonment of children (Article 37 (a) CRC) and tries to reduce deprivation of liberty to a minimum. International instruments such as the Convention on the Rights of the Child, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice provide special rules for confinement based

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<sup>229</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., Chapter 10, The Rights of the Child in the Administration of Justice, p.429.

on the best interests of the child concerned. Although the United Nations Rules are not, as such, binding on Governments, many of the rules contained therein are binding either because they are also found in the Convention on the Rights of the Child or because they have already been endorsed by national provisions.

As already mentioned, according to Article 8 of the Juvenile Code: "*Confinement of a child is considered to be the last resort for rehabilitation and re-education of the child*". The same provision suggests that the court should consider the "*minimum possible duration for confinement*" (para 2). This provision is in accordance to Article 37 (b) of CRC stating that: "*The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*".

UN Standard Minimum Rules for the Administration of Juvenile Justice Rule (The Beijing Rules, Rule 17.1), also suggest that confinement should be the last resort for the rehabilitation of juveniles in conflict with the law, and lay down the basic principles that should apply in adjudication and disposition of juveniles cases (together with the principle of proportionality that has been examined above):

*"(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;*  
*(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response*".

In line with resolution 8 of the Sixth United Nations Congress, Beijing Rule 17.1 (b) encourages the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young person<sup>230</sup>. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be granted

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<sup>230</sup> See below, Part III, 1.

to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions<sup>231</sup>.

According to the commentary on Beijing Rules (Rule 17.1.c) incarceration should not be considered in the case of juveniles **unless there is no other appropriate response that will protect the public safety**<sup>232</sup>.

Unfortunately in Afghanistan this principle seems not to apply to juveniles in conflict with the law, since the majority of juvenile delinquents end up in the Juvenile Rehabilitation Center, which is no better than prison. Thus, confinement seems to be the rule in juvenile cases<sup>233</sup>.

However, if for all juvenile cases judges apply the principle of proportionality in the process of adjudication and disposition, it is certain that confinement would be reduced to a minimum.

#### **Concluding remarks:**

Finally, particular attention should be brought to the fact that most of the rights of the accused juvenile are **non derogable**<sup>234</sup>, meaning that no derogation or suspension of these rights is accepted for any reason. In particular the **International Covenant for Civil and Political Rights** defines which rights are not derogable in Article 4 (2) which reads:

**"No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision** (emphasis added).

The articles enumerated in this provision protect the following rights:

- \_ **the right to life** – article 6;
- \_ **the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one's free consent** –article 7;

<sup>231</sup> Beijing Rules Commentary.

<sup>232</sup> Ibid.

<sup>233</sup> See, UNODC Assessment Report; UNAMA-OHCHR, *Arbitrary detention*, op. cit.; AIHRC-UNICEF, *Justice for Children. The situation of children in conflict with the law in Afghanistan*, 2008.

<sup>234</sup> See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, Chapter 16, p.831.

**\_ the right to freedom from slavery, the slave trade and servitude** – article 8;  
\_ the right not to be imprisoned on the ground of inability to fulfil a contractual obligation – article 11;  
**\_ the right not to be subjected to retroactive legislation (ex post facto laws)** – article 15;  
**\_ the right to recognition as a person before the law** – article 16;  
**\_ the right to freedom of thought, conscience and religion** – article 18;  
and  
**\_ the right not to be subjected to the death penalty** – article 6 of the Second Optional Protocol<sup>235</sup>.

In spite of their non-derogable nature, in practice, these rights tend to be the most frequently violated in emergency situations, thereby rendering a return to normalcy more difficult. In such situations, the role of judges, prosecutors and lawyers in contributing to the effective protection of the individual becomes more crucial than ever, and their respective responsibilities must be exercised with full independence and impartiality lest the individual be left without legal protection<sup>236</sup>.

### **Questions**

*\_ Which are the international legal rules relating to a juvenile case?*  
*\_ Which international principles of justice are endorsed by the Juvenile Code?*  
*\_ Have you ever been able to apply them?*  
*\_ Which principle do you consider as the most important for the determination of sentence?*  
*\_ In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring the juvenile's human rights at the pre-trial or trial stage?*

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<sup>235</sup> This Protocol has not been signed by Afghanistan, however the principle applies to juveniles in favor of other international instruments as mentioned above.

<sup>236</sup> OHCHR, *ibid.*, p.833.

*\_ If so, what were these concerns or problems and how did you address them?*

*\_ Are there any derogations from, or suspensions of, the full enjoyment of human rights and fundamental freedoms?*

*\_ If your answer is affirmative:*

*- In what circumstances can this be done?*

*- Which body decides?*

*- Which rights can be affected by a decision to derogate from, or suspend, the full enjoyment thereof?*

*\_ To what extent is the child allowed to participate in decisions concerning him or her?*

### **Case study**

Mohammad is a 15 years old boy. He is the youngest of a family of twelve members which is very poor. He used to work hard to assist his family. He did not have time to go to school. He is illiterate.

Now he is detained in JRC for murder. It is the first time that he is convicted.

The Appeal's Court has given him 5 years for the murder of a relative.

He claims innocent. It was an accident he says. He had an argument with his cousin. His cousin insulted him. Mohammad pushed his cousin who fell and hit his head and as a consequence of that he died. The Court didn't believe him because he didn't have any witness. There was no forensic examination of his cousin to conclude at the exact causes of death.

He claims that the Court did not let him speak and that only his lawyer spoke on his behalf. He has been detained already for 9 months in JRC. During his detention in JRC no one came to inform him of his rights. He does not get any visits because his parents live in Kandahar.

He believes that if he had money he wouldn't be imprisoned.

*\_ What do you consider that should be done in this case?*

*\_ Do you believe that a forensic examination is necessary and why?*

*\_ Do you believe that the Court should let Mohammad speak even if he had a lawyer who represented him?*

*\_ Do you think that this sentence is fair for the accidental cause of Mohammad cousin's death?*

*\_Does Mohammad's way of living should play a role to his sentencing?  
\_Should any one inform him of his rights during his confinement?  
\_Does the fact that his parents live in Kandahar can affect his place of detention?  
\_How do you evaluate Mohammad's last statement about relating his imprisonment with him having no money?*

## **PART II: Structure and function of juvenile justice in Afghanistan**

The juvenile justice system is part of the Criminal Justice system in general which aims to maintain social harmony by managing violations of the law<sup>237</sup>. Violations of the law, in Afghanistan, can be dealt with by the formal justice or informal justice systems. Criminal procedure is based on civil law and is basically inquisitorial<sup>238</sup>.

Over the last years, the government of Afghanistan, with the support of the international community, has worked towards the re-establishment of a just, formal criminal justice system. Nevertheless, serious short-comings remain in providing all citizens with access to the formal justice system<sup>239</sup>. Many Afghans, particularly in the rural areas have more trust in, and prefer to use the informal justice system. Although it is difficult to determine, it has been estimated that in Afghanistan; of the number and range of offenses committed; and sanctioned– about 60– 80% are dealt with by the informal system of *jirga* and *shura*; and about 20– 40% are dealt with by the formal

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<sup>237</sup> See, UNODC, *Strategies and Tactics for the Advocate Defending Human Trafficking Cases*, 2009, p.38.

<sup>238</sup> The main two systems of law are: "inquisitorial" and "adversarial". The idea behind this distinction is that in the "inquisitorial" system –applying in general in the Civil Law systems- the verdict is the result of an inquiry into the truth controlled by the Judge, where in the "adversarial" system –applying in general in the Common Law systems- the verdict is the product of a battle over the truth between opposing parties in which the Judge acts merely as referee. In Common Law systems, the Judge has far more power to control access to witnesses and evidence than a mere referee and in Civil Law countries the adversarial relationship between the prosecutor and the defense is by no means absent.

<sup>239</sup> See, UNODC, Assessment report.

justice system. The formal system needs to overcome the shortcomings starting with a better application of the law.

## **1. Components of the Justice system**

The justice system consists by several sub-systems such as the police, courts, judges, prosecutors and the corrections. Each of them has a specific role<sup>240</sup> to play in the process of a case.

**1. The Police:** is of the responsibility of the Ministry of Interior. The main role of the police is to conduct a preliminary investigation on specific crimes and to collect evidence, to search people, vicinities and buildings and to arrest suspects. It needs to be noticed that there is no national specialised **juvenile police**<sup>241</sup>. Nevertheless, it is reported that in four afghan cities (Kabul, Herat, Mazar-i-Sharif, Jalalabad) a specialised juvenile police has been established<sup>242</sup> with the help and support of the French Embassy. However, the first contact of the child with the Justice system is made by the District Police, which has usually not received any specific training on how to deal with such cases.

**2. The Prosecution Service:** is the responsibility of the Office of the Attorney-General referring to the Ministry of Justice. He generally has the duty to investigate specific crimes upon receipt of reports and

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<sup>240</sup> UNICEF, *Juvenile Justice Manual*, 2007, Module One, 8,.

<sup>241</sup> However, the request for the creation of a juvenile Police is an old request formulated by the UN as a recommendation and repeated in the Beijing Rules (Rule 12). See, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955: <http://www.asc41.com/undocs.htm>. Even if some States argue that the establishment of a juvenile police would create problems because of the lack of knowledge of police officers on juvenile issues, the official Position of International Police Organisation is that a special juvenile police is necessary and effective. See, R. Schonle Cavan, *Juvenile Delinquency, Development, Treatment, Control*, Second Edition, Philadelphia, N.Y., Toronto, 1969, p.377-378.

<sup>242</sup> See, Terre des Hommes, Report on the Assessment Mission on Minors in Conflict with the Law (MCL) conducted in Afghanistan from 18.07.2008 to 28.08.2008.



allegations of the commission of a crime from the Police; to interview the suspects and witnesses, to collect, analyse and evaluate evidence; to file cases or to prepare indictments and to prosecute the cases in court. All evidence collected and testimony taken are compiled in a written dossier and submitted to the Judges. The Prosecution service is considered also to supervise Police actions. Fact-finding is done by the primary *saranwal* (investigative prosecutor) who plays the role of an inquisitor to ascertain the truth. The investigative prosecutor has broad powers to compel testimony, seek out experts, and collect and preserve evidence. The Juvenile Prosecution Service (whose structure we will see below) is referring to the Attorney-General and it is a specialized body established especially to deal with juvenile cases.

1. **The Courts (of first and second instance):** are of the responsibility of the Supreme Court; and their role is at the preliminary stage of the trial to set bail to the accused or conditions for release; to order pre-trial detention or adopt temporary protective measures; and at the trial stage to hear the case, question the defendant and the witnesses; consider the evidence and adjudicate and determine guilt and finally to impose the sentence or dismiss from charges. The juvenile courts (whose structure we will see below) are specialized courts (of first and second instance) established especially to hear juvenile cases.
2. **The Corrections:** are of the responsibility of the Ministry of Justice and their role consists mainly to the execution of the juvenile courts' decisions for pre-trial detention or for imprisonment. The **Juvenile Rehabilitation Centers** are also of the responsibility of the Ministry of Justice and they are considered to be social services institutions, established for the execution of sentences on children in detention reporting to the prosecutor's office. They are of two types: a) the closed JRCs in order to execute pre-trial detention and confinement for juveniles and b) the open JRCs for the execution of alternative to

confinement measures (however the open Juvenile Rehabilitation Centers do not function properly<sup>243</sup>).

### **1.1. The structure of the judiciary**

The fundamental structure of the Afghan legal system places it squarely in the continental system following a civil law tradition rather than the common law tradition<sup>244</sup>.

The Afghan Constitution in Article 116 sets the principles of organization of the judiciary, safeguarding at the same time its independence<sup>245</sup> (Art.116 paragraph 1).

According to the Constitution (Art.116 para 2) the judiciary is comprised of one Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority is regulated by law.

#### **1.1.1. The Supreme Court**

The Supremacy of the Supreme Court is constitutionally guaranteed since the above mentioned provision defines it as the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.

Article 117 of the Constitution determines the composition of the Supreme Court and mode of appointment for its members<sup>246</sup> providing that it should

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<sup>243</sup> See UNODC Assessment Report.

<sup>244</sup> The Civil Law has its origins in Roman Law and the Napoleonic Code and is the traditional origin of the modern systems in France, Germany, Italy, and many other countries. Common Law has its origins in English courts of common pleas (although there are scholars that assert that many of Common Law's methods are borrowed from Islamic Law) and was further developed in English speaking countries and English colonies around the world. Common Law is the traditional root of the modern systems in the UK, USA, India, Pakistan, Malaysia and many other countries.

<sup>245</sup> Independence of the judiciary is also safeguarded by Article 2 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851).

<sup>246</sup> Article 117 provides that in observance of the provisions of clause 3 of Article 50 as well as Article 118 of the Constitution, the members of the Supreme Court should be initially appointed in the following manner:

comprise nine members, appointed by the President and with the endorsement of the *Wolesi Jirga* (House of People), the President shall appoint one of its members as Chief Justice of the Supreme Court.

The members of the Supreme Court<sup>247</sup>, (except if they have committed a crime as stated in Article 127 of the Constitution), are not dismissed till the end of their term. The Supreme Court has four *Dewans* (Sections): General Criminal *Dewan*; Public Security *Dewan*; Civil and Public Rights commercial, **but no juvenile *Dewan*.**

The organization, structure, and jurisdiction of the Supreme Court as well as of the rest of the courts are regulated by the **Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851).**

### **1.1.2. Primary and Appeals Courts**

Chapter 3 (Articles 31 to 39) of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan regulates the organization, structure, and jurisdiction of the Court of Appeals.

It is foreseen that the Court of Appeals should be established in all provinces. Each Court of Appeal should comprise the following *Dewan*: General Criminal *Dewan*; Public Security *Dewan*; Civil and Family *Dewan*; Public Rights *Dewan*; Commercial *Dewan* and **Juveniles *Dewan*.**

Chapter 4 (Articles 41 to 57) of the same Law regulates the organization, structure, and jurisdiction of primary Courts including that of juvenile courts.

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Three members for a period of 4 years, three members for 7 years, and three members for 10 years. Later appointments should be for a period of ten years. Appointment of members for a second term is not permitted.

<sup>247</sup> In order to safeguard the high quality of their duties Article 118 of the Constitution requires the following qualifications for the members of the Supreme Court:

1. At time of appointment the age of the Chief Justice of the Supreme Court and its members shall not be less than 40 years.
2. Shall be a citizen of Afghanistan.
3. Shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan.
4. Shall have good character as well as good reputation.
5. Shall not have been convicted, by a court, for crimes against humanity, crimes, or deprivation of civil rights.
6. Shall not be a member of any political party during his term of duty.

It is estimated that there are approximately around 1,300 sitting judges in Afghanistan<sup>248</sup>.

### **1.1.3. Prosecutor Office**

#### a) Structure of the Prosecutor Office:

The structure, competence and duties of Prosecutor Office is regulated by the Law on the Structure and Authority of the Attorney General's Office (AGO Law)<sup>249</sup>.

According to **Article 7** of the AGO law the Prosecutor Office of the Republic of Afghanistan is composed of:

- a. The Attorney General<sup>250</sup> of Afghanistan and his deputies;
- b. The Advisory Body;
- c. Professional central Presidents and directors in charge of the professional and administrative sections;
- d. Prosecutors; and
- e. Interrogators.

The Prosecution office of the Republic of Afghanistan is formed in the following manner:

- a. Central Prosecutor's Office<sup>251</sup> (civil, military and national security);
- b. Appellate Prosecution Offices (civil, military and national security);
- c. Provincial Prosecution Offices and
- d. Primary Prosecution Offices (civil, military and national security).

There is one Provincial Prosecution Office in every province and in Kabul city (**Article 1**). As for the Appellate Prosecution Offices, **Article 28 (2)** provides that *"after confirmation of the Advisory Body, recommendation of the General Attorney and approval of the President, the Appellate prosecution Office shall be established"*.

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<sup>248</sup> Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan, USAID, Training Course, October 2007, p.2.

<sup>249</sup> Official Gazette no 738, of April 1991.

<sup>250</sup> According to Article 134 paragraphs 2 and 3 of the Afghan Constitution: *"The Attorney's Office shall be part of the Executive organ and shall be independent in its performance"*.

<sup>251</sup> The Afghan term for this term is *Saranwali Stera Mahkama* which is equal to Supreme Court Prosecutor Office

The Provincial Prosecutor Office is composed of: a) Investigation Prosecution Office; b) Judicial Prosecution office; and c) Monitoring Prosecution Office (**Article 29.1**) and the Appellate Prosecution Office is composed of: a) Judicial Prosecution office; and b) Monitoring Prosecution Office (**Article 29.2**).

The Primary Prosecution Office according to **Article 33** is established in the capital of districts administrative units, city, city-districts and in the armed forces on the division level and levels above division, also in the case of need on brigade level.

b) Jurisdiction of Prosecutor Office:

i. Supreme Court prosecutor:

According to **Article 11** of AGO law: "*The Supreme Court prosecutor has the authority to object the decisions of the provincial or appellate courts to the Supreme Court division after the confirmation of the relative deputy AG*".

ii. Appellate and Provincial Prosecution Offices:

According to **Article 32** of AGO law the Provincial Prosecution Offices:

- assess cases of public crimes like appellate;
- assess in the primary phase cases of crimes against public security and in case of a delegation of authority, cases of crimes against internal and external security.

According to the same article the Appellate Prosecution Offices:

- assess the cases of crime against public security and crimes against internal and external security in the appeal phase and
- delegate authority in the primary phase to the Provincial Prosecution office to assess the cases of crimes against internal and external security.

The Military Appellate Prosecution Office assess in the appeal phase cases relating to all military employees except for the cases relating to the Generals and officers working in General position.

*iii. Primary Prosecution Office:*

The Primary Prosecution Office for Public Crimes has the jurisdiction to assess criminal cases in the primary phase, except for cases of the jurisdiction of the Military Primary and Appellate Prosecutor Offices (**Article 35**).

**1.2. The specialised juvenile courts and the special juvenile prosecutor's office**

**1.2.1. The specialised juvenile courts**

a) Structure of the juvenile Courts:

The above mentioned Law on the Organisation and Jurisdiction of the Courts establishes and regulates also the organization and structure of specialized **juvenile primary courts and juvenile appeal courts**. The establishment of juvenile courts is also foreseen in Article 26 of the juvenile Code which provides that specialized juvenile primary courts should be established in provincial capitals of Afghanistan.

However, specialized juvenile courts exist only in five provinces: Kabul, Hirat, Balkh, Kunduz and Nangarhar. In the rest of the provinces juvenile cases are proceeded in normal provincial or city courts.

**Primary juvenile courts** consist of three persons: one heading and two members; the **Juvenile Appeal courts** of one head and 6 members. Approximately a total of 50 to 55 judges are working in these courts. Juvenile cases are heard in two stages usually, but there is no focal point for the issue in the Supreme Court. Cases of children that need revision are sent to Supreme Court, and depending on the nature of the case they are reviewed by one of the relevant Supreme Courts tribunals (*Dewans*). However, there is no specialized Supreme Court, nor Section of the Supreme Court especially established for Juvenile cases. AS mentioned above, the Supreme Court is not supposed to be a third degree instance, but only a jurisdiction examining the question of legality of decisions of the lower courts. However, although Article 26 of the Law on the Organisation and Jurisdiction of the Courts clarifies that the

Supreme Court whenever determines that *"the lower court's ruling was contrary to the law"* should only *"overturn the ruling and remand it to the lower court for issuance of ruling"*; in practice, it acts as a third degree instance getting into the substance of the case.

Unfortunately, in general, the educational background of the judges in juvenile courts is not sufficient, since it appears that they have not received any specialized training, but they are just graduated from Shari'a or Law Faculty only.

#### b) Jurisdiction of juvenile courts:

The Juvenile Code determines the jurisdiction of juvenile courts. According to Article 29 of the JC the juvenile court is competent to hear:

- Children's crimes;
- Children whose irregular behaviour cannot be corrected through parental care or care of those who have the right to guardian them or by adopting ordinary educational measures; and
- Cases of children at risk and in need of care and protection.

The general rules on the territorial jurisdiction are determined by Article 26 of the ICPC determining the territorial jurisdiction **by the place where the crime is committed.**

Paragraph 2 of the above mentioned Article clarifies that in case of attempt crime the competence belongs to the Court which has jurisdiction on the place where the last action for the commission of the crime has been accomplished. However, Article 28.2 of JC specifies that:

*"When the place where the crime has been committed is not determined, the case will be heard by the juvenile court of the area where the child is residing. If it is not possible to determine the child's place of residence, the case shall be heard by the juvenile court of the area where the child was arrested or detained"*.

When a person is accused is for more than one crime, the territorial competence belongs to the Court having jurisdiction in the venue where the most serious crime has been committed (Article 26 para 4 ICPC).

To ensure justice in case of child offenders, Article 27 of the Juvenile Code determines the Stages of Hearing specifying that the *"legal proceedings shall be conducted in three levels; Primary Court, Appeal Court and Supreme Court"*.

### **1.2.2. The special juvenile prosecutor's office**

As we have mentioned above the Juvenile Prosecution Service is referring to the Attorney-General and it is a specialized body established especially to deal with juvenile cases.

According to Article 54 of the Law on the Structure and Authority of the Attorney General's Office (AGO Law):

- Crimes committed by juveniles are assessed in the juvenile's Special Prosecution Office and
- The Primary Prosecution office has the jurisdiction to assess the crimes committed by juveniles, where there is no Juvenile Prosecution Office.

The Juvenile Code in Article 9 (1) provides that the assessment, investigation and prosecution of juvenile crimes are of the responsibility of the juvenile prosecutor's office. To this end, special juvenile prosecutor offices shall be established in the capital and provinces. Further, the paragraph 2 of the same provision determines the composition of the Juvenile prosecutor's office by the Director and professional and administrative members dealing with children's crimes according to the provisions of the code.

As mentioned above, while investigating criminal acts, the police operate under the direction of the prosecutor (as opposed to maintenance of public order, where the police acts under the responsibility of the administration).

#### **Questions:**

*\_To what extent the Afghan juvenile courts function as required by the Beijing Rules?*



*\_ Which are the differences between the criminal courts for adults and the juvenile courts?*

*\_ Is there a judicial body supervising the Police?*

## **2. Responsibilities of judges and prosecutors in the juvenile justice system**

Under this section, as “responsibilities of judges and prosecutors in the juvenile justice system” we mean, not only the specific duties they should carry out as per stage of trial, but also the specific qualities, meaning the rules of conduct and ethics a judge and prosecutor is required to have.

### **2.1. Duties of juvenile judges and prosecutors**

***“The judicial duties of a judge take precedence over all other activities. A judge’s primary obligation is to the court”***

(Bangalore Principles, 6.1)

#### **2.1.1. Duties of juvenile judges**

As mentioned, the juvenile courts are specialized courts (of first and second instance) established especially to hear juvenile cases. The Juvenile Code provides in detail the duties of the special juvenile judges as per stage of the trial referring mainly to the “court” and not to the “judge” since the different types of orders and decisions are taken in general by the court as a body (even if this may sit as one-member).

Article 58 of the Law on Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005 (Official Gazette No. 851) sets the qualifications for becoming a judge.

#### **2.1.2. Duties of juvenile prosecutors**

i.) General duties of prosecutors:

Articles 12, and 19 to 27 of the AGO Law cover the duties and authorities of prosecutors.

In particular, **Article 12** of the AGO Law regulates the duties and authorities of the Attorney General's Office providing that the Prosecutor in his/her relevant field has the following duties and authorities:

1. To strengthen legality;
2. To defend the political rights, the right to work and freedom of the citizens stated in the Constitution and other legislative documents;
3. To safeguard and defend the rights and the legitimate interests of the central and local governmental, quasi-governmental and private institutions, political parties, social organizations against violation;
4. To supervise implementation and equal adherence to the law during the execution of the functions of the organization related to crime discovery and investigation;
5. To monitor the legality of the activities of the organization related to discovery and investigation of crime;
6. To supervise the activities of the individuals responsible for prisons and detention centers.
7. To organize affairs relating to discovery and investigation of crimes, to identify and attribute the criminal responsibility of the individual who has committed a crime;
8. To take measures in order to prevent criminality with the cooperation of concerned administrations;
9. To regulate affairs relating to the statistics of crimes and to prepare reports regarding discovery and investigation of crimes.
10. To participate in legal public awareness campaigns to enhance the level of legal knowledge of citizens;
11. To evaluate suggestions, complaints and petitions of the central and local governmental, quasi-governmental and private institutions, political parties, social organizations and citizens and to make decisions in the relating field;

12. To guide the activities of the lower Prosecution Office and evaluate its functions;
13. To unify and arrange the activities of the Prosecution Office in order to eliminate any defect and to promote the performance level of the subordinate Prosecution Office;
14. To take necessary measures in order to build capacity of prosecutors and interrogators;
15. To perform other duties and authorities pursuant to the provisions of law.

The Attorney General in addition to duties and authority of indicated in the AGO law, describes in **Article 13** the following duties and jurisdiction:

1. Leading the activities of the Prosecution Office and evaluating their executions;
2. Issuing orders and giving instructions to the relevant Prosecution Offices;
3. Participating in the Supreme Court High Council session related to revisions the decisions of the court;
4. Assigning competent Prosecutor in the case of conflict of jurisdiction during the investigation and prosecution of the accused;
5. Making recommendations relating to amendment, addition and annulment of law to each of the two houses of the National Assembly after the confirmation of the advisory body;
6. Monitoring the implementation and equal adherence to the law by governmental organizations and citizens of the country.

ii.) Specific duties of prosecutors as per stage of the trial:

**In the field of investigation** the prosecutor has the following duties and jurisdiction (Article 19 of the AGO Law):

1. Attribution of crime to the criminal according to the provisions of the law;

2. Abstaining from unlawful attribution of allegations against a real or natural person, based on no reason and imposing illegal limitations on their rights.
3. Abstaining from unlawful deprivation of liberty, arrest, detention of the suspect and accused.
4. Abiding by law during the initiation and prosecution of criminal cases and protecting the rights of the parties of the claim;
5. Requesting the documents, materials and other evidence relating to the occurrence of the crime from the responsible officials for discovery and investigation of the crime;
6. Collecting adequate evidence of conviction or innocence of the accused;
7. Issuance of instructions regarding the execution of the discovery and investigation of the crime in order to identify, amend or nullify the measures taken against a suspect or accused or to summon them, determination of the quality of the crime, severity of the allegation and execution of the discovery, prosecution and investigation of accused who are in hiding.
8. Determining movable and immovable property of the accused and to preserve it proportional to their value, to take into consideration the equal forfeiture according to the orders of the financial and economic law;
9. Recommending inspection of the area or house in order to gather the traces of evidence to the authorized court;
10. Participating in the discovery and investigation of the crime pursuant to the provisions of the law;
11. Returning the criminal file to the authorized organization of discovery and investigation and issuing order in order to correct the defects;
12. When the prosecutor violates the provisions of the law, taking the case from that prosecutor and reassigning the case to another interrogator(s);

13. Issuing order to initiate the criminal proceeding;
14. Issuing order to supervise the suspect or accused and making recommendations related to their detention and modification of detention to the authorized court;
15. In case the crime has not been committed or if there is not adequate evidence to support the conviction against the accused, the file shall be preserved.

Regarding the conditions indicated in Article 19 of the above law, the responsible investigation prosecutor, before proceeding, is duty bound to receive a confirmation first to his activities from the relevant prosecution office (Article 20).

The Juvenile prosecutor is required **not to initiate a legal action directly against children** who have committed crimes, **unless a person or a source submits a written complaint** to him/her (Article 9 paragraph 4 of the Juvenile Code).

**In the field of prosecuting criminal actions**, the prosecutor has the following duties and jurisdictions (Article 21):

1. Confirm an indictment or an order pursuant to the dismissal of a criminal case and object the investigation of a case if there are gaps or defects and issue order in order to eliminate it;
2. Pursuant to the provisions of law, file a criminal complaint and demand compensation for the loss incurred to the authorized court;
3. Participate in the authorized court judicial session, give explanation and defend claims that have been filed in the court and if there is no grounded evidence, desist from filing a criminal complaint;
4. Give reason about the issues brought up during the proceeding of a case in the authorized court;
5. Object or accept the decision or order of the authorized court.

In the field of **general monitoring** provided by Article 22, the prosecutor amongst other duties is responsible to:

- Monitor former and subsequent activities of the inspection and inspection and control organizations as deemed necessary;
- Monitor or assess the issues instructed by AG;
- Monitor the implementation and enforcement of the decision of the court;
- Monitor prisons and detentions centers at all times;
- Meet in person with those who are under custody, detention or imprisonment and take measures regarding the above occasions in order to resolve their complaints;
- Monitor the legitimacy of the orders and instructions of the responsible authorities of detention centers and prisons. If the order or instruction is in conflict with the law, the monitoring prosecutor can suspend and object it;
- Demanding explanations from the authorities responsible for the detention and prison facilities if the provisions of law are violated.
- Release people kept under detention or custody unlawfully;
- Make decision in order to abolish unlawful order or instruction of the responsible authorities of prisons and detention centers.

As we will examine below, the Juvenile Code provides in detail the duties of the special juvenile prosecutor as per stage of the trial.

According to the International Association of Prosecutors Standards, the Prosecutors should "***perform their duties fairly, consistently and expeditiously***" (4.1). However, as we will see below, most of the above mentioned duties are not accomplished in practice, especially the release of juveniles kept unlawfully<sup>252</sup>

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<sup>252</sup> See below, 3.1.2.2, ii.

## **2.2. Specific qualities of juvenile judges and prosecutors**

The specific qualities of the judiciary, such as the rules, principles or standards of conduct and ethics are in general the same for judges and prosecutors. Since in the eyes of the public judges and prosecutors represent justice and the justice system, their conduct in and out of the court should inspire confidence and maintain dignity and respect for the justice system.

The main qualities of the judiciary as safeguarded by the international instruments and endorsed to great extent by national instruments are:

- Independence and impartiality;
- Integrity;
- Propriety;
- Equality;
- Competence and diligence.

### **2.2.1. Instruments setting the standards of conduct of the judiciary**

Basic common standards of conduct for the judiciary (applying to both judges and prosecutors) have been adopted by the UN in 1985, although focused mainly on the principle of independence<sup>253</sup>. Particular consideration was given to the selection procedure of the judiciary where independence was related closely to integrity and professional competence<sup>254</sup>. At national level standards for the judiciary derive from the Constitution; the Juvenile Code and from particular laws that regulate either only the Courts or the Attorney General's Office.

#### i.) Instruments for judges' conduct:

The norms and standards for the conduct of all judges have been determined mainly at international level by the U.N. Basic Principles on the Independence of the Judiciary, as mentioned above; and in a more complete manner by the

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<sup>253</sup> U.N. Basic Principles on the Independence of the Judiciary (General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

<sup>254</sup> According to principle 10: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".

Bangalore Principles of Judicial Conduct<sup>255</sup> which have been endorsed to great extent by the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan, adopted on the 14-6-2007. Principles also are contained in the Law on the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan.

ii.) Instruments for Prosecutors' conduct:

At national level, general qualities for the prosecutors derive from the Constitution, the Juvenile Code and the Law on Structure and Authority of the Attorney General's Office. However, for the moment, there is no specific text at national level determining the qualities of prosecutors<sup>256</sup> in the sense of general rules of conduct and ethics that prosecutors in general should respect.

At international level, however, specific qualities for prosecutors are determined by the International Association of Prosecutors Standards<sup>257</sup> on professional responsibility and statement of the essential duties and rights of prosecutors.

According to the International Association of Prosecutors (IAP) Standards prosecutors are required to have:

- Professional Conduct;
- Independence;
- Impartiality;

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<sup>255</sup> The Bangalore Principles of Judicial Conduct as endorsed through ECOSOC Resolution 2006/23: [http://www.unodc.org/pdf/corruption/corruption\\_judicial\\_res\\_e.pdf](http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf). For the commentary, see UNODC (2007), Commentary on the Bangalore Principles of Judicial Conduct:[http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf)

<sup>256</sup> At present there is a draft Code of Ethics and Conduct for prosecutors under preparation with the assistance of UNODC.

<sup>257</sup> The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors were developed within the International Association for Prosecutors and were approved by the IAP in 1999. The standards serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. At the 17th session of the U.N. Commission on Crime Prevention and Criminal Justice (Vienna, 14-18 April 2008), a Resolution was passed which called for "Strengthening the rule of law through improved integrity and capacity of prosecution services' The full text of the IAP Prosecution Standards was annexed to the Resolution and state parties were requested to take them into consideration when reviewing or developing their own Prosecution standards (ECOSOC Resolution, E/CN.15/2008/L.10/rev.2, E/2008/30, Resolution 2008/5, 17-4-2008).



- Confidentiality;
- Competence and diligence

### 2.2.2. Common standards for judges and prosecutors

#### i.) Independence and impartiality<sup>258</sup>:

Further to what has been developed above in Part I, under the principle of independence, it should be added that the principle of independence of the judiciary was not invented for the personal benefit of judges and prosecutors, but was created to protect defendants against the abuses of power of the judiciary<sup>259</sup>. That entails that judges and prosecutors cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that they have the **duty to apply the law**. In the field of protecting the individual, this also means that members of the judiciary have the responsibility to apply, whenever relevant, domestic and international human rights law<sup>260</sup>.

For the public to accept the independence of the judicial branch, and give deference to the rulings and judgments of the courts, the public must have confidence in the integrity and independence of the members of the judiciary. To earn and retain this confidence, judges and prosecutors must comply with the law and act without fear or favor<sup>261</sup>.

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<sup>258</sup> See, above, under the section on international principles what has already been developed on the issue of independence and impartiality.

<sup>259</sup> See also, U.N. Basic Principles on the Independence of the Judiciary (General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

<sup>260</sup> See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., Chapter 4, p.115.

<sup>261</sup> According to Article 3 of the Regulation of Judicial Conduct for Judges of the Islamic republic of Afghanistan, "*The independence and neutrality of a judge are the sole guarantees to ensure the administration of rights and the dispensing of justice. Hence, the judge shall be required to strictly prevent any interference, or attempt at interference, in the affairs that fall within his or her jurisdiction by other authorities or persons, including relatives. He or she shall respect and comply with the law, and shall bear in mind that in exercising his or her judicial functions, he or she shall not be subject to any authority other than the authority of the law*". As for prosecutors the IAP Standards in Rule 2.2 require that "*if non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence*".

It should also be stressed that the main role of Prosecutors is not to convict at any price the defendant, but **to search for the truth** and assist the court to arrive at the truth and for doing so they should be impartial<sup>262</sup>.

ii.) Integrity:

Integrity is the attribute of rectitude and righteousness<sup>263</sup>. The components of integrity are honesty and judicial morality. A judge and a prosecutor should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity as so defined.

**High standards are required from the judiciary in both private and public life.** If a member of the judiciary is to condemn publicly what he or she practises privately, he/she will be seen as a hypocrite.

This inevitably leads to a loss of public confidence in the judge, which may rub off on the judiciary more generally.

**Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity<sup>264</sup>.**

The judiciary is an institution of service to the community. **It is not just another segment of the competitive market economy** (Bangalore Principles, Commentary, 195) and certainly it demands high integrity. If integrity is not respected then justice cannot be done. Integrity is also very much related to independence, as mentioned above.

Article 21 of the Regulation of Judicial Conduct expressly prohibits any action of corruption, conflict of interest or misuse of office by a judge, stating: "*A judge shall not accept any gifts or favors that put him or her under suspicion of graft or corruption, and shall not let any of his or her relatives or dependants receive such gifts or favors in regard to his or her position as a*

<sup>262</sup> See IAP Standards in Rule 3.

<sup>263</sup> Bangalore Principles Commentary, 101, p.79.

<sup>264</sup> Ibid.

*judge. A judge, or any of his or her court staff, or family members, shall not request or accept any gift, reward, loan, or favor in relation to anything done or to be done in connection with the performance of judicial duties. A judge shall not use his or her judicial position to enhance his or her personal interests, the interests of his or her family members, or any other person”.*

The acceptance by a judge, his or her court staff, or a member of the judge’s family living with the judge, of any gift, reward, loan, or favor, whether solicited or unsolicited, carries a clear implication that the judge will be obligated or will feel obligated to reciprocate. Such a perception calls into question the independence and impartiality of the judge. Therefore, no gift, reward, loan, or favor should be accepted from any person, attorney, business, organization, or other entity that is appearing, or may appear in the future before the judge, or that has, or may have, business with the judge connected to the performance of his judicial duties. This article does not prevent the acceptance by a judge of an honorarium, provided to the judge by a governmental entity or an organization engaged in the provision of continuing legal or judicial education courses or seminars, in recognition of the judge’s participation in the teaching of a course. Judges must distinguish between the proper and improper use of the prestige of the office in their personal, as well as their professional activities. The judge must avoid lending the prestige of his or her office for the advancement of his or her private interests or the private interests of others<sup>265</sup>.

In general, judges and prosecutors should resist any temptation to devote excessive attention to extra-judicial activities if this reduces their capacity to discharge the judicial office. There is obviously a heightened risk of excessive attention being devoted to such activities if they involve compensation. In such cases, reasonable observers might suspect that the judge or prosecutor has accepted the extracurricular duties in order to enhance his or her official income. Although it is understandable that in Afghanistan magistrates are not well remunerated and also that they might often face temptations through

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<sup>265</sup> See, Commentary under Article 21 of the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan, USAID, Training Course, October 2007, p.54.

eventual attempts of bribery, **corruption is neither acceptable nor forgivable in this case.**

An ethically compromised judiciary means that the legal and institutional mechanism is not capable of fighting efficiently crime. Unfortunately, evidence is steadily and increasingly surfacing of widespread corruption in the courts in many parts of the country.

To confront the problem, the UN have taken a variety of approaches<sup>266</sup>. In particular UNODC is examining judicial corruption in detail and seeking to identify means of addressing it, in higher and lower levels of court systems.

The objectives of strengthening judicial integrity<sup>267</sup> are to:

- Formulate the concept of judicial integrity and devise the methodology for introducing that concept without compromising the principle of judicial independence;
- Facilitate a safe and productive learning environment for reform minded chief justices around the world;
- Raise awareness regarding judicial integrity and to develop, guide, and monitor technical assistance projects aimed at strengthening judicial integrity and capacity.

Integrity is very much related to **Propriety**<sup>268</sup>. Impropriety is the conduct that compromises the ability of the judge or the prosecutor to carry out judicial responsibilities with integrity, impartiality, independence and

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<sup>266</sup> See, the efforts made by UNODC on this issue:

<http://www.unodc.org/unodc/en/corruption/judiciary.html>. Among the tools that UNODC has developed against corruption, see, *Anti-Corruption Toolkit*:

[http://www.unodc.org/documents/corruption/publications\\_toolkit\\_sep04.pdf](http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf)

<sup>267</sup> In close collaboration with Transparency International (TI), the British Department for International Development (DFID) and the UN Special Rapporteur on the Independence of Judges and Lawyers, the Anti-Corruption Unit of UNODC organized several meetings of chief justices from common and civil law countries supporting them in identifying and applying best practices in strengthening judicial integrity and capacity. The outputs of this process included a model action plan for judicial reform, a methodology for the assessment of justice sector integrity and capacity and the Bangalore Universal Principles of Judicial Conduct, which was submitted to the United Nations Commission on Human Rights at its 59th session in 2003.

In 2002 the Judicial Integrity Group (an association composed of chief justices and senior judges supported by UNODC) adopted *the Bangalore Principles of Judicial Conduct on Strengthening Judicial Integrity* which UNODC's Global Programme against Corruption is helping implement.

<sup>268</sup> Bangalore Principles, Value 4, Commentary, 112, p.86.

competence, and it is likely to create, in the mind of a reasonable observer, the perception that the judge's or prosecutor's ability to carry out judicial responsibilities in that manner is impaired.

The *Adab al-Qadi* (The Judge's Etiquette) by Abu Bakr Ahmad ibn al-Shaybani al-Khassaf, an eminent jurist, is a manual designed to enable judges to administer justice on the foundations of revealed law granted by the Prophet Muhammad. This ethical code includes, *inter alia*, the following rules for judges<sup>269</sup>.

*a) Affirmative Rules*

A judge should:

1. possess a commanding personality and knowledge, and should display patience in court. He should ensure that every person has easy access to the court;
3. consider a previous decision of the court as null and void when the falsehood of a case is apparent to him;
4. know the manners and customs of the people to whom he has been appointed *qadi*;
5. keep a close watch on the day-to-day affairs of his court officials;
6. be acquainted with the jurists, as well as with the pious, trustworthy and *udul* (just people) of the town;
7. He may attend funerals and visit sick persons, but while doing so he should not discuss the judicial affairs of litigants.
8. He may attend general banquets. According to al-Sarakhsi, 'If the banquet can take place without the presence of the *qadi*, then this banquet would be taken as "general". But if at a banquet the attendance of the *qadi* is inevitable, then such a banquet would be called "special", that is, arranged especially for the *qadi*.

*b) Negative Rules*

1. He must not give judgment in anger, nor when under emotional strain.

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<sup>269</sup> Muhammad Ibrahim H.I. Surty, "The Ethical Code and Organised Procedure of Early Islamic Law Courts, with Reference to al-Khassaf's *Adab al-Qadi*", in: Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), *Criminal Justice in Islam*, London and New York, I.B. Tauris & Co Ltd., 2003, pp. 149-166 at pp.151-153 as referred to in: Bangalore Principles Commentary, p.157.

This is because, when a *qadi* is mentally or emotionally upset, his reasoning power and judgment may be impaired.

2. He must not decide a case when sleep overcomes him, nor when he is unduly tired or overjoyed.

3. He must not give judgment when he is hungry or has overeaten.

4. He must not accept any bribe.

5. He must not laugh at litigants, nor should he make fun of them.

6. He must not weaken himself with non-obligatory fasting when he is deciding cases.

7. He must not put words into the mouth of a victim, nor should he suggest answers, nor should he point at any of the litigants.

8. He must not permit a litigant to enter his home, although men who are not concerned with a case may visit a *qadi* in order to greet him and for other purposes.

9. He must not entertain one of the litigants at his residence. He may, however, entertain both litigants together.

10. He must not persist in ignorance of something, but must ask those who have knowledge.

11. He must not crave wealth, nor should he be a slave to his lust.

12. He must not fear anyone.

13. He must not fear dismissal, nor must he eulogize, nor should he hate his critics.

14. He must not accept gifts, although he may accept gifts from his relatives, except for those awaiting trial. He may also continue to accept gifts from those who gave him gifts before his appointment as *qadi*, but, if they increase the value of the gift after his appointment then it is not permissible for him to accept.

15. He must not deviate from the truth for fear of someone's anger, and must not walk in the street alone. In this way, his dignity will be maintained and he will not be exposed to the undue approaches of interested parties.

16. He must give no consideration to the emotions of litigants.

### iii.) Equality:

The principle of Equality has been examined above under the principles of justice in relation to impartiality. However, we should add that members of the judiciary are also obliged to respect equality of genders while treating a case, which means that they should not act by a discriminatory manner. Unfortunately in practice, girls do not seem to have an equal treatment neither during investigation nor during trial. Many of the girls could be released by the prosecutor since the so-called "crimes" committed by them are not crimes, e.g. running away from home with no relation to zina. Further, girls are punished more severely than boys for the same crimes. In addition to that, members of the judiciary should not behave (in their speech, gestures or other conduct) in a way that could be interpreted as diminishing self-esteem or decreasing the level of confidence to the parties (lawyers, defendant, witnesses).

### iv.) Competence:

Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation<sup>270</sup>. Judicial competence may be diminished and compromised when a judge is debilitated by drugs or alcohol, or is otherwise mentally or physical impaired. In a smaller number of cases, incompetence may be a product of inadequate experience, problems of personality and temperament, or the appointment to judicial office of a person who is unsuitable to exercise it and demonstrates that unsuitability in the performance of the judicial office.

The juvenile Code refers to professional conduct when it requires from both judges and prosecutors to have specific aptitude, professional training and special experience "*in children's trial*" (: for judges; Articles 26.3) and "*in juvenile matters*" (: for prosecutors; Article 9 paragraph 3).

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<sup>270</sup> Bangalore Principles, Value 6, Commentary, point 192, p.129.

According to the **International Association of Prosecutors Standards** prosecutors should show professional conduct (Rule 1). However, the concept of **“professional conduct”** encloses a cluster of principles that should be respected by the prosecutor, such as integrity, independence and impartiality, legality, equality and fair trial. In that respect, Rule 1 requires that:

*“Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person’s right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights”.*

v.) Diligence<sup>271</sup>:

To consider soberly, to decide impartially, and to act expeditiously are all aspects of judicial diligence<sup>272</sup>. Diligence also includes striving for the impartial and even-handed application of the law, and the prevention of the abuse of process. The ability to exhibit diligence in the performance of judicial duties may depend on the burden of work, the adequacy of resources (including the provision of support staff and technical assistance), and time for research, deliberation, writing and judicial duties other than sitting in court.

**Justice delayed can equal to justice denied**, which can give rise to misjudgement. In all activities related to official duties, a judge should carefully and diligently carry out those responsibilities to enhance the reputation of the judicial system. That means not only to devote adequate time to judicial duties and to keep good records of cases, but also among

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<sup>271</sup> We have already developed this issue above (under Part I) under the right to a trial without delay and to a decision within a reasonable time.

<sup>272</sup> Ibid., point 193, p.129.



other things to be punctual; to be expeditious in determining matters under submission and to insist court officials, parties and lawyers cooperate.

Diligence under the aspect of promptness and timeliness constitutes a right of the defendant; however, diligence is a major obligation of judges and prosecutors foreseen by Article 13 of the Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan, by Article 38 of the Law on the Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan, and by Principle 6.5 of the Bangalore Principles of Judicial Conduct. For the Prosecutors Rule 4.1 of the IAP Standards require to **"perform their duties fairly, consistently and expeditiously"**. As mentioned above, the Juvenile Code is extremely demanding on the respect of timeliness and diligence of both judges and prosecutors since it sets very short deadlines for each judicial action.

Finally, if the conduct of a member of the judiciary is not appropriate or if he/she does not abide to his/her duties disciplinary proceedings can be initiated against him/her<sup>273</sup>.

The role of judges, prosecutors and lawyers is essential for the protection of the human rights of all persons suspected or accused of having committed criminal offences. The responsibility of these legal professions is particularly great when the judicial proceedings concern children, who are in conflict with the law. Such proceedings require special knowledge and skills on the part of judges and prosecutors, (as well as also from other professionals concerned)<sup>274</sup>.

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<sup>273</sup> Disciplinary proceedings against a judge are provided by the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan (Article 23) and by Chapter 6 of the Law on Organisation and Jurisdiction of the Courts of the Islamic Republic of Afghanistan of 21/5/2005. Disciplinary responsibility of prosecutors is foreseen by Chapter 7 of the Law on Structure and Authority of the Attorney General's Office.

<sup>274</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., Chapter 10, p.442. The Committee on the Rights of the Child has often recommended that States parties introduce or strengthen training programmes on relevant international standards for all professionals involved in the juvenile justice system. It has also consistently suggested that the States parties consider seeking technical assistance in the area of juvenile justice, including the police, from the Office of the United Nations High Commissioner for Human Rights and the United Nations Children's Fund (UNICEF), among other organizations.

*"Children are persons in their own right and possess rights and obligations which have to be considered and respected by both administrative and judicial authorities. Furthermore, children have special rights, needs and interests which must be considered. The administration of justice, whether criminal or otherwise, must also at all times be guided, inter alia, by the overriding principles of non-discrimination, the best interests of the child, the child's right to life and development and its right to be heard. However, in order to make these principles a reality for the children of the world, States must incorporate all relevant international rules into their own domestic legal systems, as well as providing proper training and financial means to the legal professions, police and social authorities, enabling them to acquire the necessary knowledge and skills to carry out their duties in conformity with States' legal undertakings"<sup>275</sup>.*

### **Questions**

- \_ What do you believe are the essential qualities of a good judge?*
- \_ What happens if some of the qualities required by the Code are missing?*
- \_ How do you, as judges and prosecutors, perceive the role of the principle of separation of powers?*
- \_ How is this principle ensured?*
- \_ How are the independence and impartiality of the Judiciary guaranteed in practice?*
- \_ Have you ever experienced any difficulties in performing your professional duties in an independent and impartial manner?*
- \_ If so, what were those difficulties, and how did you deal with them?*

### **Case study 1**

Jamil has just become a member of the court, and assigned to his first panel of judges. Ahmed, the senior judge in the district, has the office next to Jamil. Ahmed is not on the panel with Jamil, but tells Jamil that he had a case similar to the one that Jamil's panel is hearing, and the decision he rendered was for the defendant. Ahmed tells Jamil he should rule for the defendant.

- \_ Has Ahmed done anything wrong?*

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<sup>275</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., Chapter 10, p.443.

*\_Has Jamil done anything wrong?*

*\_What should Jamil do?*

*\_Would the situation be different if Ahmed was the Chief Judge?*

*\_Would the situation be different if the person who contacted Jamil was his father, a member of the Government?*

### **Case study 2**

Judge Abdulrahman's son is stopped by a traffic officer for speeding, and is given a speeding ticket. He tells his father, that he is very sorry and is worried that he will lose his drivers license. Judge Abdulrahman calls the traffic officer, identifies himself, and simply asks what happened. Following their conversation the traffic officer files the case.

*\_Do you see any flaw in Judge Abdulrahman's conduct?*

*\_Would it make any difference if the son of judge Abdulrahman was a law student who failed in his exams and judge Abdulrahman had called his teacher to ask him to pass his son?*

### **Case study 3**

Sayed is a long time friend of Rameen. When Sayed became a successful businessman, he started sending Rameen a goat every year at the end of Ramadan. When Rameen became a judge, Sayed began sending Rameen two goats. Now that he is a judge, what should Rameen do with the goats?

### **Case study 4**

Judge Shahin is very moved by orphan children. He organized a committee to raise money for the orphanages. On that purpose, Judge Shahin asked many attorneys, judges and businessmen to contribute money. All the people at court who worked for Judge Shahin were expected to donate something to this charity. He also put a jar in his courtroom with a sign saying people could put contributions in the jar for the committee for the orphan children.

*\_Do you see any possible problems?*

*\_ Do you believe that a judge should use the prestige of his or her office to further a personal interest even if the cause is worthy?*

### **Case study 5**

Judge Sadi is very nice and fair and intelligent. However, he is just lazy about writing up his decisions and issuing them. He has a backlog of many files that have been heard, but no decision issued. The plaintiff in one of Judge Sadi's cases is quite ill and may die very soon. His attorney wants to get the decision.

*\_ What should the attorney do?*

### **Case study 6**

Ali is the cousin to judge Abdulrahman. Ali's son is prosecuted for robbery. The night before the hearing Ali is paying a visit to his cousin.

*\_ Do you see any harm in that?*

## **3. The role of juvenile judges and prosecutors at different stages of the trial**

Under the legal system of Afghanistan, the stages in the process of dealing with a criminal case can be summarised by:

1. **Report or detection of a crime.** The victim or a witness to a crime makes a report to the Police. At times the Police may themselves observe or detect an offense.
2. **Initial investigation** of a crime which is conducted by the police. The purpose of a criminal investigation is to gather evidence to identify a suspect and support an arrest.
3. **Arrest** of a suspect by the police. An arrest involves taking a person into custody for the purpose of holding the suspect until court. The detention of the suspect also prevents them from interfering with evidence or witnesses.

4. **Referral of the case to the Prosecution** made by the Police upon the completion of their initial investigation.
5. **Investigation by the Prosecution** of the case is undertaken by the Prosecutor with the assistance of the Police. The suspect is interviewed, evidence is collected and evaluated, witnesses are interviewed; and possible charges examined.
6. **Indictment** of the suspect is undertaken by the prosecutor if the crime is serious and the evidence strong enough for further referral of the case to the court.
7. **Pre-trial detention** and/or **bail**. Detention refers to a period of temporary custody prior to trial. Bail is an undertaking by a defendant to ensure he or she will show up for a trial.
8. **Trial** conducted by the Court who hears the charge and supporting evidence presented by the prosecutor.
9. **Adjudication of guilt**. The standard of evidence for a criminal conviction is *'guilt beyond a reasonable doubt'*— that is less than absolute certainty, but more than a high probability. If there is any doubt for the accused's guilt he is entitled to be acquitted.
10. **Sentencing**. If the accused is found guilty, the court imposes a sentence.
11. **Appeals** can be made on the wrongful:
  - application of the law and definition of crime,
  - evaluation of facts and circumstances; or
  - application of the penalty and/or of its height.Appeals are first heard by a secondary court. Appeals can be further made to the Supreme Court where its decision is final.
12. **Execution of the Sentence** is the last phase of the process and it is followed by specific regulation regarding confinement executed in the Juvenile Rehabilitation Centers.

From the moment of the commission of the alleged crime, there are three main stages in the process of bringing to justice the juvenile (three stages of the trial):

- a) **Pre-trial stage.** This stage is very crucial for the outcome of the case and it can be divided in two sub-stages:
  - o **The preliminary investigation:** which starts with the reporting of the crime and its detection by the police; it continues with the arrest of the suspect and the collection of evidence and the preparation of the file by the police (preliminary investigation conducted by the police); and ends by sending the file to the juvenile prosecutor.
  - o **The (main) investigation:** conducted by the juvenile prosecutor. It starts with the reception of the file from the police; it continues with the examination of evidence, eventual collection of supplementary evidence and evaluation of it by the juvenile prosecutor and ends: 1) either by the issuance of the indictment and referral of the case to the court or 2) by the filing of the case and the dismissal of the accused of any charges; or 4) by *diversion* of the trial; if the prosecutor chooses to apply a measure e.g. of warning or involvement in a life-skill program of the juvenile, etc.
- b) **Trial stage:** the procedure before the Court where during the hearing all the evidence is presented and at the end the defendant is either condemned (after adjudication of guilt) or acquitted.
- c) **Post-trial stage:** (in the event of sentencing the accused person) it is the stage of execution of the sentence. In case of confinement, the juvenile is referred to the Juvenile Rehabilitation Center.

It needs to be noticed that the first stage where the police<sup>276</sup> have control over the alleged crime is very important not only for the entire outcome of the case but also of the personal situation of the juvenile and of his/her general treatment (especially for girls).

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<sup>276</sup> See below, 3.1.1.2.

Before we enter into more details about the role of juvenile judges and prosecutors as per each stage of the trial, we should know first if any child can be prosecuted and sentenced after the commission of a crime, or if there are restrictions to children's criminal responsibility.

### **3.1. Pre-trial stage**

#### **3.1.1. Detection of Children's Crimes: Police Arrest and Preliminary Investigation**

Of course the manual is not addressed to police officers and there is no need in getting into much detail in explaining their work. As we have mentioned above, the judiciary, and especially the prosecutors should control the legality of police's actions it is thus, important for them to know what the law provides for this stage.

Thus, it is the professional role and duty of judges and prosecutors to use their respective competences to ensure that a *just rule of law* prevails, including respect for the rights of the individual at all stages of the trial. These rules and principles have to be consistently and meticulously applied, since judges, and prosecutors have the most important role to play in applying national and international human rights law. *"Their work constitutes the chief pillar of the effective legal protection of human rights, without which the noble principles aimed at protecting the individual against the abuse of power are likely to be sapped of much or even all of their significance"*<sup>277</sup>.

According to Article 16 of the Regulation of Judicial Conduct *"Whenever it is noticed by a judge while considering a case that the basic rights of the accused were violated during the investigation and detection of the crime, upon the conclusion of the case, the judge shall be required to issue a decision identifying the violation and forward the decision to the appropriate authority for further proceedings and possible prosecution"*.

This means that the police and the prosecutor during arrest, investigation and prosecution should respect the rights of the accused. If, during the

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<sup>277</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 1, p.25.

proceedings, the judge determines that the police or the prosecutor violated those fundamental rights, the judge, may consider that violation in reaching a verdict. Upon the conclusion of the case, the judge must issue a decision identifying the violation, and forward that decision to the appropriate authority for further proceedings and possible prosecution.

Article 134 para 1 of Afghan Constitution: *"Discovery of crimes shall be the duty of police, and investigation and filing the case against the accused in the court shall be the responsibility of the Attorney's Office, in accordance with the provisions of the law"*.

Other than the Constitution, the actions of the Police its structure and duties are regulated by the Police Law (detailing standards for police practice)<sup>278</sup>; Interim Criminal Procedure Code (ICPC) (general procedural framework, under revision)<sup>279</sup>; the Criminal Procedure Law of 1965, amended in 1974<sup>280</sup>; and the Juvenile Code.

### **3.1.1.1. Detection of the crime and collection of evidence**

According to Article 9.1 of the Juvenile Code: *"The detection of children offences is the responsibility of police while special juvenile prosecutor's office is responsible for assessment, investigation and prosecution of juvenile crimes. To this end, special juvenile prosecutor offices shall be established in the capital and provinces"*.

No one could seriously argue that the police in Afghanistan conduct all possible investigations and uncover all possible exculpatory evidence and witnesses in every case.

The police that first arrive at the scene of a crime are typically not properly trained to collect evidence or to preserve the crime scene. Sometimes the police make errors (e.g. they might destroy evidence) or overlook important evidence and, often, they simply stop investigating a case once they have referred it to the Prosecutor's Office. Sometimes the investigation is

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<sup>278</sup> Official Gazette No. 862, 2005.

<sup>279</sup> Official Gazette No. 820, 2003.

<sup>280</sup> Official Gazette No. 26, 1965.



completed by defence lawyers who have to conduct their own search for exculpatory evidence or witnesses<sup>281</sup>.

### **3.1.1.2. Police Arrest**

The CRC sets in Article 37 (b), (c) and (d) the Basic principles which prevails during arrest and also during investigation and any kind of deprivation of liberty,

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

It is clear that during and immediately after arrest juveniles are most at risk of abuse or torture in the justice system and it is police personnel who are most likely to be perpetrators. It is also the time when children are placed

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<sup>281</sup> See, UNODC, *Strategies and Tactics for the Advocate Defending Human Trafficking Cases*, op. cit. p.38. Specific tasks that may be undertaken by investigators include: producing crime scene diagrams and photos; obtaining official documents and records; victim and witness background investigations; witness interviews; identifying new witnesses; serving ICPC article 49 notification on witnesses; writing reports; and testifying at trial.

most at risk of abuse from adults together with whom they are detained<sup>282</sup>. Besides ill-treatment and human rights violations, surveys also attest of over-arrest by the police<sup>283</sup>. Considering that, it is imperative that the judiciary supervises the actions of the Police and monitors the places of police detention.

**Something that most prosecutors seem to forget in practice is –as we mentioned above- that the law gives them a clear authority to supervise the Police actions during that phase.**

Article 12 of the AGO Law related to the duties and authorities of the Attorney General's Office provides that it is among these duties:

*"4. To supervise implementation and equal adherence to the law during the execution of the functions of the organization related to crime discovery and investigation;*

*5. To monitor the legality of the activities of the organization related to discovery and investigation of crime;*

*6. To supervise the activities of the individuals responsible for prisons and detention centers".*

Besides, Article 33 para 1 of ICPC states that the Police's activities and decisions are subject to ratification by the Primary Saranwal. In particular, it states that the Primary Saranwal immediately after having been informed about the judicial police's activities (arrest, interrogation, seizure, etc.) either sanctions the deeds of the judicial police's activities or adopts decisions to revoke or modify them. Before taking any action the Saranwal can ask the police to provide explanations (Art. 33 para 2 of ICPC).

All the above mentioned duties are not left to the discretion of the prosecutors to apply. The prosecutors do not simply have the discretion of controlling the Police actions, but they have the clear obligation to do so. This means that they should monitor the police stations for eventual breaches of the law concerning e.g. illegal detentions or mistreatment of detainees, especially when juveniles are detained and they should not just wait to

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<sup>282</sup> See, UNICEF - AIHRC, *Justice for Children*, op. cit., p.16.

<sup>283</sup> See, UNODC, *Assessment Report*; UNAMA, *Arbitrary Detention*, op. cit.

receive a complaint against police actions in order to react. The above mentioned duties imply the energetic intervention of the prosecutor in the field of supervision of police actions during the first stage of the trial. Under this section we present the legal provisions on the duties of the Police during the preliminary phase, so judges and prosecutors can detect more easily eventual breach of the law by the Police.

**Case studies:**

A. An NGO having information that in district 13 the Police are mistreating the juveniles during their arrest contacts the Juvenile Prosecutor and explains the situation. The Juvenile Prosecutor replies that according to the law he can not act before he receives a written complaint from a person containing all the allegations with names and circumstances in detail.

B. Imagine in the previous example, that the NGO after the reply of the Prosecutor is leaving his office and contacts the second Juvenile Prosecutor on duty explaining to him the situation. This Prosecutor replies that the Police are another body supervised by the Ministry of Interior and not by the judiciary and in that case they should contact the Ministry of Interior.

*\_Has any of these two prosecutors replied correctly?*

*\_If not, how should they have acted instead?*

C. During investigation Ahmed who is denying the accusations is complaining to the Prosecutor that during his two days arrest at the Police station, the Police have beaten him in order to confess. The Prosecutor replies that unfortunately the Police are a bit cruel with children.

*\_Has the prosecutor replied correctly?*

*\_If not, how should he have acted instead?*

It needs to be noticed that a police arrest (unless the crime committed in flagrancy) needs a warrant issued by a judge. It also needs to be stressed

that according to **Article 10** of the Juvenile Code the Police have the right to arrest a child **only** if the following conditions are completed:

- If there is **grounded evidence** of misdemeanour, felony, or crime and
- From the moment the previous condition is fulfilled, the police has the authority to arrest a child **only** if additionally one of the following circumstances take place:
  - a. Risk of flight of the child;
  - b. Alteration of documents and evidence by the child and
  - c. Risk of repetition of a new crime by the child.

In the second paragraph of the Article 10 of the Juvenile Code it is provided that the Police should **not use handcuffs for persons who have not completed 18 years of age, unless there is a risk of flight or if they pose imminent threat to themselves or to others**<sup>284</sup>.

According to Article 11 of the Regulation of Judicial conduct, it is an **obligation of the judge** "*not allow the security officers to bring the accused handcuffed or in chains into the hearing session*". Only in exceptional cases, "*the judge may order the adoption of necessary security measures to avoid the escape of the accused or to preserve order in the courtroom*".

Security measures can give the impression that the judge has prejudged the guilt of an accused before the case has been completed. Therefore, although necessary in some cases, the judge should exercise restraint in the imposition of security measures<sup>285</sup>, otherwise he violates the presumption of innocence.

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<sup>284</sup> Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time (Beijing Rule 13.1). Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response (Beijing Rule 17.1). According to the Havana Rules, detention before trial for children shall be avoided to the extent possible and limited to exceptional circumstances (Rule 17). The presumption of innocence should apply to the entire procedure.

<sup>285</sup> See, USAID, Training Course on the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan, p.32.

i.) Notification of the arrest:

Upon the apprehension of a juvenile, the Police are duty bound to report the arrest and place of detention of a child to child's legal representative<sup>286</sup> and social services institutions within 24 hours from the time of arrest (Article 11.1 of JC).

The same provision of the Juvenile Code requires that if this information is not provided within the time limit, the police are obliged to provide written report explaining the reasons for the delay to the relevant prosecutor's office. If the police fail to present logical reasons for the delay, the issue shall be prosecuted.

ii.) Preparing the first investigation report (preliminary investigation):

The police, after having identified the child arrested<sup>287</sup>, inform him/her of the reasons of the arrest and interrogate him/her about the crime and its circumstances.

According to Article 13.1 of JC the Police are duty bound to organize the papers containing all required information about the suspected child and disposition of the case within **24 hours** from the time of discovery and submit them to the juvenile prosecutor's office for completion of the investigation. If this is not possible within 24 hours, the **juvenile prosecutor** has the authority to **extend** the period for submission of the papers and required information **up to 48 hours upon written request by the police**. The prosecutor also has the authority to hand over the child to his/her legal representative (Article 13.2).

During this stage the defence council of the juvenile offender has the right to be present<sup>288</sup>.

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<sup>286</sup> According to the Beijing Rules "where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter" (Beijing Rule 10.1).

<sup>287</sup> See Article 31.1 of ICPC.

<sup>288</sup> See, Art.32 of ICPC and also the right to defence above under the principles and rights.

### iii.) Eventual release:

Immediately after apprehension of the child, his/her legal representative can demand his/her release on bail<sup>289</sup>. The police and prosecutor are duty bound to declare their decision on the release request within 24 hours. If the decision is not taken in the given time, the legal representative can complain to the higher prosecutor (Article 11.2 of JC).

The prosecutor and judge have the authority to release a child on bail without monetary deposit, unless his/her situation requires detention (Article 11.3 of JC). The legal representative can request release of the child on bail or bail's extension during the course of investigation or trial. If the court does not deem detention of the child necessary, it can issue the child's release order without bail (Article 11.4 of JC).

As we have already mentioned above, all international instruments require that the child should not be kept in detention, especially if the crime is committed for the first time and if it is not serious. Unfortunately, in practice even if the majority of juvenile offences are only misdemeanours of not serious nature (e.g. minor theft) and most juveniles are first time offenders, the trend is to arrest them and to keep them throughout the entire judicial process in detention.

It needs to be stressed that the law does not require monetary deposit for a bail and in fact it does not specifies the nature of this "bail". In practice, only if a person of "high social status" (e.g. a shop owner) guarantees for the juvenile the latter can be released. However, the law is leaving this issue entirely to the discretion of the judge to evaluate which kind of guarantee can be given instead of a monetary deposit. Considering that Article 10 of JC requires that a child can be arrested only in three cases<sup>290</sup>: a) Risk of flight of the child; b) alteration of documents and evidence by the child and c) risk of repetition of a new crime by the child; we should conclude that the **absence**

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<sup>289</sup> According to the Beijing Rules "a judge or other competent official or body shall, without delay, consider the issue of release" (Beijing Rule 10.2).

<sup>290</sup> After having established first that there is **grounded evidence** of misdemeanour, felony, or crime.

**of these conditions** constitutes at the same time a **guarantee for releasing the child** in case of his/her arrest. It is very important to remind at this point, that the presumption of innocence requires that the child offender is treated as innocent until the complete prove for his/her guilt. The eventual detention contradicts the principle and acts rather as presumption of guilt.

iv.) Detention place:

According to Article 12.1 of JC *"the suspected and arrested child shall be detained in a special temporary location"*. It should be added that Article 37 (c) of CRC and Article 10.4 of JC require that children in detention are kept separately from adults. Thus, children should be kept separately from adults not only for the confinement or after the issuance of the decision on pre-trial detention from the court, but also during the detention from the police.

The second paragraph of Art.12 of the JC is rather unrealistic at present. It requires that *"the detention authority is obliged to provide access of the detained child to social, educational, vocational, psychological and health services considering the age and gender requirements of the child"*. However, none of the above-mentioned requirements with the exception of educational and (in some places) health services are provided to the juvenile offenders. Since 2008 an effort is made with the help of UNICEF to provide social services to juveniles<sup>291</sup> and eventually allevates the sanctions by imposing alternative measures<sup>292</sup>.

*During the second South Asia Conference on December 2002 in Dakha, on Access to Justice and Penal Reform<sup>293</sup>, it was suggested that:*

*1. Reducing the number of arrests wherever possible would affect the number of those sent to prisons as under-trials. Arrests without substantial grounds need to be avoided. There are other ways that could be attempted:*

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<sup>291</sup> UNICEF-AIHR, *Justice for Children. The situation of children in conflict with the law in Afghanistan*, op. cit.

<sup>292</sup> See below, Part III, 1.

<sup>293</sup> See, PRI, *Access to Justice, 2002*, <http://www.penalreform.org/access-to-justice-and-penal-reform.html>

- (a) In many cases 'caution' should be used instead of arrest;*
  - (b) The police should compound offences;*
  - (c) They should levy fines instead of arresting and locking up offenders;*
  - (d) Arrests should be delayed until police had sufficient evidence;*
  - (e) Efforts towards guidance and counselling should be made at this stage.*
- 2. Procedures of arrest need to be followed meticulously; offenders being duly informed of their rights and their relatives being informed of the offender's arrest and whereabouts.*
  - 3. While the alleged offender is in police custody there should be humane treatment meted out to him/her and all procedures carried out at the police stations should be transparent.*
  - 4. If the arrested person is a woman all the rules laid down for special handling must be followed. Proper records of cases brought before each police station should be maintained and should be readily available for examination by those who are entitled to examine them.*
  - 7. Investigations carried out by the police into alleged filed cases should be speedy and undertaken with a sense of urgency so that unnecessary detention of 'suspects' is avoided.*
  - 8. Those officers who are in charge of the investigation of cases should not be a part of the prosecuting agency as this is likely to lead to tough stances against arrested persons to justify the arrests, with a likelihood of their being sent to jail pending investigation.*
  - 9. During investigations and when ever required experts, constituting special investigation teams (forensic experts for instance) should be engaged for speed and efficiency.*
  - 10. Independent inspection systems for the police particularly at police stations must be instituted to ensure that rules, written and unwritten, are observed and undue and excessive use of power is curtailed including the proclivity to 'lock up' unnecessarily.*
  - 11. Police could be given the power to use pre-trial diversion measures that might prevent too many persons from being sent down the long and arduous road of the legal process surrounding court appearances.*
- Police and judicial custody should be used as sparingly as possible and only where necessary in cases awaiting or pending trial.*
- 3. In the absence of sufficient evidence or cogent reasons judges should not remand offenders in custody.*

### **Case study 1**

Nematullah is a 16 years old boy. He is accused of theft of two bikes and he is being sentenced to 2.5 years of confinement by the Primary Court. During his arrest by the Police he was mistreated by the Police. They used to slap him while he was sleeping to wake him up. He was detained at the police station for 4 days before the Prosecutor orders his transfer to JRC for pre-trial detention.



*\_Do you believe that the Police should have sent the case to the prosecutor earlier?*

*\_Did the prosecutor have the right to ask the Police to bring Nematullah before him immediately?*

*\_Is Police's conduct lawful? What are their flaws?*

### **Case study 2**

Ahmedi returns home when he sees a 14 year boy who lived nearby walking away with a bag on his shoulder. Immediately after he enters his house he finds out that several valuable objects are missing. He rushes to the Police station and files a complaint against Ali (the 14 year boy who saw near his house). The Police send the juvenile to the Prosecutor.

*\_How should the Prosecutor treat the case?*

### **3.1.2. Investigation**

The investigation is the stem of the entire judicial procedure on which the outcome of the trial is based. The objective of the investigation is to research, collect, evaluate and assess the elements on which the entire evidence is based. Without evidence the judicial opinion can not be formed. If this part of the judicial process is conducted in an impeccable way and evidence has been collected and evaluated correctly for the establishment of truth, one can assume that this stage has contributed not only to a fairer, but also to a speedier attribution of justice. This can be achieved:

- either because the trial stage will be avoided if at the end of the investigation the prosecutor chooses to:
  - drop the charges and close the file or
  - to divert the procedure; or
- the trial stage will be mostly facilitated because it will be based on a flawless material of evidence.

The juvenile prosecutor is responsible for the **assessment, investigation and prosecution** of juvenile crimes (Article 9 para 1 of the Juvenile Code).

As we mentioned above, the prosecutor might be confronted with three situations after investigating a case:

- a) He has not enough facts and evidence to prosecute the case. In that case, the prosecutor closes the file and notifies the victim and the one who has sustained property losses within one week in order for this person to submit his/her request for compensation of losses to the relevant civil court within 30 days (**Article 16**)<sup>294</sup>;
- b) He has enough facts and evidence to prosecute. In that case he issues an indictment against the accused child; or
- c) He chooses to divert the case out of the formal justice system, because he believes that this should be for the best interest of the child (e.g. especially in minor offences).

However, the prosecutor has certain restrictions as to the initiation of the legal action. According to Article 9.4: *"The Juvenile prosecutor cannot initiate a legal action directly against children who have committed crimes, unless a person or a source submits a written complaint to the prosecutor"*. This implies that:

- a) even if the prosecutor knows for certain that a crime has been committed he cannot press directly charges to a juvenile unless he receives a **complaint** by any source (e.g. from the police) or third person, and
- b) that the complaint submitted to the prosecutor by a source or a third person has to be **written**.

### Case study

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<sup>294</sup> Compare with Article 39 ICPC: *"1. At the conclusion of the investigations phase, if the Primary Saranwal deems that there is not grounded evidence dismisses the case. 2. The victim or higher Saranwal can file a complaint to the Court against this decision within ten days. 3. The Court, after having examined the case, can confirm the decision of the Saranwal or vice versa request him to lodge the indictment. 4. In any other case the Saranwal shall submit to the Court the act of indictment requesting the assessment by trial of the criminal responsibility of the indicted person"*.

(a) The juvenile Prosecutor is walking down the street when he sees a 17 year old juvenile stabbing a man with a knife and stealing his money. He recognizes that the boy is Faisal a neighbour of his and decides to call immediately the police to arrest him and press charges against him.

(b) The juvenile Prosecutor receives an anonymous phone call informing him about the murder of a man and denouncing Faisal for this. Immediately the Prosecutor orders the police to arrest Faisal and at the same time he issues an indictment against him.

*\_In case (a) does the prosecutor have the right to proceed this way? What should he do instead?*

*\_In case (b) does the prosecutor have the right to initiate a legal action? What should he do instead?*

As we mentioned above, the **Police disposes 24 hours (maximum 48 hours) from the time of discovery of the crime to submit the file to the juvenile prosecutor's office** for completion of the investigation (Article 13.1 of JC).

After the Police hands over the file to the Juvenile Prosecutor, the Juvenile Prosecutor is obliged to check first if the actions of the Police are lawful and either ratify them or ask for explanations by the Police.

**For example:**

If the Police have arrested a 5 year old child for a crime the Prosecutor is not obliged to initiate a legal action. On the contrary, he should order the immediate release of the child since according to the juvenile law a child below 7 years of age does not have criminal responsibility and it is not even "discerning". It is another issue if this child is in need of social or therapeutic measures if his/her mental state is not well. In this case, the Prosecutor will have to refer the case to the Court for the specific measures to be ordered according to Art.19.2, 38 and 47 of JC.

First of all it needs to be stressed, as mentioned above, that the prosecutor is not a one way supporter of the accusation. His aim is not to see the accused person condemned at any price, but to discover the truth in order for justice to be done. That means that the prosecutor's duty during investigation is to research and collect all the evidence impartially and if this leads to the acquittal of the accused then to release this person from all charges. It is the prosecutor who bares the main burden of proof during this phase<sup>295</sup>, according to the principle of presumption of innocence<sup>296</sup>.

### **3.1.2.1. The initial steps to follow before assessing a case: Age determination and criminal responsibility**

The first steps that a prosecutor has to follow when a minor is referred before him/her are the following: first he has to assert if the person is a child according to the JC and, in the affirmative, if this child is over the age of criminal responsibility. That means that (according to Art.4.1) this person should not have completed the age of 18 to be considered a child and should be above the age of 12 years (and below 18) to be considered having criminal responsibility.

The main questions that need to be replied at the beginning of the investigation of a juvenile case (or confirmed, if already replied by the police) are:

1. Is the case of competence to the juvenile authorities? Two more questions need to be asked in that case:
  - a. Is the person referred to the prosecutor a minor or not?
  - b. If yes, is the minor over the age of criminal responsibility or not? In order to reply to the above questions we need to have concrete and official information on the age of the person who is brought to the prosecutor<sup>297</sup>.

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<sup>295</sup> During the trial stage this burden goes to the court.

<sup>296</sup> See above, Part I, 4.2.2.1.

<sup>297</sup> A judge should also ask these questions if there doubts occur about the age of the child during the hearing.

i.) Age of criminal responsibility:

In general, a person is held accountable for a crime when he/she is actually the perpetrator, and:

- is of sound mind; and
- has consciously and willingly committed the act (willingness relates to the power of understanding and choosing among options without compulsion, pressure, reluctance, or threat).

Criminal responsibility may be limited by minority, duress, intoxication, emergency situations, and mistakes.

In juvenile law there is a minimum of age under which a child is not responsible or in other words, is presumed not to have the capacity to infringe the penal law.

The first question that needs to be asked is: *Who is the child offender?*

In other words, who should be considered to go under trial according to the juvenile justice system and to which punishment should be submitted?

We are referring to the "child offender" in the broad sense of the minor (: a child, according to the definition given by the CRC<sup>298</sup> and followed by the Afghan Juvenile Code<sup>299</sup>, meaning the person (boy or girl) who has not completed the age of 18). Children are generally separated in two categories: a) discerning and b) non-discerning children. The second category is indifferent to the criminal system, because it refers generally to very young children<sup>300</sup>. Only discerning children can be referred to the justice system. Among discerning children those that can be prosecuted and punished are the children who are over the age of criminal responsibility.

**The age of criminal responsibility refers to the minimum of age below which children are presumed not to have the capacity to infringe the penal law and be blameworthy.**

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<sup>298</sup> Article 1 of CRC.

<sup>299</sup> Article 4.1 of the Juvenile Code.

<sup>300</sup> According to Article 4.2 of the Afghan Juvenile Code a non-discerning child is: "A person who has not completed the age of 7".  
it is the child who has not completed 7 years of age.

Thus, if a crime has been committed by a discerning child (above 7 years), but below the age of criminal responsibility, (which in Afghanistan is 12 years), the court has the right to impose only social measures (Art.47 of JC) and not a proper punishment (e.g. confinement). According to the Afghan Law **only juveniles have criminal responsibility** (a person who has **completed the age of 12 but not completed the age of 18**)<sup>301</sup>. That means that only juveniles can be punished to confinement. So, in order to have the right to prosecute a child and subsequently to refer him/her to court a prosecutor before anything else should check the age of the child<sup>302</sup>. The same process should be followed by the court when the child is referred to, in order for the court to choose the adequate measure, treatment or punishment against the child offender.

*a) The international guidelines on the minimum age of criminal responsibility:*

At this point it needs to be noticed that there is a variation in minimum age of criminal responsibility around the world. Unfortunately there are no clear international standards regarding the age at which criminal responsibility can be reasonably imputed to a juvenile; the minimum age of criminal responsibility varying from 8 to 18 years<sup>303</sup>:

- [Sweden](#), [Finland](#), [Denmark](#), and [Norway](#) all set the age at fifteen years.
- In most of the [US states](#), the age varies between states but is normally not lower than 7 years.
- In [Belgium](#), it is eighteen years.
- In Greece, the age for a discerning child, that is of criminal responsibility is set at 13 years<sup>304</sup> (recently raised from 12), but it can be raised to 18 years if the juvenile is not assessed as being mature enough to understand his/her action (in order for the act to be imputed to him/her). Only a responsible juvenile can be punished to

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<sup>301</sup> Articles 4.4 and 5.1 of the Juvenile Code.

<sup>302</sup> See below for further development.

<sup>303</sup> Save the children, *Juvenile Justice. Modern Concepts of Working with Children in Conflict with the Law*, 2004, p.49.

<sup>304</sup> From 8 to 13 years of age only rehabilitative measures can be imposed against a child.

confinement. In other words, the judge can not impose confinement even if the juvenile is over 13 years of age unless he is convinced from the behaviour of the juvenile, the circumstances of commission of the crime and the gravity of offence that the juvenile is "discerning" (: mature and thus blameworthy) for his/her act. A juvenile over 13 years who is not however considered discerning can only be punished to rehabilitation measures (alternatives to confinement).

However, the Committee on the Rights of the Child constantly emphasizes the need to rise the minimum age of responsibility as high as possible and it has particularly criticised countries where the age is set below 10 years.

The international instruments have taken the following position regarding the establishment of a minimum age of criminal responsibility:

According to Rule 4.1 of the Beijing Rules, *"In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity"*. In addition, the Vienna Guidelines<sup>305</sup> in Article 14(c) state that: *"No child who is under the legal age of criminal responsibility should be subject to criminal charges"*.

The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally<sup>306</sup>.

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<sup>305</sup> Guidelines for Action on Children in the Criminal Justice System Recommended by the Economic and Social Council, Resolution 1997/30 of 21 July 1997.

<sup>306</sup> Commentary of Beijing Rules, under Rule 4.1.

However it needs to be noticed that the level at which the age of criminal responsibility is set is no way an automatic indication of the way a child is dealt with after committing an offence. Neither does it necessarily reflect the perspective (repressive or rehabilitative) of the authorities in a country<sup>307</sup>.

*b) The Afghan Juvenile Code:*

As we mentioned above, according to Article 4.1 of JC a "child" is a person who has not completed the age of 18. Children that have not completed the age of 7 are considered as "Non-discerning", which means that they are indifferent to the juvenile justice system because of their immaturity (Article 4.2 of JC). Consequently, they are not blameworthy due to their complete lack of maturity of adults (morally and cognitively, physically and emotionally) in order to understand their actions. From the age of 7 to the age of 12 (not completed) a child is considered as "discerning" (Article 4.3 of JC). This does not mean that the child has reached at the level of complete maturity (this is why he/she is not punished), but rather that he/she is beginning to understand its actions (: discerning). A child who has completed the age of 12 but has not completed the age of 18 is supposed to have criminal responsibility as a "Juvenile"; which means that he/she can be punished by the court but, being a minor, his responsibility is still decreased in comparison to an adult's. This is why the juvenile is entitled to particular rules and principles in the criminal justice system; particular courts; particular procedure; and particular sanctions.

According to Article 5.1 of the Juvenile Code **the age of criminal responsibility for both boys and girls starts at 12 years**. Thus, as we've mentioned, **only juveniles are criminally responsible**.

However, for the children below 12 years of age, the Juvenile Code seems to contain some inconsistencies. The Code even if it does not provide for specific measures against children below 12 years that have committed misdemeanor and felonies it states (in Article 20.1) that: *"If a child with wisdom and*

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<sup>307</sup> See also the policy of Save the Children on the issue of status offences and ACR which supports measures that decriminalize the behaviour of children, abolish status offences (e.g. vagrancy) and increase the age of criminal responsibility, op. cit., p.50.



*intelligence, who has not completed 12 years of age, commits misdemeanour or felony, s/he shall not be detained for completion of investigations. The prosecutor can hand over the child for supervision to his/her legal representative or relatives respecting degree of their relationship, by obtaining guarantee from them".* In case these children do not have any legal representatives or relatives the Code provides (in Article 20.3) that they shall be surrendered for supervision to the juvenile rehabilitation centers or any other educational or training institution.

This explains why children below the age of criminal responsibility are held up in the juvenile rehabilitation center together with juveniles that are at pre-trial detention and other who serve their confinement.

The Juvenile Code does not clarify what should be the measures imposed against children below 12 years who have committed misdemeanour or felony. It only provides measures for children who have demonstrated in general "irregular behaviour". Since children below 12 years of age are clearly considered by the Juvenile Code as criminally **non responsible**, we can assume that they are considered only as **children with "irregular behaviour"**.

Consequently, "**when a child manifests irregular behaviour**" the Juvenile Code, in Chapter 5, foresees its placement to one of the social services institutions or to one of the governmental educational or health institutions (Article 47 para 2). Unfortunately, since such institutions do not exist, children with irregular behaviour often end up to the Juvenile Rehabilitation Center together with children having criminal responsibility.

Judges and prosecutors should be very careful not to drug into the formal justice system children below the age of 12 years and certainly to avoid placing children having no legal representatives in the Juvenile Rehabilitation Centers during investigation as provided by Article 20.3 of JC.

#### **Case study**

Sherzad is a boy 6.5 years old. He is accused of killing with a gun he found on the table of the house his two brothers. While arrested, Sherzad declares to

the police officer: "I did not like them anyway. They were always annoying me".

*\_ Will Sherzad be prosecuted for the murder of his two brothers?*

*\_ Is the declaration made to the police considered as confession of a murder of first degree (intentional murder)?*

*\_ If Sherzad was 8 years old would that make a difference?*

*\_ What would be the case if Sherzad was 13 years old?*

ii.) Age determination<sup>308</sup>:

Determining and fixing the juvenile's age is based on the date the offence was committed (Article 6 paragraph 4 of JC). Ambiguity over the fact, whether a suspect is under age, leads often to inadequate treatment and occasionally even misleads judgments. For a child under the age of twelve and therefore below the age of criminal responsibility to be mistakenly identified as juvenile, this means entry into the formal juvenile (criminal) justice system when he or she should have been reunited with his/her family or supported into alternative arrangements. Therefore, the true determination of the child's age is very important to ensure that children and juveniles are identified and treated appropriately.

If the child referred before the prosecutor does not have an Identity Card or other official document proving his/her age, or if his/her appearance is different to the one indicated in the ID, then things become a bit complicated. It has to be noticed that Article 7 of CRC requires that: "*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents*". However, a lot of children in Afghanistan are not registered at birth<sup>309</sup> and this poses a major problem.

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<sup>308</sup> For more details, see also UNODC, Assessment Report.

<sup>309</sup> According to UNICEF-AIHR in Afghanistan only an average of 10% of children are registered. See, UNICEF-AIHR, *Justice for children*, op. cit., p.18. See also, Afghanistan Research and Evaluation Unit, *Afghanistan from A to Z Guide to Afghanistan Assistance 2009*; UNODC, Assessment report, etc.

In Afghanistan, the ascertainment of a person's age is no easy task. Many people in Afghanistan don't know their age, or date of birth, and don't have ID cards. An effective birth registration system is not in place<sup>310</sup>, it is estimated that only up to 10% of all births are registered<sup>311</sup>. Further, in many regions verifiable means of establishing the age of a person are not accessible. The lack of a proper age determination process leads to errors which entails the risk to let juveniles outside of the protection they are entitled to.

However, as many of the children do not know their age or date of birth and do not have ID cards, this leaves room for confusion and increases the likelihood of abuse of the system by law enforcement officials, either processing children as adults (to avoid complications or secure a conviction) or adults as children (to benefit from leniency in sentencing and improved conditions in juvenile rehabilitation centres)<sup>312</sup>.

For a child under the age of twelve and therefore below the age of criminal responsibility and entitled to special care and protection, to be mistakenly identified as juvenile means entry into the formal juvenile (criminal) justice system when he or she should have been reunited with his/her family or supported into alternative arrangements. Therefore, realistic determination of age is vital to ensure that children are identified and treated appropriately.

In this regard, the Juvenile Code foresees a specific procedure for the determination of the child offender's age during investigation and trial.

According to Article 6 of JC:

1. The age of a child during investigation and trial is determined on the basis of his/her citizenship ID Card.

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<sup>310</sup> The UN Guidelines for Action on Children in the Criminal Justice System requires states to ensure the effectiveness of birth registration programmes, but in those instances where the age of the child involved in the justice system is unknown, recommends that measures be taken to ascertain the true age of a child by independent and objective assessment (Guideline 12).

<sup>311</sup> <http://www.southasianmedia.net/cnn.cfm?id=362320&category=civil%20society&Country=AFGHANISTAN>. See also, UNICEF-AIHR, *Justice for children*, p.18.

<sup>312</sup> UNICEF-AIHR, *ibid*.

2. In case a child has no ID Card or his/her physical appearance indicates an age different from that indicated in the ID Card, the opinion of a forensic doctor shall be sought.
3. If the opinion of the forensic doctor or other doctors contradicts the background of the case and the child's physical appearance, the issue of determining the child's age shall be referred to a medical team of not less than three doctors.

However, it appears that the process defined by the Code is problematic both practically and theoretically<sup>313</sup>. In practice, if a child (as opposed to an adult) is assigned the wrong age and wishes to contest this it assumes the fact that the child has legal representation and the resources to challenge this. In addition the range of ages provided by medical examination (such as between 15 and 17 years or 11 and 12 years) leaves room for dispute in a situation with critical consequences (the maximum sentence for a 15 year old is a third of the maximum adult sentence while for a 16 year old this is half; an 11 year old is not criminally responsible while a 12 year old is).

The more practical effect of the testing (producing a range of ages) is that whenever the range straddles a legally significant age it should be clear that there is insufficient evidence that the child is on one side or the other of the age in question.

Further, it is currently not possible to employ the most accurate form of testing in Afghanistan. The first obstacle is a lack of properly trained experts; the second problem is that there have been no large studies of dental growth rates amongst Afghan youth. It is well established that different ethnic groups, different diets, and different climates result in very different growth rates between nations. Data compiled in other countries cannot be used to support any definitive conclusions about an Afghan child raised in Afghanistan.

More importantly perhaps the process ignores the difference between legal age which is chronologic while any medical identification of age is largely

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<sup>313</sup> Ibid.

based on physical maturity. Legal age has no relation to physical maturity, although the Juvenile Code underlines the importance of physical appearance in identifying or challenging reported age. The only reason that a child's age is of concern in the law is because children of different ages have different levels of mental, emotional, and moral development. However, it is widely recognised that there is no specific medical examination to determine age. Assessments based on dental age have a margin of error of +/- 2.15 years<sup>314</sup>; while assessments based on bone density or pubic development (: Tanner scale)<sup>315</sup> are not appropriate if conducted in isolation of other evaluations<sup>316</sup>. Relying upon solely physical development to determine age makes no logical sense. It is essential that some objective testing of the child's intellectual and psychological development be undertaken for the results to have any relevance to the real issue.

What is perhaps most disturbing<sup>317</sup> about Article 6 of the Juvenile Code is that it makes no clear reference to the use of witnesses or family history to determine age when in many circumstances such evidence would be far more reliable than inherently flawed medical opinions. However, article 6 does mention in subsection 3 "*the background of the case*" which presumably refers to evidence of age given by the accused his or her family, neighbors, and acquaintances.

Thus, the prosecutors (and in the trial stage the judges) have to take into consideration a multiplicity of elements and not only the report of the forensic doctor which can not indicate a clear age.

### **3.1.2.2. Initiation of a legal action against the child offender**

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<sup>314</sup> The Royal College of Paediatrics and Child Health, *Policy statement on the assessment of the age of refugee children*, 2007, at: [www.rcpch.ac.uk/Publications/Publications-list-by-title](http://www.rcpch.ac.uk/Publications/Publications-list-by-title).

<sup>315</sup> The Tanner scale (also known as the Tanner stages) is a scale of physical development in children, adolescents and adults. The scale defines physical measurements of development based on external primary and secondary sex characteristics, such as the size of the breasts, genitalia, and development of pubic hair. Due to natural variation, individuals pass through the Tanner stages at different rates, depending in particular on the timing of puberty.

<sup>316</sup> UNICEF - AIHRC, *Justice for children*, op. cit., p.17.

<sup>317</sup> See, UNODC, *Strategies and Tactics for Defending Juvenile Cases*, op. cit., p.57.

It needs to be clarified at this point, that if the child offender has an **accomplice above the age of 18**, any legal action taken against him/her should be conducted separately, according to Article 24 para 2 of the Juvenile Code.

i.) Duration of investigation:

First of all we should notice that the investigation period is extremely short in theory but unfortunately extremely long in practice.

The juvenile prosecutor is obliged to complete the investigation only within **one week** after receiving the file from the police (Article 14 of JC). However, the Juvenile Code provides that if the investigation cannot be completed within the mentioned period, the prosecutor is obliged to request from the relevant court extension of this period to **three weeks**. This period is also extremely short considering that juveniles are kept for several months in detention awaiting trial<sup>318</sup>. The Juvenile Code gives to the Prosecutor one more week in order to issue the indictment after the completion of the investigation (three at the most given that the child is not detained).

ii.) First concern: the state of freedom of the child during investigation –

Pre-trial detention:

If the child is arrested the **juvenile court**<sup>319</sup> is obliged to announce its decision about his/her detention or release **within 24 hours**<sup>320</sup>. Of course, according to Art.14 para 2 of JC, the child, his/her legal representative or the child's attorney can complain to the court against the order of pre-trial detention at any given time.

On the issue of eventual detention, a hearing should be held to determine whether to detain or release the child. The court then has two possibilities, either:

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<sup>318</sup> Even up to 11 months. See UNODC, Assessment Report.

<sup>319</sup> See, UNICEF, *Juvenile Justice Manual*, Module Five for the first steps of the investigation.

<sup>320</sup> See Article 34.2 of ICPC stating that: "*The Primary Saranwal can release the arrested suspect whenever he deems no more necessary the deprivation of liberty*".

- to find no cause to detain the child and in that case the court must order the child's release or
- to decide that the child should be detained.

If the court decides that the child should be detained, it must inquire first about the existence of a responsible person to take the child in his care. In that case the court should check if:

- A responsible person is available and
- If the child is willing to be placed in the responsible person's care.

There are two possibilities:

- A responsible person is available and the child is willing to be placed in his or her care; or
- A responsible person is not available or the child is not willing to be placed in his or her care. In that case, the court orders the child to be placed in the Juvenile Rehabilitation Center until the end of investigation.

Unfortunately in practice, very often children are placed in detention either because:

- their parents do not wish to take them in their care because they believe that the child has disgraced the honour of the family by committing the crime or
- parents are not even asked; the court placing quasi automatically the child in custody in order to facilitate the investigation.

*a) Detention and age of the accused child:*

At this point it is necessary to distinguish the possibilities of detention during investigation according to the **age of the child offender** as the Juvenile Code does.

However, if the age of the child has not been determined and the determination can not take place immediately<sup>321</sup>, then it is necessary to **release the child independently of his/her age**, unless he/she presents an absolute danger for society (children rarely do). We should again at this point remind that all international instruments as mentioned above, suggest that children are not placed in custody or anyway, at least to use it as last resort. Thus, supposing that the age of the child offender has been determined the Juvenile Code in Article 20 provides the following possibilities:

1. If a child with wisdom and intelligence, who has **not completed 12 years** of age, commits misdemeanour or felony, **s/he should not be detained** for the completion of investigations. The prosecutor can hand over the child for supervision to his/her legal representative or relatives respecting degree of their relationship, by obtaining guarantee from them (Article 20 para 1). However, it needs to be stressed at this point that a child below 12 years is not criminally responsible, so only alternative measures can be imposed to him/her and in no case the child should be detained in closed institutions even if they are called "rehabilitation centers".
2. To complete the investigation in case of **children who have completed 12 years of age and have not completed 18 years** of age and have committed misdemeanour, the child should be surrendered to his/her parents, executors, legal representatives or relatives upon request of the relevant prosecutor and after the permission of the authorized court (Article 20 para 2).
3. **If children mentioned under paragraph (1) and (2)** of the above article **do not have legal representatives or relatives**, they should be surrendered for supervision to the juvenile rehabilitation centers or any other educational or training institution (Article 20 para 3). Again we repeat here that children below the age of 12 years should not be

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<sup>321</sup> The Juvenile Code provides for a deadline for the determination of the age of the accused child only in case of detention. The shortest period within which a medical report can be issued is a week, according to Article 18 of the Juvenile Code stating: *"If the accused is under detention, the medical team is obliged to give their opinion within one week"*.



placed at closed institutions under any circumstances, unless they need medical treatment.

4. If children who have **completed 12 years of age and have not completed 18 years of age** commit felony, they should be sent to the juvenile rehabilitation centers upon request of the relevant prosecutor and **after permission of the authorized court** for completion of investigation (Article 20 para 4). We should point out that it is not an obligation of the court to place every juvenile accused for felony to the rehabilitation center, but the court in order to give its authorization it should assess the need for this measure; that is whether or not the juvenile is likely to commit another crime or to escape from justice, taking into consideration the personality of the child and his/her eventual criminal record and the circumstances of the alleged crime<sup>322</sup>. The obligation for the prosecutor to ask the permission of the court in order to place the child in custody means that the court has also the possibility **not to order the child's detention**. According to Article 10.3 of JC, the juvenile court has the authority, **at the time of issuing the pre-trial detention order, to consider other appropriate alternatives instead of detention**<sup>323</sup>.
5. Independently of the age of the discerning child the Juvenile Court **upon request of the prosecutor** or the child's legal representative can adopt **temporary protective measures** regarding the accused children with irregular behaviour (Article 19 para 1).

*b) Meaning of pre-trial detention:*

The Pre-trial detention, (as indicated by its term), refers to the detention of the accused person during a part or the entire stage of investigation. It

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<sup>322</sup> This is why the Juvenile Code in Article 20 paragraph 6 requires that "The Juvenile rehabilitation centers and social services institutions are duty bound to provide complete additional information about the living environment, attitude and behaviour of the child along with their suggestions in this regard to the relevant prosecutor's office and the court".

<sup>323</sup> See also Article 37 of CRC requiring that the deprivation of liberty of a child should be a last resort and for the shortest period of time possible.

consists in a very heavy measure for the personal freedom<sup>324</sup> and seems contradictory to the principle of presumption of innocence, since the accused suffers the equivalent of a serious punishment while s/he is not yet judged. This is aggravated in practice by the fact that, very often, the court has the tendency to sentence the accused to a period of imprisonment at least equal of the pre-trial detention's<sup>325</sup> and to use less easy an alternative to imprisonment when the period of pre-trial detention is long.

Under the formal justice system and international standards, pre-trial detention generally is a mechanism to prevent further harm to others' rights or evidence, flight of the suspect or accused, or reoccurrence of the crime and is to be minimized in light of the presumption of innocence. Currently in Afghanistan where guilt is presumed, however, pre-trial detention is largely used as an interrogation tool and as a way to punish the accused. Surveys show that 96 per cent of cases in detention are pre-trial or under-trial detainees<sup>326</sup>. For those convicted, detention is seen purely as punishment, and not rehabilitative so as to prevent further criminal activity upon release (see Article 10(3) ICCPR)<sup>327</sup>.

Procedural protections generally are not functional because they are frequently viewed as unnecessary, or hindrances to investigations and convictions, rather than as protections against injustices, e.g. prolonged detention of innocent people. UNAMA has found<sup>328</sup> that police, prosecutors, and judges who are aware of detainees' rights on many occasions wilfully choose to ignore the detainees' rights in pursuit of a confession, indictment,

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<sup>324</sup> OHCHR (1994), *Human Rights and Pre-Trial Detention. A Handbook of International Standards Relating to Pre-trial Detention*, Professional Training Series No. 3. See, also G. Stefani, G. Levasseur, B. Bouloc, *Procédure Pénale*, Précis Dalloz, 14th Edition, Paris, Dalloz, p.695.

<sup>325</sup> According to Article 2 of the Decree No. 141 of 11/01/2009 (22/10/1387HS) of the President of the Islamic Republic of Afghanistan on Endorsement of the Law on Juvenile Rehabilitation and Correction Centers the suspect and accused children are kept only in the Juvenile Rehabilitation and Correction Centers, until the completion of investigation and trial.

<sup>326</sup> See UNODC, Assessment report, Part II, 1.5.2. Also, AIHRC - UNICEF (2008), Justice for Children. The situation of children in conflict with the law in Afghanistan, p.9.

<sup>327</sup> UNAMA - OHCHR, *Arbitrary Detention*, Vol. I, op.cit., p.16.

<sup>328</sup> Ibid.

or conviction. As explanation they assert that 'human rights hinder their work'.

*c) Pre-trial detention contradicting the principle of presumption of innocence:*

It is necessary to re-examine very essentially the fundamental principle of 'presumption of innocence' until proven guilty, and whether long prison terms as under-trials does not violate that principle; that under-trials were sometimes in prison for periods that might exceed the imprisonment that they may be sentenced to for the crime that they may have committed<sup>329</sup>.

Of most concern is the pervasive presumption of guilt by detaining authorities (police, prosecutor, judges) throughout Afghanistan<sup>330</sup>. The presumption of guilt creates the conceptual foundation for many arbitrary detentions in Afghanistan.

Presuming guilt prejudices the criminal justice system towards detaining the accused pre-trial, corrodes respect for the detainees' rights, and renders ineffective many procedural protections.

It is compounded by a general attitude that those guilty of crimes, even after having completed their sentence, are not entitled to dignity and justice.

Taken together, these factors result in judges being hostile towards detainees' right to defence counsel and to present a defence, helps justify coerced confessions, and leads to failures to release at the expiration of time limits or acquittal.

It also diminishes the likelihood that alternatives to detention or alternative sentencing will be considered and may help account for failures to release prisoners at the end of their sentences without guarantees<sup>331</sup>.

*d) Deprivation of Liberty as measure of last resort:*

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<sup>329</sup> PRI, *Access to justice and Penal Reform*, Second South Asia Conference, Dhaka, December 2002, p.6.

<sup>330</sup> As identified during monitoring from UNAMA. UNAMA - OHCHR, *ibid*.

<sup>331</sup> UNAMA, *ibid*.

**“Liberty is the rule, to which detention must be the exception”<sup>332</sup>.**

Only the suspicion that the child is the offender is not enough to substantiate the issuance of a pre-trial detention order. As we mentioned above the Juvenile Code in Article 10 is very clear as for when the arrest of the child can take place (: risk of flight, alteration of documents and evidence and risk of repetition of a new crime), and this should also be the rule for the pre-trial detention in combination to the principles set by CRC and other international instruments.

We should recall that Article 37 of CRC addresses the issue of deprivation of liberty of children and states the principle that **deprivation of liberty should be a last resort** and for the shortest period of time possible.

In particular, Article 37:

- **Prohibits** unlawful arrest or deprivation of liberty of children;
- States that if a child is deprived of his or her liberty this must be done in a **manner which takes account of the special needs of a person of their age** and in a **manner which is respectful of the child’s inherent human dignity;** and
- Obligates the government to **separate children from detained adults**<sup>333</sup>, to provide children contact with family, and to provide access to legal and other assistance.

Other international instruments demand also that pre-trial detention for the children be limited as much as possible. In particular:

- Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time (Beijing Rule 13.1 and Tokyo Rules 6.1).

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<sup>332</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 5: Human Rights and Arrest, Pre-Trial and Administrative Detention, p.173.

<sup>333</sup> As mentioned above, according to Article 2 of the Decree No. 141 of 11/01/2009 (22/10/1387HS) of the President of the Islamic Republic of Afghanistan on Endorsement of the Law on Juvenile Rehabilitation and Correction Centers the suspect and accused children are kept only in the Juvenile Rehabilitation and Correction Centers, until the completion of investigation and trial.

- Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances (Havana rules, 17).
- Whenever possible, detention pending trial shall be replaced by alternative measures (at as early a stage as possible), such as close supervision, intensive care or placement with a family or in an educational setting or home (Beijing Rule 13.2, Tokyo Rules, 6.2, and Havana rules, JDLs Rule 17)<sup>334</sup>.
- Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response (Beijing Rule 17.1).
- The **Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988)** applies also for the protection of all persons under any form of detention or imprisonment. Principle 1 requires: all persons under any form of detention to be treated "in a humane manner and with respect to the inherent dignity of the human person". According to Principle 2 "*...detention shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorised for that purpose*".

*e) Conditions of Detention:*

International human rights law contain strict rules about the treatment of detainees and prisoners which are applicable at all times, and States are under a legal duty to take the necessary legislative and practical measures to

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<sup>334</sup>Article 9(3) of the International Covenant on Civil and Political Rights states: "*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...*". The United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) have interpreted this article and recommend that detention be used only where non-custodial measures cannot. Since overcrowding of facilities and lengthy or inefficient pre-trial investigations are major factors contributing to abuses of pre-trial detention, release of the greatest possible number of detainees is desirable to the extent consistent with the investigation of the alleged offence and the protection of society and the victim. See, OHCHR (1994), *Human Rights and Pre-Trial Detention. A Handbook of International Standards Relating to Pre-trial Detention*, Professional Training Series No. 3, p.3.

put an end to all practices that violate these rules. In this respect, the task of judges, prosecutors and lawyers is of primordial importance in contributing to an increased respect for the legal rules that will help safeguard the life, security and dignity of people deprived of their liberty. In their daily work, these legal professions, when faced with people suspected or accused of criminal activities, will have to exercise constant vigilance for signs of torture, forced confessions under ill-treatment or duress, and any other kind of physical or mental hardship. Thus, judges, prosecutors and lawyers have not only a key role in this regard, but rather the professional duty to ensure the effective implementation of the existing domestic and international rules for the protection of the rights of people deprived of their liberty<sup>335</sup>. In particular, the following rules should apply also in pre-trial detention:

- The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles, (Havana rules, JDLs Rule 12).
- The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being, (Havana rules, JDLs 28).
- While in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality (Beijing Rule 13.5; Havana rules, JDLs Rules 49 and 87 (d)).
- When preventive detention is used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention (Havana rules, JDLs Rule 17).

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<sup>335</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 8, International Legal Standards for the Protection of Persons Deprived of Their Liberty, p.317.

- In all detention facilities juveniles should be **separated from adults**, unless they are members of the same family (Havana rules, JDLs 29).
- Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice (Havana rules, JDLs 18 (c)).

*f) Length of pre-trial detention:*

Normally, the pre-trial detention should end with the end of the investigation (issuance of the indictment and referral of the case to the court). However, the courts might not set a hearing immediately entailing that the accused remains in detention for an indefinite period of time<sup>336</sup>.

On the issue of the length of **detention**, since the Juvenile Code does not foresee any time frames we can assume that provisions contained in the ICPC can also apply in juveniles cases.

ICPC lays out the **length of detention** considered reasonable and to be without delay for each stage of the judicial process from indictment to appeal decisions of the Supreme Court as follows:

**1 month from arrest to indictment**<sup>337</sup>;

**2 months from indictment to primary court decision**<sup>338</sup>;

**2 months from announcement of primary court decision for appeals court to announce decision**<sup>339</sup>;

**5 months from the announcement of the appeals court decision for Supreme Court to announce decision.**

Both the ICPC and the Law on Prisons and Detention Centers require release when timelines are breached, even if the process is not completed<sup>340</sup>. Yet, these laws do not agree on when release is required. The ICPC requires release when any time limit is breached, while the Law on Prisons and

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<sup>336</sup> See, Assessment Report.

<sup>337</sup> Article 6(1) and 36, ICPC.

<sup>338</sup> Article 6(2), ICPC.

<sup>339</sup> Article 6(2), ICPC.

<sup>340</sup> Article 6(3), ICPC and Articles 20(4) and 49, Law on Prisons and Detention Centers.

Detention Centers only requires release when the overall time limit is breached.

While Afghan law has defined reasonableness by establishing timelines, international standards do not<sup>341</sup>. Instead, they require that procedures be put in place in order to ensure that the trial, including the issuance of decisions, will proceed without delay at all levels (primary and appeals). In fact, while international standards require all cases, particularly those involving detention, be dealt with as expeditiously as possible, whether a delay is unreasonable or unjustified must be evaluated on a case-by-case basis taking into account factors including the complexity of the case.

Still, international standards establish that delays be reasonable and justified at all stages of judicial proceedings. For instance, a 29-month lapse between arrest and trial which can not be explained violates the detainee's right to a fair trial without delay. It is relevant to note that lack of resources is not considered a justification for delays.

Monitoring found that, from a detention perspective, the right to a fair trial without delay was not respected throughout Afghanistan. Unreasonable delays regularly occurred, many times well beyond the legally established timeframes<sup>342</sup>.

*g) Recourse against pre-trial detention:*

As we mentioned above, Article 14.2 of the Juvenile Code foresees the possibility of recourse against pre-trial detention *at any given time* by the child, his/her legal representative or the child's attorney who can complain to the court against the order of pre-trial detention.

If the child and his/her legal representatives do not complain either because they do not know how or because the child does not dispose an attorney, it is to the prosecutor's duty, according to what we have mentioned above, to

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<sup>341</sup> UNAMA-OHCHR, *Arbitrary detention in Afghanistan: A Call for Action*, Vol. II, p.72.

<sup>342</sup> See UNODC, Assessment report for JRC Kabul and UNAMA-OHCHR, *ibid.*, p.73.



monitor the detention places in order to stop unlawful detentions and release the children that are held unlawfully.

Summarising:

A detention decision before trial:

- should be avoided to the extent possible and
- limited to exceptional circumstances.

When occurred, children should be entitled to the following rights:

- The right of the child to be separated from adults<sup>343</sup>;
- The right to humane treatment<sup>344</sup>;
- The right of the child to remain in contact with his or her family<sup>345</sup>; and
- The child's rights to prompt access to legal assistance and to legal challenge of detention<sup>346</sup>.

Pre-trial release decisions<sup>347</sup>:

- may be made at the initial appearance of the accused child, or
- may occur at other hearings, or
- may be changed at another time during the process.

**Questions**

- \_ *What are the legal prerequisites for the pre-trial detention of a juvenile?*
- \_ *How long can an accused child be legally detained in pre-trial detention?*
- \_ *Are there any alternatives to pre-trial detention?*
- \_ *Does the law provide for recourses against an order for pre-trial detention?*
- \_ *If the Court does not set a hearing can the accused child spend an indefinite period in pre-detention? What can be done and which are the duties of the prosecutor in that case?*

<sup>343</sup> OHCHR, (2003), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, Chapter 10, The Child and Deprivation of Liberty, p.423.

<sup>344</sup> Ibid., p.422.

<sup>345</sup> Ibid., p.424.

<sup>346</sup> Ibid.

<sup>347</sup> *Juvenile Justice Manual*, Module Five, 7.

### 3.1.2.3. Principles of investigation: how the prosecutor should carry out the investigation

Children must be granted the same rights as adults at all relevant stages of the criminal procedure<sup>348</sup>. So, all the guarantees and the rights to the accused that we have examined above<sup>349</sup> apply also during investigation in juvenile cases. There is no need to repeating them; only to point out some important issues.

We remind that **Article 40 of the CRC** legally binds states to the respect of following principles of juvenile justice:

- **Dignity:** the right of every child in conflict with the law to be treated with respect and dignity;
- **Consideration of Age:** the treatment of a child should take into account the child's age;
- **Reintegration:** the aim of juvenile justice system is to promote the reintegration and rehabilitation of the child;
- **Diversion:** Whenever appropriate, measures for dealing with children without resorting to judicial proceedings should be used, provided that human rights and legal safeguards are fully respected;
- **Minimum guarantees:** Article 40 provides for minimum guarantees of children's rights in the administration of juvenile justice, including presumption of innocence, access to legal support and confidentiality.

One of the main principles that apply to the stage of investigation is **secrecy**. This presupposes during this phase the existence and implementation by judges and prosecutors of **the principle of confidentiality**<sup>350</sup>, safeguarded also by Article 17.3 of the Juvenile Code regarding **prosecution** providing that: *"the Prosecutor is obliged to keep the investigation documents and details confidential. Only the relevant courts and the child's attorney can have access to criminal records"*.

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<sup>348</sup> The Committee on the Rights of the Child has expressed concern where due process has not always been so guaranteed. See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., Chapter 10, p.412.

<sup>349</sup> Part I, under Section I.4.

<sup>350</sup> See above in Part I, more details on this principle under the section I.4.3.1.

Among also other principles<sup>351</sup> that apply during investigation we recall the importance of:

- **Legality in obtaining evidence**, which prohibits the collection and use of evidence that has been obtained with unlawful methods such as torture, cruel or inhuman treatment and
- **Presumption of innocence**<sup>352</sup>, which prohibits the treatment of the child as being already guilty. That means also that deprivation of liberty should be avoided at the maximum. Detention as a last resort is a principle per se<sup>353</sup>.

Considering that we have already examined above the presumption of innocence we will examine below the issue of legality in obtaining evidence.

-Legality in obtaining evidence:

*"..It is true of torture of every kind alike, that people under its compulsion tell lies quite as often as they tell the truth, sometimes persistently refusing to tell the truth, sometimes recklessly making a false charge in order to be let off sooner".*

**Aristotle, Rhetoric [1376b, 30 -1377a]**

Evidence obtained by torture, cruel, inhuman or other degrading treatment should not be considered as **legal**.

We should recall to that respect that Article 37 of CRC **prohibits torture, cruel treatment or punishment**<sup>354</sup> and Article 40 of the CRC requires the respect of dignity of the child offender. As we mentioned above, the child does of course also benefit from the general protection against physical and mental abuses found in article 7 of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>351</sup> Juvenile Justice Manual, Module Five, 8.

<sup>352</sup> For more details see supra in Part I, under section 4.3.

<sup>353</sup> See Article 37 of CRC.

<sup>354</sup> For the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, see the Istanbul Protocol submitted to the United Nations High Commissioner for Human Rights on 9 August 1999. OHCHR, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No. 8/Rev.1.

**This prohibition is of absolute nature and no derogation can be accepted under any circumstances<sup>355</sup>.**

The prohibition on ill-treatment is of course particularly relevant to children deprived of their liberty, but it also concerns children who are being investigated by the police or the prosecutor.

The Afghan Constitution also expressly prohibits such practices during investigation even if they could lead to discovering the truth. Article 29 states: "No one shall be allowed to or order torture, even for discovering the truth from another *individual* who is under investigation, arrest, detention or has been convicted to be *punished*". Thus, if statements and confessions are obtained from an accused or from a witness by means of compulsion they should be considered **invalid** (Article 30).

**It is important to be aware that acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of children because of their specific sensitivity and particular vulnerability<sup>356</sup>.**

According to Article 1 of the UN General Assembly Resolution 3452/9.12.1975 (Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment), **torture** is a crime against human dignity defined as **any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity for such purposes as obtaining from him or a third person information or a confession, as well as any kind of intense and intentional cruel, inhuman or degrading treatment<sup>357</sup> or punishment.**

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<sup>355</sup> OHCHR, *Human Rights in the Administration of Justice*, op. cit., p.412.

<sup>356</sup> Ibid.

<sup>357</sup> For the concept of inhuman or degrading treatment, see the case-law of the European Court of Human Rights, G. Dutertre, *Key case-law of the ECHR*, op.cit., p.57-73.

On the issue of how to document and respond to allegations of torture within the international system for the protection of human rights, see: Penal Reform International, (2000) by: Camille Giffard - Human Rights Centre, *The Torture Reporting Handbook*, University of Essex.

Article 5 of the UN Code of Conduct for Law Enforcement Officials<sup>358</sup> (adopted on 17.12.1979 by the UN General Assembly) states also that: *"...no law enforcement official may inflict, instigate or tolerate any act torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."*

The European Court of Human Rights<sup>359</sup> has considered a treatment both "inhuman", because it had been applied with premeditation and for hours at a stretch, and had caused "if not actual bodily injury, at least intense physical and mental suffering", and "degrading" because it was "such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"<sup>360</sup>.

### **Case study 1**

Farzad is informed by a friend that there is an on-going investigation against him for fraud. Farzad as soon as he hears that he rushes to the prosecutor's office with his uncle asking for more information about the accusation. The prosecutor tells him that he has no right to disclose any information because

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<sup>358</sup> See also the first principle of the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN General Assembly on 18.12.1982), which provides that: *"Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained"*. According to Principle 2: *"It is a gross contravention of medical ethics as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."*

<sup>359</sup> Interpreting Article 3 of the European Convention on Human Rights, which also prohibits torture as well as any cruel, inhuman or degrading treatment. The concept of "torture" was initially defined in the judgment: Ireland v. UK, of 18.1.1978, Series A no 25, p.66, para 167. See also ECHR, Adkoy v. Turkey, judgment of 18.12.1996, *Reports of Judgments and Decisions*, 1996-VI, p.2279; ECHR, Selmouni v. France, judgment of 28.7.1999, *Reports of Judgments and Decisions*, 1999-V, paragraphs 96-106.

<sup>360</sup> ECHR, B. v. France, judgment 25.3.1992, Series A no 232-C, p.87; Ireland v. UK, 18.1.1978, op. cit., p.66; Soering v. UK judgment of 7.7.1989, Series A no 161, p.39.

of the secrecy of the investigation, according Article 17 paragraph 3 of the JC and besides Farzad has not been summoned yet nor has the prosecutor prepared the indictment.

*\_ Is that correct?*

*\_ If not, has the prosecutor violated any of Farzad's fundamental right (s)?*

*\_ What should the prosecutor do instead?*

### **Case study 2**

Ali is a 13 year old boy who is arrested by the police on charge of theft.

The boy claimed he was wrongfully accused by the victim, because he wanted to marry Ali's sister, but his family did not allow the marriage. Ali believes that the person who accused him did it for revenge.

Ali reports that while in custody he was beaten severely by the police. He has a defence lawyer but complains that he does not follow-up his case. The boy also says that he was beaten in the prosecution office and was forced to make statements.

Ali is detained in the juvenile rehabilitation centre since 4 months now without having been sent to the court. Ali has never been arrested before and complains of the injustice which has been done against him.

*\_ Which flaws do you find in this procedure?*

*\_ What should have been done instead?*

*\_ Could the statement given under the above circumstances be used at Court?*

### **Case study 3**

Ahmed aged 16 and Rameen aged 19 have been arrested together for stealing two bicycles. The police have sent the file to the prosecutor who after collecting all the evidence has prepared an indictment for Ahmed and Rameen and sent the case to the Primary Court.

*\_ Please comment the actions: a) of the Police and b) of the Prosecutor.*

*\_ Supposing that the Police have forwarded the file to the Juvenile Prosecutor what should the Juvenile Prosecutor do?*

### 3.1.2.4. Collection of evidence

During the investigation's phase the Juvenile Prosecutor collects all relevant evidence which can substantiate a decision pro or con the suspect child<sup>361</sup>.

The main objective of the investigation is the research, collection and maintenance of the collected evidence that will be subject to evaluation and assessment by the prosecutor.

During this stage the Prosecutor needs to reply to 7 important questions:

**What?** (it refers to the facts: what happened?)

**Who?** (it refers to the perpetrator: who did it?)

**Where?** (it refers to the place of commission of the crime)

**When?** (it refers to the time of commission of the crime)

**How?** (it refers to the method used by the perpetrator)

**With what?** (it refers to the weapon or other means of commission of the crime)

**Why?** (it refers to the motive of the perpetrator)

The collection of evidence is not restricted to particular forms or matters. The Prosecutor is free in selecting tools and modalities of proof. The Law does not mention the forms of evidence. The only restriction to evidence is that it should be "legal evidence", meaning that it should not be obtained by unlawful methods and means, as mentioned above (e.g. confession obtained by cruel or inhuman or degrading treatment of the accused person; false evidence "created" to incriminate the accused such as false testimonies, criminal elements in the possession of the accused).

As in the investigation of crimes committed by adults the following is considered as key tools:

- a. Witnesses
- b. Confrontations
- c. Line up procedures

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<sup>361</sup> See also Article 37 of ICPC.

- d. Inspections
- e. Searches
- f. Seizure
- g. Expert exams and evaluations
- h. Interrogations

Under this section we should focus to some of the above as to the interrogations of the witnesses and the accused and to expert exams, and we should add the importance of autopsies of place of crime (collecting evidence from the crime scene).

i.) Characteristics of the evidence upon which depends their acceptance and credibility:

In order for a piece of evidence to be considered credible enough to convince the court and weight heavy for its judgment (acquitting or sentencing the accused child) this should be:

- **Serious:** this means that the evidence presents the following sub-characteristics:
  - it can be explained scientifically;
  - this explanation is achieved through contemporary/up-dated scientific methods;
  - it can be appropriate to prove the specific facts and
  - it can be apt to prove the facts.

In that sense, the following evidence can not be accepted as serious by the court.

**For example:**

- a) an expertise given by an astrologist;
  - b) an expertise given on the DNA of the perpetrator based only on the visual examination of a piece of hair found on the victim's body;
  - c) the statement of a blind "eye-witness" or of a deaf "ear-witness";
  - d) a psychiatric expertise in order to assess the paternity of a child.
- **Legal:** as mentioned above, legal is the evidence that has not been based to unlawful methods (e.g. confession under ill-treatment).



- **Credible:** the credibility of pieces of evidence varies according to the category and its nature (e.g. the statement of a witness or the confession of the defendant have less credibility than a legal document)

For the control of credibility of evidence the prosecutor should examine:

- **the genuineness** of evidence (if it concerns documentary evidence): in order to assess that the documents have not been forged;
- **the honesty** (if it concerns personal evidence, such as statements of witnesses);
- **the authenticity** of evidence (to assess if they are really rendered to the person concerned) and
- **the scientific value of the methods used** (to assess if the method is apt to prove the facts).

As the criminal law does not restrain the prosecutor in the type of evidence he might use, any element presenting the above mentioned characteristics can be used as a piece of evidence.

**For example:** physical evidence, autopsy, expertise, statements of witnesses and the confession of the defendant or documents or any other element, procedure or research (as long as it is **legal**).

#### ii.) Collecting physical evidence from the crime scene:

The research of the place is of great importance for the investigation especially in crimes related to specific place such as robberies, burglaries, murders, terrorist attacks, etc., in order to find physical evidence<sup>362</sup> and have a better understanding of the method used by the perpetrator. Examples of physical evidence<sup>363</sup> that can be retrieved and recovered from a crime scene are:

- **Traces:** any kind of marks or material produced or left from the offender or the victim on the place of crime before, during or after the

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<sup>362</sup> UNODC, *Crime scene and physical evidence awareness for non-forensic personnel*, 2009: [http://www.unodc.org/documents/scientific/Crime\\_scene\\_awareness\\_\\_Ebook.pdf](http://www.unodc.org/documents/scientific/Crime_scene_awareness__Ebook.pdf)

<sup>363</sup> Practical guidance on the equipment for crime scene investigation is provided in the UNODC manual on "Staff Skill Requirements and Equipment Recommendations for Forensic Science Laboratories" to be published in 2009.

commission of the crime, such as fingerprints, footprints, shoemarks, biological material (such as blood, hair, saliva); bite marks, marks from vehicle wheels, etc. Some materials that can avail as traces are also textile fibres, threads, wood, paint or glass fragments, etc.

- **Diagnostic points:** any type of change or action on the normal condition or place of objects in space **which can not be considered as traces**, such as tool marks on a door proving a burglary.
- **Exhibits:** any object that has been used either as:
  - the means to commit the crime e.g. weapons
  - the tools that have facilitated the commission of the crime, e.g. a ladder to climb a wall or a screw-driver to open a door;
  - objects which carry on them traces e.g. a glass which has fingerprints on; or
  - the *corpus delicti*, e.g. the stolen jewelry or forged money.

Considering all sources of information available in investigations (e.g. confessions, testimonies, etc.), physical evidence plays an especially valuable role. With the exception of physical evidence, all other sources of information suffer from problems of limited reliability. Physical evidence, when it is recognized and properly handled, offers the best prospect for providing objective and reliable information about the incident under investigation.

However, the value of even the most carefully recovered and preserved evidence can be lost if the chain-of-custody is not properly maintained. "Chain-of-custody" is often recognized as the weak link in criminal investigations. It refers to the chronological and careful documentation of evidence to establish its connection to an alleged crime. From the beginning to the end of the forensic process, it is crucial to be able to demonstrate every single step undertaken to ensure "traceability" and "continuity" of the evidence from the crime scene to the courtroom.

While there are general principles related to crime scene investigations, local laws, rules and regulations govern many activities of the crime scene investigation and forensic process. They relate to issues such as how to obtain authority to enter the scene, to conduct the investigation, to handle

evidence (e.g. the type of sealing procedure required) and to submit physical evidence to a forensic laboratory (if any). They ultimately determine the admissibility of the evidence collected at the crime scene<sup>364</sup>.

Failure to comply with existing laws, rules and regulations can result in a situation where the evidence cannot be used in court. It is therefore of importance for personnel working at the scene to be aware of, and ensure proper compliance with, these rules<sup>365</sup>.

The planning, organization and coordination of the work at the scene aims at deploying resources commensurate to the case being investigated and using these resources efficiently and effectively<sup>366</sup>.

The main rules prevailing during this phase are:

- **Extreme concentration of the investigator;**
- **Calmness;**
- **Attention;**
- **Not remove anything from the place before detailed description and photos are taken;**
- **Storage of the evidence to secure maintenance and integrity (avoid degradation);**
- **Isolation of the place for its secureness.**

Arriving unprepared at the scene, especially without the commensurate equipment and expertise, may result in missed opportunities and compromise the entire investigation.

Having too many or inappropriate people involved without clear assignments of responsibility also runs the risk of compromising or destroying relevant evidence.

Locating and identifying physical evidence at crime scenes, as well as identifying potentially missing evidence, is very challenging and is much more difficult and demanding than it might appear to those unfamiliar with crime scene investigation.

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<sup>364</sup> UNODC, *Crime scene and physical evidence awareness for non-forensic personnel*, op. cit., p.5.

<sup>365</sup> If adequate laws, regulations and rules to enable the forensic process do not exist, their establishment may be a matter of necessity. See, Ibid.

<sup>366</sup> Ibid., p.8

The most relevant and important evidence may not be obvious or directly visible to the naked eye. The construction of an exhaustive listing of the steps to recognize evidence at crime scenes is not possible.

This is very important<sup>367</sup> because:

- Relevant evidence that is present at the crime scene but goes unrecognized cannot contribute to the solution of a case. It may be irretrievably lost or may send an investigation in a costly and unproductive direction;
- Recovery of only the most obvious and visible evidence may result in leaving the most relevant evidence behind;
- Adequate recovery methods avoid loss, degradation or contamination of the evidence;
- Indiscriminate collection of any item as potential evidence might overburden the work of investigator with removing the irrelevant items and thus hinder the investigation.

It is the duty of the prosecutor to carry out an effective and adequate investigation of the corresponding case. If s/he fails then s/he directly violates the principle of fair trial and due process of law<sup>368</sup>.

### iii.) Examination of the defendant:

As we mentioned above, the Juvenile Prosecutor disposes one week (maximum three) to finish the investigation and within this period s/he has to summon the child and interrogate (examine) him/her. For the interrogation the child has to be summoned first.

According to Article 25 para 1 of JC the accused child shall be summoned for investigation (or trial) through his/her legal representative<sup>369</sup>. If the child is detained in juvenile rehabilitation center, he/she should be summoned for completion of investigation, if needed, through these centers (Article 25 para 2 of JC).

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<sup>367</sup> UNODC, *Crime scene and physical evidence awareness for non-forensic personnel*, op. cit., p.14.

<sup>368</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., p.256.

<sup>369</sup> The same paragraph of the provision sanctions with a fine of 500Afs the legal representative who fails to accompany the child.

The legal representative, the staff of the juvenile rehabilitation centers or other educational and training institutions are duty bound, if needed, to present the child that is under their supervision or detained to the court for completion of investigation (Article 25 para 3 of JC).

*a) Requirements at Initial Appearance*<sup>370</sup>:

The juvenile prosecutor is obliged to call before him/her the child in order to understand the child's point of view on the case. As we mentioned above, this is an obligation deriving from the right of the accused to be heard in person. Unfortunately very often in practice prosecutors are contented only to hear the version of the legal representative who in many cases does not have a legal (professional) background and, what might be worse in some cases, he/she is the parent of the child offender who often is to blame for its child being in conflict with the law.

So, as soon as the accused child is brought before him/her, the prosecutor has to:

1. Ensure that the child understands of what s/he is accused;
2. Explain to the child the consequences of its alleged acts as well as the procedure, and where applicable, associated with his/her to a sentence;
3. Explain to the child his/her rights including the right to remain silent;
4. Explain if appropriate, that the child may plead guilty or not guilty.

If the child does not have a defence counsel the Prosecutor must give him/her reasonable time to obtain one and prepare his/her defence.

*b) The notion of "Defendant":*

A defendant in a criminal case is actually the accused person. To be accused means *stricto sensu* that there are official charges pressed against a person, which refers to the issuance of an indictment. *Lato sensu*, the concept includes also the case of a formal suspect. However, it is common that a person is considered as "accused" from the moment s/he is officially mentioned as the actor of specific crime in a written report (police report).

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<sup>370</sup> Juvenile Justice Manual, Module Five, 4.

Police often incorrectly use the word of “**suspect**” when referring to the **actor**, or **perpetrator** of the offense. The perpetrator is the person who has actually committed the crime. The distinction between a “suspect” and a “perpetrator” is that the suspect is not *known* to have committed the offense, while the perpetrator [who may not be a suspect yet] is the one who actually did it. The suspect may be a different person from the perpetrator, or there may have been no actual crime, which would mean there is no perpetrator.

Even as a formal suspect a person gains automatically certain rights that a witness would not have (e.g. s/he has the right to remain silent, not to answer any question that may incriminate him/her and does not face legal action for lying unlike a witness).

As we mentioned already, under the legal system of Afghanistan, the accused has several rights, among which:

- To be presumed innocent until proved guilty according to the law;
- To be informed of the charges against oneself in detail and promptly, in a language one understands;
- To have adequate time and facilities for the preparation of a defense and communication with counsel of one's own choosing;
- To be tried without undue delay; to be tried in one's own presence, and to defend oneself in person or through legal counsel of one's own choosing;
- To examine witnesses against oneself and be able to obtain the attendance and examination of witnesses on one's behalf, under the same conditions as the prosecution;
- Not to be compelled to confess guilt or incriminate oneself; and
- To be able to appeal to a higher tribunal against conviction and sentence.

*c) Tactics to be avoided:*

We remind again under this section that the accused child has the right to not be compelled to testify against oneself or to confess guilt and from this flow

the right to remain silent<sup>371</sup>. This procedural protection also grows out of the prohibition against inhumane and degrading treatment and torture and the right to a presumption of innocence, as mentioned above.

If police, prosecutors or other interrogators were allowed to force confessions or use coercive means to get a detainee to testify against him/herself, then the practical result would be persecution of detainees, widespread and systematic torture and ill-treatment, and, ultimately, a government which could terrorize its citizens with impunity<sup>372</sup>.

Signing confessions at the police station or prosecutors' investigation has no value if not according to law. However, if detainees do not have a defence lawyer, do not know their rights and are illiterate, their confession can easily be used against them during trial<sup>373</sup>.

The prosecutor has to proceed to the interrogation of the accused with impartiality without bias or prejudice and avoid certain tactics. Some examples of **unacceptable tactics** (other than torture, and cruel, inhuman and degrading treatment) used by the Prosecutor during the accused child's interrogation are shown below:

- **Intimidation** (depending the situation this might fall in the framework of psychological violence which can constitute cruel and inhuman treatment);
- **Demonstration of pretended gentility;**
- **Feint that he knows the truth or that he has incriminating evidence against him/her;**
- **Overwearing examination** (such as hours of examination without letting the accused sleep or eat; which also depending the situation

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<sup>371</sup> According to Article 40.2.b (iv) of the CRC, every child alleged as or accused of having infringed the penal law has the right "Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality".

<sup>372</sup> Interviews in Pol-e Charkhi prison (Kabul) revealed that women were often made to sign confessions at police stations or in pre-trial detention. Most women were illiterate and did not know what they were signing; the signature constituted a finger print. Sometimes they were promised release upon signing the confession, but subsequently sentenced. See, UNAMA, *Arbitrary Detention*, Vol.II, op. cit., p.63.

<sup>373</sup> UNODC, *Female Prisoners and their social reintegration*, March 2007, 4.4.6, [http://www.unodc.org/pdf/criminal\\_justice/Afghan\\_women\\_prison\\_web.pdf](http://www.unodc.org/pdf/criminal_justice/Afghan_women_prison_web.pdf)

might fall in the framework of cruel and inhuman treatment or even torture);

- **Misleading questions or questions which seem to suggest an answer** (e.g., “*You hated the victim didn’t you?*” or, “*On the night of the robbery it seems that you were near the house of the victim, right?*”). This type of questions might create a ‘false memory’ to the child. The ‘false memory’ occurs when the memory of the subject is influenced by the ideas, attitude or wishes of the investigator. It should be underlined that in this case, vulnerable witnesses, especially children, may be influenced by the questions they are asked or by the circumstances of the interview.
- **Unclear questions or confusing questions** (e.g. “*Did your environment pushed you in behaving this way?*”).

All of the above mentioned should be avoided by the prosecutor, otherwise, if used, they might constitute depending the specific case, a violation of human dignity or abuse of power. In any case, they violate the right to a fair trial and provoke invalidity to the procedure. The Prosecutor should bear in mind that he should:

- use simple language since he/she addresses to children;
- let the child speak spontaneously and without interruption and only pose small questions for assisting the child to remember.

*d) When the accused Child is actually the victim<sup>374</sup>:*

It is very important always to remember that things might not be as they seem and certainly not as presented by the police in some cases. So, it is likely that children who are brought as offenders are actually the victims. In particular, in sexual crimes where the offender is an adult or a much older juvenile, the child might feel shame or even be so much traumatized by the event that s/he is unwilling or unable to speak the truth. In most of the times such children remain silent; their silence being interpreted as guilt.

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<sup>374</sup> See above the connection between delinquency and victimization, Part I, 1.3.



After any traumatic event, most people, both children and adults, experience some psychological and physical effects. This is a natural part of the human response to stress. In the case of a traumatic experience these effects persist in time and might cause the temporary loss of memory (symptom of the 'post-traumatic stress disorder' - *PTSD*<sup>375</sup>). In cases where victims are coerced into a long-term abusive and/violent relationship with the offenders, they might develop survival strategies, to adapt their behaviour in order to reduce the risk of further incidences of abuse. This seriously damages, often irreversibly, the psychological health and quality of life of the victims. Among the main survival strategies is what is known as the ***Stockholm syndrome***<sup>376</sup>.

Normally a person recalls better facts of the near past than from a deep space (except elder persons whose memory has normally faded). However, if a person suffers from 'post-traumatic stress' it is likely he/she presents lapses of memory or even that the traumatic events are eradicated from his/her memory together (or not) with a series of facts of the near past.

Prosecutors need to understand how and why victims suffering from trauma may, until they receive adequate treatment, not only deny that they have been a victim of specific crime, but actually having trouble reconstructing or

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<sup>375</sup> The *PTSD* is explained as disorder of stress manifested after an exposure of the person to a traumatic event having caused fear. See, *Diagnostic and statistical manual of mental disorders*, DSM-IV. Washington, DC: American Psychiatric Association, 1994. See, also: Barbara Mitchels, "Let's Talk: Developing Effective Communication with Child Victims of Abuse and Human Trafficking," UNICEF, 2004, accessed at [www.childtrafficking.org](http://www.childtrafficking.org); Mark Jordans, "Specialized Training Manual on Psychosocial Counselling for Trafficked Youth: Handling the Trauma of Sexual Exploitation," ILP-IPEC, 2002, accessed at: [www.ilo.org/public/english/standards/ipecc/publ/download/counsel\\_traffic02\\_en.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/download/counsel_traffic02_en.pdf); ECPAT-International, "The Psychosocial Rehabilitation of Children Who Have Been Commercially Sexually Exploited: A Training Guide," 2003, accessed at [www.ecpat.net/eng/index.asp](http://www.ecpat.net/eng/index.asp)

<sup>376</sup> The other two survival strategies a victim might develop in order to reduce the risk of further incidences of abuse are the "Avoidance" when the victims do everything within their power to avoid further violence or abuse, becoming docile and completely obedient to the offenders and even do anything to please the offenders; and the "Numbing", when victims are so involved in identification with the offender that they become alienated from their emotions and thoughts, which explains the often noted, extremely high levels of apathy or indifference to their own suffering displayed by many victims, especially of trafficking in persons. Cf. ICMPD, Regional Standard for Anti-Trafficking Training for Judges and Prosecutors in SEE, 2004, p.40-41, [www.icmpd.org](http://www.icmpd.org)

remembering what happened to them<sup>377</sup>, which may make them appear –in the eyes of a prosecutor- as offenders (especially in cases of adultery, or rape, the silence of the juvenile would not leave much space to think that the juvenile did not consent). Other victims might blame themselves for what happened and actually take the blame by confessing the crime (e.g. confessing that they consented to a rape).

Sometimes it may happen that children who are victimised and have memory lapses to feel (under the pressure of the questions asked by the prosecutor) that they should fill in the gaps by fear that, if they do not answer, the prosecutor might think they are lying. However, this entails the risk to provoke a negative result of what they had expected and actually make the prosecutor believe that they are lying.

Another element very often overlooked by the prosecutors, is the cultural, religious or other societal taboos that may inhibit victims, especially children, from mentioning some subjects, which might mislead the prosecutor as to why they remain silent.

If the Prosecutor is not aware of the traumatising of the child it is likely to raise conscious and subconscious fears to the victim. Thus, Prosecutors should be particularly aware of the problem of sensitivity and **avoid retraumatizing the victim/witness**<sup>378</sup>.

*e) The evaluation of the defendant's confession:*

The confession of the accused should be considered more as means of defence rather than a piece of evidence. Besides, it often raises questions as to way this has been obtained.

The Afghan Constitution in Article 30 requires that a **confession to a crime should be voluntary and given by an accused in a sound state of mind**. This means that the confession of the accused child is invalid under the following circumstances:

- If the child's mental condition has led him/her to confess a crime;

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<sup>377</sup> OHCHR (2001), *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7, Chapter 8, p.122.

<sup>378</sup> Ibid.

- If the confession has been abstracted by violence, coercion or other unlawful means, as it has been mentioned above; or
- If the confession is not voluntary do to other reasons, e.g. the child confessed a crime fearing retaliation by the true offender.

The Prosecutor should always check with meticulous attention the confession given to the police by the accused child and at the same time be very skeptical about spontaneous confessions given by the interrogated child to her/him.

Each time the prosecutor evaluates a confession he/she has to check:

- The **character of confession** (is it voluntary or not?) and
- The **content of the confession** (what is the child confessing about?)

First, as to the character of confession, special attention should be brought to the following:

1. Sometimes children want to feel important and attract all the attention on them, ignoring that if they lie about a crime this might have negative consequences for their lives. It is important for the prosecutor to underline to the child the consequences of his/her confession and of his/her eventual sentencing. It has to be noticed that between imagination and judgment, imagination is the first to develop in a child's mind reaching its highest point between 3-5 years of age. **From 5 to 10 years of age there is a balance between fantasy and judgment** and then again **fantasy is increasing with adolescence (from 12 to 18 years)**<sup>379</sup>. This means

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<sup>379</sup> A research conducted by the Department of Psychology, University of California USA, examined the development of the ability to monitor memory strength and memory absence at retrieval. In two experiments, 7-year-olds, 10-year-olds, and adults enacted and imagined enacting a series of bizarre and common actions. Two weeks later, they completed a memory test in which they were asked to determine whether each action had been enacted, had been imagined, or was novel and to provide a confidence judgment for each response. Results showed that participants across age groups successfully monitored differences in strength between memories for enacted actions and memories for imagined actions. However, compared with 10-year-olds and adults, 7-year-olds exhibited deficits in monitoring of differences in memory strength among imagined actions as well as deficits in monitoring memory absence. Results underscore metamemory developments that have important implications for memory accuracy. See, Ghetti S., Lyons K.E., Lazzarin F., Cornoldi C., "The development of metamemory monitoring during retrieval: the case of memory strength and memory absence", *Journal of Experimental Child Psychology*, 2008 Mar.; 99(3): 157-81. See also another research conducted in the Department of Psychology, Yale University, USA. Age differences in reality monitoring of interactive events were examined among 4-year-olds, 8-year-olds, 12-year-olds, and adults. Participants engaged in some interactions and imagined others. Afterward, they were asked to determine whether each action was

that a juvenile is expected to lie, and this is as a normal part in the process of his/her development. **This is why a juvenile is never a good witness, because it is likely that s/he fills in the gaps by his/her imagination.** For the same reason a juvenile who has given a spontaneous confession is likely to be a mythomaniac.

2. **The Prosecutors should always double-check -especially in cases of sexual crimes- the eventuality of the child offender being actually the victim.** If the child is suffering from a post-traumatic syndrome it is likely, as mentioned above, that the child blames him/herself for what happened and takes the blame by confessing a crime s/he never did.
3. It is also very likely that children being in a situation of blackmailing, e.g. a victim of trafficking threatened by the trafficker that he will reveal to his/her family that s/he was willingly prostituting, or that he will kill her/his family if s/he does not take the blame of a theft. Some years ago a trafficker was forcing children to steal and then he was threaten them that if they revealed his identity he would kill their families. The children when arrested for theft took all the blame, while in reality they were victims of trafficking.

Of course a confession alone, detached from other evidence has no validity. The prosecutor (and later on the court) should evaluate the entire evidential material together with research conducted on the environment of the accused

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performed, imagined, or new. This memory test was repeated 1 week later. The 4-year-olds had more difficulty discriminating imagined actions than the two oldest age groups. Imagined actions were more often confused with performed ones than the reverse, though this bias was significant only for the two younger age groups. Reality monitoring decreased over time, especially for imagined items. Activities in which the participant was the agent of action were discriminated better than those in which someone else was the agent of action. Object use during the activity increased the discrimination of imagined actions, especially after the delay. Similarity among actions had no effect. Implications for child eyewitness testimony are discussed. See, Sussman A.L., "Reality monitoring of performed and imagined interactive events: developmental and contextual effects", *Journal of Experimental Child Psychology*, 2001 June; 79(2): 115-38.

Also, Cohen G., Faulkner D., "Age differences in source forgetting: effects on reality monitoring and on eyewitness testimony", *Psychology and Aging*, 1989 Mar.; 4(1): 10-7; McDaniel M.A., Lyle K.B., Butler K.M., Dornburg C.C., "Age-related deficits in reality monitoring of action memories", *Psychology and Aging*, 2008 Sept.; 23(3): 646-56.

child by the social workers<sup>380</sup> providing more details as to the child's social, cultural and family environment as well as details on his/her personality. Secondly, the prosecutor also has to examine the content of the confession.

The prosecutor should always ask the following questions:

1. Is the claim manifestly unfounded? (for example: is the child confessing that he killed the entire presidential guard by his bear hands?)
2. Does it contain inconsistencies or contradictions?
3. Is the child incriminating a third person in his/her confession? (This point is examined separately below due to its specificity).

*f) Confession of co-defendant:*

Under article 26 of the Afghan Constitution "*[c]rime is a personal act. Investigation, arrest and detention of an accused as well as penalty execution shall not incriminate another person*".

An expression of the principle of legality of crimes and sanctions is the principle of personal culpability as expressed by the Latin adage: "*nullum crimen sine culpa*". This means that in criminal law the responsibility is personal, entailing that the testimony or the plea of the co-defendant for the same act does not suffice alone to condemn the defendant.

**For example:**

The fact that the defendant's brother confessed to this crime does not make the defendant in anyway responsible. Other clues have to be evaluated as well in order to conclude to the guilt of the defendant. So, if e.g. there was biological material found on the body of victim matching the defendant's.

This prohibition can also be explained by the fact that one person can not meet the attributes of witness and defendant all at the same time. Thus, it is unacceptable for the defendant during his/her plea to testify for facts that incriminate other persons. This can be explained by the following reasons:

1. **Procedural reasons** that prohibit the coincidence of roles:

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<sup>380</sup> On the key role of the social workers at each stage of the trial see below, under 3.1.2.5.

- the defendant has the right to remain silent and he is not obliged to reply to the questions posed;
- the defendant is not obliged to take oath (unlike the witnesses);
- the defendant has no obligation of speaking the truth (unlike the witnesses).

Other procedural reasons are those who impede the exercise of the right of defence of the one against the other. This does not allow the court to take into consideration facts mentioned in the plea of the defendant and incriminate his co-defendant for the same crime.

2. **Substantive reasons:** only the testimony or the plea of the co-defendant for the same act is not enough to condemn the defendant since it is plausible enough that the first will try to put the blame to the second (and vice versa).

### **Case study 1**

A. During investigation Ahmed is complaining to the Prosecutor that the Police have forced him to confess after several days of deprivation of food.

B. Ali has been mistreated by the police to obtain confession. The Police claim that there was no other mean to obtain his confession than to press him. Besides what matters is that he has confessed his crime.

*\_What can the Prosecutor do for these allegations?*

*\_Is the confession made in both cases valid?*

### **Case study 2**

A murder has been committed and Jamil has been arrested by the Police following the phone call of a witness saying that Jamil was seen coming out of the house of the victim. The Police during their preliminary investigation call the Prosecutor and invite him to come at the scene of crime to be present during the collection of evidence. The Prosecutor replies that this is not within his duties and refuses to go.

*\_Does the Prosecutor have the right to refuse?*

*\_Who is responsible for collecting evidence from the crime scene?*

iv.) Examination of the witnesses:

As a general principle, anyone who detains crucial evidence for the trial is entitled to testify in favour or against the accused<sup>381</sup>. Article 34.3 of the Juvenile Code states that: *"[t]he court cannot prevent any one from providing testimonies that yield information about psychological development of the child, and his/her personality and living environment in the court"*.

However, ICPC Article 51.3 allows the court to exclude witnesses and experts if it believes that they are not material. By setting forth the expected testimony and linking it to the defense theory of the case, the materiality and relevance of the testimony can be explained, thereby avoiding the exclusion of vital evidence.

The objective of the prosecutor (and during the hearing: of judges of the court) is to pose the questions in such way that: a) they would reveal the truth; and b) they will not offend or violate any human rights of the witness.

The main purpose of artful questioning is to reveal the truth that would otherwise be obscured by a witness's bias, prejudice, ignorance or mistakes. Artful questioning also aims to avoid wasting time and to focus upon those facts which could be of assistance to the case<sup>382</sup>.

Witnesses are not always compelled to testify. Article 54 of the ICPC provides an "Exemption from Testimony" in the following cases:

1. A spouse has the right not to give evidence against the other spouse, even though their marital relation is ended;
2. The accused's ancestors and descendants and their relatives of the second degree have the right to avoid testifying against one another except when: a)

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<sup>381</sup> In its resolution 2005/20 of 22 July 2005, the Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (the "Guidelines"), contained in the annex to that resolution. The Guidelines form part of the body (Compendium) of the United Nations standards and norms in crime prevention and criminal justice, which are internationally recognized normative principles in that area as developed by the international community since 1950 and set the guidelines for each stage of the trial.

<sup>382</sup> See UNODC – UNICEF (2009), *Justice in Matters involving Child Victims and Witnesses of Crime - Model Law and Related Commentary*.

the charge legally attributed to the accused is not committed against the witness himself, or b) they reported the criminal offense.

It should be noticed that many judicial errors have occurred based on untrue witness confessions as well as on bad evaluation of the evidence.

**However, what matters is not really the type and content of the evidence, but the method and aptitude by which these are evaluated by the prosecutor and the judge.**

The prosecutor's only tool is the good knowledge of psychology of witnesses (which refers to another scientific branch: the judicial psychology).

*a) Types of witnesses:*

**1. The victim:** In principle, the first and basic witness in a criminal case is the victim. It needs to be noticed that the examination of the victim brings much more discomfort to the victim than the crime itself, because it might create a secondary victimization<sup>383</sup> to him/her, especially in violent crimes, where the victim has to remember traumatising details<sup>384</sup> from the event. This might create irreversible damage to his/her psychological state. Thus, in such case, additional measures should be taken from the prosecutor (e.g. referral to health institutions for medical, psychological treatment)<sup>385</sup>.

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<sup>383</sup> On this concept, see above under Part I, 1.4.

<sup>384</sup> On the effects of this traumatising, see above under 3.1.2.4, iii (d). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power – adopted on the 7<sup>o</sup> UN on Crime Prevention, 1985.

<sup>385</sup> It is very important to ensure the protection of witnesses especially when the basic witness is the victim or when the perpetrator turns to be actually the victim (in cases of sexual crimes involving girls). Some of the main United Nations instruments on standards and norms related to the protection of witnesses are: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34); Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Council resolution 2005/20); Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Economic and Social Council resolution 1989/57); Plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Council resolution 1998/21). On the issue of witness protection see, UNODC, *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, 2008:

<http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

The good practices prepared by UNODC provide a comprehensive picture of available witness protection measures and offer practical options for adaptation and incorporation in the legal system, operational procedures and particular social, political and economic circumstances of UN Member States. The good practices identified take a holistic approach to witness protection. They examine a series of measures that may be undertaken to safeguard the



**2. Witnesses testifying for facts fallen to their attention through their own senses** (mainly: hearing and sight) can be further distinguished to:

- eye witnesses and
- ear-witnesses

**3. Witnesses testifying for any information that they have acquired through narration to them from third persons** and who can be further distinguished to:

- witnesses by hearsay and
- informers (a very old tactic used by the police worldwide).

It should be noticed that this category of witnesses is not very reliable.

**4.** There is also a special category of witnesses: the **Experts**, which we examine under separate section below (f), due to their particular role during investigation.

*b) Principles in examination of witnesses:*

The principles valid for the examination of the defendant as mentioned above are also valid for the examination of witnesses (the prosecutor should proceed to the examination of the witness with impartiality without bias or prejudice, etc. and without using unlawful methods or putting psychological pressure on the witness). Further, we can add the following:

1. Witnesses should be interviewed separately unless the prosecutor believes that a cross-examination should give better results (if e.g. he thinks that the witness would not lie in front of the other witness).
2. Prohibition of communication of the witness with persons having interest from the outcome of the trial.

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physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation. These measures provide for a continuum of protection starting with the early identification of vulnerable and intimidated witnesses, moving through the management of witnesses by the police and enactment of measures to protect their identity during court testimony and culminating with the adoption of the exceptionally severe measures of permanent relocation and re-identification. In the development of the good practices, UNODC consulted with more than 60 Member States and international organizations such as Europol, Eurojust, International Criminal Court, International Criminal Tribunal for former Yugoslavia, International Criminal Tribunal for Rwanda, Interpol, SECI Regional Center for Southeast Europe, Sierra Leone Special Court as well as UNAFEI and UNICRI.

3. Prohibition of interruption by the prosecutor of the narration of the witness (unless clarification is needed or in order to bring to point the narration).
4. Prohibition for the prosecutor of posing unclear or confusing questions to the witnesses. Questions should be clear, precise and comprehensible.
5. Prohibition of asking questions that lead necessarily to the acceptance of only two options.
6. Prohibition for the prosecutor of posing misleading questions or questions which seem to suggest an answer.
7. Prohibition for the prosecutor of expressing personal comments to the witness.

From the witness side, there is a strict obligation on his/her behalf not only to say the truth, but also to explain how the facts came to his knowledge. The latter is particularly important when police-officers are invited to testify and they often invoke their obligation to secrecy towards their service (e.g. "*According to our information*"), but they do not wish to reveal their sources). It is important to make them reveal their sources, otherwise the defendant can not exercise fully his/her right to defence. The defendant has the right to know the source of information in order to answer back.

According to Article 50 of ICPC<sup>386</sup> the witness has also the obligation to give oath before s/he testifies (unlike the defendant who is not examined under oath); and according to Article 49 ICPC<sup>387</sup> s/he is obliged to appear at court.

At the end of investigation the Prosecutor will submit to the Court the list of the witnesses and experts he wants to be heard together with the act of indictment, indicating the reasons of the relevance of their testimony and exams. The accused and/or his defense counsel have the right to present

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<sup>386</sup> Article 50 of ICPC states:

*"1. Witnesses who have completed fourteen years of age are duty bound to swear, before giving evidence in Allah's name to tell the truth and be honest in their testimony.  
2. If the witness has used the term "Ash-ha-do" knowing that the term itself implies taking an oath, he or she is not required to swear in that terms. However, it is permissible for information gathering to hear the testimony of a witness under fourteen years of age without making him take the oath of truthfulness".*

<sup>387</sup> Article 49 of ICPC states: *"1. Witnesses and experts are duty bound to be present in the hearing indicated in the notification served on them. 2. If they do not appear without grounded justifications the Court orders their accompaniment by the police imposing on them a fine up to 500 Afghani".*

their own lists of witnesses and experts indicating the reasons of the relevance of their testimony and exams (Article 51 ICPC).

*c) Method of putting questions:*

The best type of questioning in direct examination is the one that directs the witness to the relevant subject matter, through a narrative response. This is because the testimony will be more persuasive if the witness tells the story in her/his own words.

Generally, it is better to ask *"Tell us what happened the night of May 12, 2009?"*, rather than: *"Did something happen the night of May 12, 2009?"*. The first type of question is more likely to produce a lengthy detailed answer, while the second type of question will usually get just a "yes" or "no" response<sup>388</sup>.

As we mentioned above, it is also best to avoid questions which seem to suggest an answer, for example, it would be better to ask *"Who were you with on the evening of May 12, 2009?"*, rather than: *"Isn't it true you were with the defendant on the evening of May 12, 2009?"*.

The first question will be likely to produce a detailed answer which is clearly coming from the witness' memory while the second question may seem like the examiner is suggesting the witness of what to say.

In order to obtain maximum benefit from the helpful evidence, prompt the witness to provide further detail<sup>389</sup>. For example, *"You say he looked very frightened, what physical signs of fear did you see?"*, this question directs the witness to supply exactly the type of detail that you are interested in.

It is useful to repeat the witnesses own words in the follow up questions to obtain further detail. The repetition both reinforces the witness' testimony and avoids the witness disputing the wording of the question.

**For example:** *"You say the color drained from his face and his hands were shaking, can you describe how his hands were shaking?"*. If the question

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<sup>388</sup> See, also UNODC (2009), *Strategies and Tactics for Defending Juvenile Cases*, op. cit., p.44.

<sup>389</sup> Ibid., p.45.

accurately recites the witness' own words the answer will focus on providing more detail, while using a question that alters the witness' words can lead to confusion.

*d) Assessing credibility:*

Among the different types of witnesses a prosecutor has to distinguish those who deliberately lie and those who despite their good intentions to tell the truth, they cannot restate the veracity of facts due to factors that can be either **objective** or **subjective**. A prosecutor while examining a witness (and afterwards while evaluating a witness' statement), should be aware of these problems and try to avoid them by using specific questioning technique. Especially for eye and ear-witnesses the prosecutors should take into consideration the following factors that can influence even a good witness in describing the facts exactly how they happened.

*-Factors on which depends the restitution of truth by witnesses:*

**1. Subjective factors** which depend on:

- the good state of the witness' *organs of senses*, such as:
  - vision, hearing, etc.;
- the good state of the witness' *psychological functions*, such as:
  - memory;
  - apprehension;
  - imagination<sup>390</sup>;
  - attention;
  - suggestibility, etc. and
- factors of social character, such as:
  - education;
  - profession;
  - social status, etc.

**2. Objective factors**, such as:

- the quantity of light;

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<sup>390</sup> As mentioned above the juveniles have increased imagination and should be very meticulously chosen to be witnesses.

- the existence or not of motion of the subject or of the witness, etc.,
- the time that has elapsed from the commission of the crime<sup>391</sup> and
- the normal inability of persons *in calculating some dimensions*, such as:
  - Speed;
  - Time;
  - Distance and
  - Numbers.

It should be noticed that it is normal for a witness to present some divergences if s/he has to answer about the above mentioned dimensions. No one can estimate with exact precision the above mentioned dimensions unless s/he has a specialization that has accentuated his/her aptitude in calculating these dimensions. So, normally, while describing a suspect, witnesses tend to confuse:

- The shape of his/her face;
- The colour of his/her hair (especially in Western countries where more hair colours exist);
- The height (witnesses tend to over-estimate the height up to 12 cm) and
- The age (witnesses tend to over/under-estimate age up to 8 years).

All the above is normal and the witness should not be considered lying if he presents the above mentioned divergences in his description. The prosecutor should try to pose questions in different ways in order to detect contradictions and eventual lies.

The prosecutor should assess the credibility of the witness and if s/he feels that s/he cannot believe him/her, then he should explain why s/he did or did not believe the witness. It is not uncommon to be unsure as to a victim or witnesses' credibility. In considering issues of credibility<sup>392</sup>, the interviewer should first consider the following general ascertainties:

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<sup>391</sup> As we mentioned above, a person normally remembers better facts that happened in the near past.

<sup>392</sup> OHCHR (2001), *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7, Chapter 8, p.120.

- (a) The interviewer needs to **identify the information which is based upon the personal experiences** of the witness.
- (b) Many fact-finders consider a person to be credible if they are assertive and clear. The witness may have been neither clear nor assertive. The witness may be relatively powerless and traumatized. If the witness is a woman and the prosecutor a man she might feel uncomfortable to talk on sensitive matters.
- (c) As mentioned above, individuals who have been traumatized often have difficulties with their memory and, for this reason, may not be assertive or clear. This **problem of memory loss** applies to all traumatized individuals.
- (d) The interviewer needs to be patient with a witness who is **not very clear about time sequences**. Many witnesses may not refer regularly to the calendar in their daily lives. They may need to be assisted by tying the events of concern to holidays or other remarkable days which are clearly fixed.
- (e) The interviewer should try to identify the information from the witness which is consistent with the information from entirely independent sources. Many fact-finders consider that a fact cannot be established unless **two unrelated witnesses give concordant testimony**<sup>393</sup>. The reliability of the witnesses and the experience of the prosecutor with that reliability may be an important factor in assessing the veracity of information. **Detail helps to provide credibility** and the fact that a witness is able to give a lot of particularized information is important. Also, some witnesses may have evident biases and those biases need to be factored into the assessment of veracity.
- (f) The interviewer should record information provided by a witness even if the interviewer is not sure of its reliability, because that information may be useful when further information is collected.

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<sup>393</sup> Ibid.

### **Case study 1**

Hamid has signed a written confession to committing the crime of beating and laceration under Article 407 of the Penal Code. He has confessed to the Prosecutor that he beat the victim so badly that he left him with a permanent deafness in one ear. Medical reports confirm the deafness. Five elders from Hamid's village come and testify to the Prosecutor that Hamid is a very peaceful boy who would never use violence against anyone and that the victim is a dishonest person and that he is probably faking his deafness.

*\_What should the prosecutor decide?*

*\_What actions should he taken?*

### **Case study 2**

Sharifa has been sentenced to 10 years confinement, by the Appeal Court, convicted of the murder of her first husband. During the incident she was in her first husband's house, where she was visiting her children. Her second husband called and asked her to come back, but the first husband would not let her go, trying to persuade her to stay with him. The second husband came to the house and, following an argument with the first husband, killed her first husband with a knife. Despite the testimonies of the neighbours stating that they have heard the argument between the two men and the first threatening the second, Sharifa and her second husband were arrested and both convicted of her first husband's murder.

*\_What are the elements that a Prosecutor should have evaluated in order to assess that Sharifa was not involved?*

### **Case study 3**

Nematullah is 16 years old and does construction work when he can get it, but most days he waits by the mosque and is not hired for any jobs because he is small for his age. Nematullah is accused of transgression against an official of public service under article 290 of the Penal Code and beating and laceration under article 409. The police gave statements to the prosecutor saying that Nematullah kicked and punched a policeman named Hasib outside

the mosque when the policeman asked him to stay out of the road. According to the police it took four of them to stop Nematullah's attack on Hasib and place him in handcuffs.

They explain that Nematullah's arm was broken when he jumped out of the truck on the way to the police station. Hasib says that his back was injured in the attack and that he could not work as a traffic policeman for 10 days because of the injury.

Nematullah says that he was standing by the mosque on the sidewalk with 20 others waiting for work when they were told by the police Sergeant Ali that they had to leave or pay 50 Afs each. Nematullah says he gave 50 Afs to Hasib but that Hasib still would not let him stay. He shouted at Ali that Hasib was a thief and then Hasib and three other policemen Zulmai, Rameen, and Faisal started beating him. Nematullah says he did not fight back but fell to the ground, at which time all four men began kicking him. After several minutes they put handcuffs on him and as they pulled him to his feet he realized his arm was broken. You have written copies of the statements given by Ali and the four policemen. You also have several witnesses available to testify, including Mustafa a mullah, Masoud a construction worker, and Samir a neighbour of Hasib.

*Mustafa's statement:* On October 1 at 9am I was walking to the old mosque when I saw a group of five or six policeman arguing with a group of 15 or more workers. I then saw the policeman surround a boy in the crowd, knock him to the ground and begin kicking him. I shouted at them to stop, they were really hurting him, and eventually they did stop. They put him in handcuffs, dragged him to a green police truck, pushed him inside the cab and drove off.

*Masoud's statement:* I was standing by the old mosque hoping to find work at about 9 am on October 1. Lots of other men were there looking for work. It is the same most days. Lately the police have been bothering us for money but if we don't get work we can't pay them and they chase us off. This day the Sergeant told us everyone must pay 50 Afs. I started to leave because I had no money, then I heard some shouting and I saw a boy on the ground being



beaten by the police. He was curled up on the ground like a baby not fighting back. It was embarrassing, it seemed like he was crying as well. If he were my son I would give him another beating for being such a weakling.

*Samir's statement:* My neighbor Hasib is a policeman and he is a very good and religious man. I have known him since we were boys. He would never hurt a fly. He helps me a lot with every kind of works if I need assistance.

*Ali's statement:* I was commanding a small squad of traffic police by the big traffic circle (rotary) next to the old mosque on October 1 at about 9am. I was in my jeep when a young beggar went crazy and attacked one of my soldiers named Hasib and the others had to pull him off. Afterwards Hasib reported to me that he was in great pain from his back and could not feel his fingertips. Hasib never complains of being sick and always comes to work no matter what so when he was unable to work for the next ten days I knew he must be badly hurt.

*Zulmai's statement:* I was working on traffic duty at the rotary by the old mosque on October 1 at around 9am when Hasib was attacked by a young talib who was shouting anti-government slogans. First he was standing on the sidewalk and then when Hasib looked away the boy ran at him and jumped onto his back and started trying to strangle him. I shouted to Rameen and Faisal and we all ran over to help. Together we pulled the boy off but he was kicking and punching the whole time. Hasib fell to the ground during the struggle and twisted his back. Once we had the talib in handcuffs he still did not calm down and on the way to the police station he jumped from the bed of the truck and broke his arm. I think the Taliban must give them drugs to make them act this way.

*Rameen's statement:* I was on traffic duty at the rotary by the old mosque around 9 am the morning of October 1. Hasib, Faisal, Zulmai, and I were attempting to expel a group of loiterers from the roadway because they were blocking traffic. A boy began yelling and started to punch and kick Hasib. Hasib tackled the boy and took him to the ground. Hasib hurt his back doing this. It then took all four of us to handcuff him because he was trying to kick and punch. We had to drag him to the truck.

*Faisal's statement:* I was on traffic duty at the rotary by the old mosque around 9 am the morning of October 1. Hasib, Rameen, Zulmai, and I tried to get a bunch of loiterers out of the road because they were blocking traffic. A boy began yelling and started to punch and kick Hasib. Hasib tackled the boy and threw him on the ground. Hasib hurt his back doing this. Then the three of us handcuffed him. He was trying to kick and bite as we dragged him to the truck.

*Hasib's statement:* I was on traffic duty at the rotary near the old mosque around 9am on October 1. I shouted at a teenager who was standing by himself in the middle of the cars to get out of the road. He did not move, and I thought maybe he is deaf, so I went close to him and ordered him to move again. The next I knew the boy was kicking and punching like a madman. I stepped forward to grab him but he kicked my foot and I fell onto my back. He kept attacking me but I was too injured to get back up by myself. I was grateful that Faisal, Zulmai, and Rameen were nearby and able to pull him off me.

Once he was handcuffed Rameen and Faisal led him to Ali's jeep for transport to the police station and Zulmai helped me to my feet. I was in great pain and had numbness in one of my legs. I could not get out of bed without great suffering for over a week.

*\_What kind of questions is the prosecutor allowed to make to each one of them?*

*e) A particular type of witnesses: the experts*

Experts are like any other witnesses except that they have specialized education, training, or experience which allows them to offer opinions on matters within their specialization<sup>394</sup>. They can be appointed by the court, the prosecutor, or by the defendant<sup>395</sup>, but their expertise does not bind the court. The court decides freely upon a case and if it comes out that the expert

<sup>394</sup> See, UNODC, *Strategies and Tactics for Defending Juvenile Cases*, op. cit., p.55.

<sup>395</sup> Article 51 paragraph 2 of ICPC.

did not conduct the expertise in a proper manner or that he does not have the adequate knowledge on the issue, his expertise should be rejected. The following points should be given particular attention:

- The details of the expert's education, training, or experience that form the basis of his or her expertise.
- The scientific basis of the expert's specific report related to the case.
- The use of up-dated scientific methods for the specific case.
- The specific actions taken by the expert in the case that form the basis of the expert's opinion.
- The expert's opinion, that relates to this case.

It is likely if the expert is appointed by the defendant to serve his client's interests. So, in that case the expert's report is not as strong as the one of an expert appointed by the court or the prosecutor. However, it is possible for the expert to be challenged by the defendant's attorney for bias, prejudice, fraud, mistake, lack of opportunity to observe, lack of recollection or any of the other issues that apply to an ordinary witness.

- Whether the expert's, education, training, or experience is sufficient to make him an expert in the area where he claims his expertise. **Example:** The expert claims to have conducted an autopsy on the victim and determined that the time of death was at 2:30am on Tuesday. However, the expert's medical school diploma is from a school in Pakistan that is not recognized by any government or academic institution and for many years his only work has been with sheep.
- Whether the expert employed methods recognized within the field of his or her expertise. **Example:** a) The expert has a degree in medicine from a well respected university in Germany. He claims that by examining the victim's facial expression after death that he can say that the victim died of poisoning; b) The expert testifies that the death could not have been a suicide because the expression on the victim's face was one of anguish and pain and a suicide is always peaceful.

- Whether the examination is achieved by scientific methods. **Example:** an expertise given by an astrologist.
- Whether the examination is achieved through contemporary/up-dated scientific methods. **Example:** an expertise given on the DNA of the perpetrator based only on the visual examination of a piece of hair found on the victim's body.
- Whether the expert correctly employed the methods he used in the case. **Example:** The expert used a special kit designed and manufactured in the United Kingdom to determine that the substance seized from the accused was heroin, however, the instructions on the kit say "*Do not expose to temperatures exceeding 25° C*" and the testing was done during the middle of the day in August under 38° C in a laboratory in Kabul that is not air conditioned.

A common area of use of expertise in juvenile cases is the use of a forensic doctor or other medical opinion in determining the age of the child offender<sup>396</sup>.

As we mentioned above, there is currently no scientific or medical procedure that could estimate the exact age of a child, nor is there likely to be such a procedure in the future. The best result that can be currently achieved is an opinion as to a range of ages.

Finally, it should be noticed that the records of the testimonies of the witnesses as well as of the expert exams, collected during the investigative phase, can have the value of evidence as basis for the decision only if it results that the accused and/or his defense counsel were present during the operations and were in a position to raise questions and make objections (Article 55 paragraph 1 ICPC). Otherwise the related deeds have the sole value of clues (Article 55 paragraph 2 ICPC).

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<sup>396</sup> See more on that issue above under 3.1.2.1.

### **Case studies**

1. A man is found dead in his house. The policeman that found the body testifies that he believes that the cause of the death was poisoning by his nephew with who, according to neighbours, had dispute over land.

2. The police detective to whom the accused child confessed the murder testifies that he threatened the defendant when he asked for a defense attorney to be present during the questioning. This threat resulted to his confession. This means that he is guilty, because a threat would have not scared an innocent person.

*\_Do you have any objections to the examples of expert opinion testimony above?*

### **3.1.2.5. The importance of social inquiry report**

Social Inquiry Reports (SIR) are an indispensable tool in most legal proceedings involving juveniles<sup>397</sup>. The competent authority should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, etc. For this purpose, some jurisdictions use special social services or personnel attached to the court or board. Other personnel, including probation officers, may serve the same function. Thus, it is indispensable to have adequate social services to the juvenile system available to deliver social inquiry reports of a qualified nature (Commentary, Beijing Rules 16.1).

A Preliminary Inquiry Report prepared by a social worker<sup>398</sup> is useful because it is:

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<sup>397</sup> The importance of the role of social workers to children at risk or in conflict with law has been established many years ago. See, W.B. Miller, "The impact of a 'total community' delinquency and control project", *Social Problems*, (10) 1962, p.168-181; M.W. Klein, *Street gangs and street workers*, Englewood Cliffs, NJ. Prentice-Hall, 1971.

<sup>398</sup> Juvenile Justice Manual, Module Five, 6.

- Intended to examine the child's background in order to assist the judge in the choice of sentencing options or to send the child to a health institution (if the child despite his/her age does not understand the meaning of his/her action nor the process of trial);
- Essential if the court is to act in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile and of society;
- Should be heard at the start of the trial to provide basic information for the proceedings rather than before sentencing.

The SIR is very useful at the stage of investigation while the Juvenile Prosecutor prepares grounded reasons against the child. In that respect, **Article 17** states that the Juvenile prosecutor is obliged to take into consideration the following points:

1. Age (day, month and year of birth);
2. Degree of psychological development;
3. Character and aptitude;
4. Reasons and causes for committing crime;
5. Education level at the time of committing crime;
6. Circumstances and living environment at the time of committing crime;
7. Disgrace and intensity of crime;
8. Previous criminal record;
9. Behaviour while committing crime and thereafter;
10. Type, proofs, means, intention, time and location of crime;
11. Level of danger caused to the victim of the crime;
12. Existence of accomplices, and those who encouraged the crime;
13. Other circumstances that can affect determining the punishment.

The above mentioned information can not be obtained by the Juvenile Prosecutor unless he has a detailed social inquiry report on the child. The second paragraph of Article 17 states that information about the child can be obtained from: the police, parents, care takers, teachers, experts and **any**

**other person that has information about them. This refers directly to the social inquiry report.**

In June 2008 the Ministry of Interior (MOI), the Attorney General's Office (AGO), and the Ministry of Labor and Social Affairs (MLSA) signed an agreement entitled "Referrals and Cooperation between Social Workers, Police Officers, and Prosecutors". The agreement was intended to support implementation<sup>399</sup> of Article 8 of the Juvenile Code under which confinement of a child should be "the last resort" and of the "minimum possible duration" by formalizing the role of social workers within the justice system and introducing the Social Inquiry Report (SIR)<sup>400</sup>.

The SIR is a report assessing the child's background, social, and family environment prepared by a qualified social worker for the purpose of providing information for consideration under article 17 of the Juvenile Code, and therefore under articles 15, 24, 36, and 47 as well<sup>401</sup>.

The social inquiry report should include:

- A summary of the social worker's comments of the child in conflict with the law;
- The evaluation of the specific case; and
- The conclusion of the social worker on the case as well as his/her final Recommendation.

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<sup>399</sup> The Child Protection Action Network (CPAN) has committed to ensure the implementation of the agreement in the provinces with an emphasis on promoting the involvement of social workers in children's cases and the submission of SIR's to the prosecutors. CPAN together with the United Nations Children's Fund (UNICEF) has initiated the training of social workers in selected provinces.

<sup>400</sup> UNICEF is also supporting the development of social work as a skilled, specialised and recognised profession in Afghanistan. See, UNICEF, Justice for Children in Afghanistan Series, *The Role of Social Workers in Juvenile Justice*, Issue 1, Aug. 2008.

<sup>401</sup> "In all cases except those involving minor offenses, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offense has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority" (Beijing Rules 16.1). According to UNICEF the formal juvenile system should be reserved only to those serious offenders representing 3-7% of children coming in conflict with the law. See, UNICEF, Justice for Children in Afghanistan Series, *The Role of Social Workers in Juvenile Justice*, Issue 1, Aug. 2008; OHCHR (1994), *Human Rights and Social Work. A Manual for Schools of Social Work and the Social Work Profession*, Professional Training Series No. 1.

If the social worker has conducted a thorough examination of the child's personality, environment, background, etc. his/her assistance to the prosecutor is really valuable and very often it can lead in alleviation of the judicial procedure. Indeed, the social worker's recommendations can direct the prosecutor to opt for diversion<sup>402</sup> rather than referring the child to the formal system of justice (to court). Social workers can play a fundamental role in the development of juvenile justice in Afghanistan by developing and providing alternatives to the use of detention and in providing a wide range of services for children promoting their rehabilitation and reintegration<sup>403</sup>.

The juvenile system needs more an approach which supports children in becoming accountable for their actions, therefore preventing future offending and supporting the social reintegration of child offenders.

Without trained social workers at every stage of the trial, there are limited opportunities for rehabilitation and reintegration of child offenders in society and, thus, for the prevention of crime in general.

Before the implementation of the above mentioned ministerial agreement<sup>404</sup>, prosecutors were preparing the indictment without giving great consideration and time to understanding the situation of children. With the introduction of the agreement social workers take part now in the proceedings providing information on the child's family situation and background. This results to a speedier procedure since children charged with minor offences are more likely to be diverted out of the formal justice system.

### **Case study**

Najia is a 16 years old girl. Her father is deceased and her mother has been remarried. Najia is being sentenced by the Appeal's Court to 7 years of confinement for running away from home. Her parents were arranging for her to be married to a 45 years old man. It was an economic settlement. Najia refused to marry but her parents insisted. Najia has been severely mistreated

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<sup>402</sup> See more details on diversion under Part III.

<sup>403</sup> UNICEF, *ibid.*

<sup>404</sup> UNICEF, *ibid.*



(beaten up every day) by both her mother and her step-father in order to obey. Najia believed that Najia had no other choice than to escape from this situation. Now she is being detained for 8 months and nobody has paid a visit to her.

*\_How would you treat this case? Would you rather refer this case for a family settlement instead?*

*\_Do you believe that the parents of Sharifa have contributed in a way to her behaviour?*

*\_Do you believe that a social worker should work together with the family to take her back and also to pay some visits to Sharifa while in detention?*

### **3.1.2.6. End of investigation and issuance of the indictment**

After evaluating all the evidence the Juvenile Prosecutor has three options at the conclusion of the investigation:

- to dismisses the case if there is no grounded evidence<sup>405</sup>;
- to issue an indictment and refer the case to the court or
- to divert the case out of the formal justice system.

For the issuance of the indictment the Juvenile Prosecutor has a specific **deadline**. According to Article 15 of the Juvenile Code:

*"The juvenile prosecutor, **after completing the investigation and collecting information** mentioned under article 17 of this code, is obliged to complete the indictment in **one week** and submit it to the court officially. If completion of the indictment is not possible within the mentioned period, the prosecutor can request **three weeks extension** from relevant court **provided that the child is not kept in detention**"*(emphasis added).

It needs to be noticed that the obligation of the prosecutor does not refer to the issuance (or not) of the indictment, but to the deadline in which he should issue it. **This does not mean that the prosecutor is obliged in each**

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<sup>405</sup> See also Article 39 of ICPC. The prosecutor needs the approval of the court for the dismissal of the case (paragraph 3 of Art.39).

**case to issue an indictment, but that if *after completing the investigation* he believes that this case should be referred to the court, then, he should do it rapidly.**

From the above it results that the Juvenile Prosecutor has **6 weeks maximum** (3 maximum for the investigation + 3 maximum for the issuance of the indictment) in order to research, collect and evaluate all evidence **and** issue the indictment. In practice this is rather **unrealistic**, especially in the provinces where there is only one prosecutor per province. This is one of the reasons why children remain so long in pre-trial detention, despite the clear requirement of the law.

The meaning of Article 15 is that if a pre-trial detention has been ordered during investigation (which has to be completed within 3 weeks) and the issuance of the indictment delays<sup>406</sup> more than one week, **the prosecutor is obliged to liberate the accused child.**

We should mention again that the prosecutor has the duty to exploit other solutions than the referral to the formal justice system and to divert the child offender from it as much as possible.

However, in cases the Prosecutor decides to issue an indictment, he should **always** ask the following questions before its issuance:

1. Is there enough evidence to substantiate the case in order to refer it to Court or not? If the answer is yes, then two more questions need to be asked:
  - a. What kind of evidence has been collected and how this evidence has been established?
    - \_Is it true or false evidence?
    - \_Has this evidence been gathered by the use of legal means or not?
2. How serious is the crime I intend to refer to the Court?
3. Have I exhausted all other options for the best interest of the child?

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<sup>406</sup> Only to dispatch a criminal record from the Ministry of Interior it takes one month.

4. Is there really no any other alternative I could avoid the formal justice justice system?
5. Have I asked for and consulted a social inquiry report?
6. Did I follow the recommendation of the social inquiry report, and if not, why?

Together with the act of indictment the Prosecutor should transmit to the Court the file containing all the deeds formed during the investigation, putting at the Court's disposal the eventually seized items and goods (Article 39 paragraph 6 of ICPC).

### **Questions**

- 1. Which are the first steps that a judge should follow when a child is referred to him/her?*
- 2. What is the age of criminal responsibility for child offenders in Afghanistan?*
- 3. What happens if in the same case there is participation of both adult and minor offenders?*
- 4. How can a confession that has been obtained by the police by illegal means be evaluated? Is there a time limit for raising the issue of illegal evidence?*

### **Case study 1**

Shahin is accused for theft by Ali. The Police after the preliminary investigation send the file to the juvenile Prosecutor. The Prosecutor examines the file and concludes that the evidence contained is not strong enough to establish that Shahin is the perpetrator of this theft. He decides then, that he should close the case and put the file in the archive.

*\_Has the Prosecutor acted correctly?*

*\_If not, what should he have done instead?*

### **Case study 2**

Two Police-officers Ahmed and Zabi are patrolling in a central street in Kabul when they hear the breaking of a glass. They immediately run on the spot and arrest in flagrante Mohammad aged 19 and Babour aged 17 after they have had broke the window of a jewelry shop. While police-officer Ahmed is handcuffing Mohammad and Babour, police-officer Zabi is trying to make a report on the crime scene. Near the window-shop he finds a sac with the tools used for breaking in. He asks Ahmed what to do with that and Ahmed replies that they don't need it since they have arrested the burglars in flagrante. Zabi throws the sac in the garbage. The Police-officers take Mohammad and Babour to the police station where they keep them for a week in order to make them confess other crimes. They both demand to see a lawyer but they claim is not satisfied. After a week they are taken to the Juvenile Prosecutor. During examination by the Juvenile Prosecutor Babour puts the blame on Mohammad. The Case is referred to the Primary Juvenile Court that sentences both to 2.5 years for attempt of burglary and sends them to Pul-e Charki prison.

*\_What flaws do you see in the procedure conducted by the Police, the Prosecutor and the Court?*

### **Case study 3**

Sadi is 12 years old. He is being detained at pre-trial stage for the last 8 months in JRC. His case is still under investigation. He is accused for homosexual relations. He is facing a sentence of two years confinement for this alleged crime. He is claiming that he does not understand the charges. Nobody has explained to him what this crime is about. He has not seen a lawyer yet and nobody has explained to him his rights.

-Note for the circumstances of the crime that an older boy of 17 years has molested Sadi.

*\_Is the order for pre-trial detention correct? What steps should have been followed in this case?*

*\_To your opinion is Sadi a delinquent or a victim?*

*\_Does his age play a role to his criminal responsibility or not?*  
*\_Is there a social inquiry report necessary and if yes why?*  
*\_What would have been changed in the treatment if you assess that Sadi is a victim? How could you arrive at this conclusion?*

### **3.2. Trial stage**

This is the stage where all evidence collected and evaluated by the prosecutor is presented before the court and the accused child appears in order for the court to decide on his/her guilt or innocence and (in the first case) impose him/her the appropriate sentence.

After the file is sent by the prosecutor to the court, the court is obliged to set a date for the hearing. However, as it was mentioned above, in practice, it is likely that most of the children spend an indefinite period of time waiting for a hearing to be set by the court, and as a consequence (if detained) they might spend all this time in detention.

Needless to repeat again, that all the principles and rights of the accused analysed above (such as the right to a fair trial, the right to be tried by an independent and impartial tribunal, the right to be heard in person, the right to be tried "within a reasonable time", etc.), apply also to the stage of trial. We have mentioned that judges decide according to their free conscious, but they should respect among others the principles of legality, equality and proportionality and decide impartially without bias or prejudice. They should also show integrity both in professional and private life.

#### **3.2.1. Separation of Criminal Justice and Juvenile Justice Systems**

It is clear according to Article 26 of JC that the trial of juveniles' offences is conducted by special courts and special judges (juvenile) and that the juvenile judges should have specific aptitude, training and experience in children's trials.

As mentioned above, if there is participation in the same case of both minor and adult offenders the case should be separated and only the juvenile offenders should be referred to the juvenile courts<sup>407</sup>.

### **3.2.2. Competence on punishment**

According to Article 27 of the Afghan Constitution: *"No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense"*. This Article safeguards the right to access to justice and to legality of justice. It means that other authorities other than a court legally established prior to the offense can not punish the offender. Thus, the police or the prosecutor, do not have the right to punish the child offender. On the contrary however, if there are no charges, the police and the prosecutor –as mentioned above- have the **obligation to release** the accused child.

The competence of the juvenile court is set by Article 29 of the Juvenile code stating that the court hears not only the cases of children's crimes, but also the cases of children at risk and in need of care and protection and also cases of children whose irregular behaviour cannot be corrected through parental care or care of those who have the right to guardian them or by adopting ordinary educational measures.

### **3.2.3. Abstention of the judge**

As mentioned above, the principle of impartiality implies that a judge should be required to exhibit *"neutrality and impartiality in all his or her work as a judge, and to avoid any discrimination for reasons related to race, gender, ethnicity, sect, language, religion, or disposition while carrying out his or her*

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<sup>407</sup> *"States shall make efforts to establish a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice"* (Beijing Rule 2.3).

*judicial duties*<sup>408</sup>. Furthermore, members of the judiciary should perform their duties without favour, bias or prejudice<sup>409</sup>.

In that respect, Article 11 of ICPC requires that a Judge should not handle a case if:

- the crime was committed against him or his relatives;
- the judge has performed the duties of the judicial police, of prosecutor or has given witness or functioned as an expert in the same case;
- the judge has been defense counsel of the accused.

In that case the same provision provides that the judge him/herself should require his/her substitution by another judge.

### **3.2.4. The unrollment of the hearing**

We should underline at this point that the main principle applying at this stage is the confidentiality of hearings<sup>410</sup>. According to Article 32 of the Juvenile Code the juvenile court hears the cases behind closed doors, but reads the decision publicly. In addition, as mentioned, the publication of documents related to the proceedings of children's trial including witnesses' testimonies and ideas of experts is not allowed in mass media (Art.32 para 2). Revealing information about the child's personality or information that can result in identification of the child is not allowed either (Art.32 para 3).

#### **3.2.4.1. The procedure**

The conduct of the Hearing follows the general rules of Article 34 of the juvenile Code in combination with those of Article 53 of ICPC.

The presence of the following persons<sup>411</sup> is allowed:

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<sup>408</sup> See Article 15 of Regulation of Judicial Conduct for Judges of the Islamic Republic of Afghanistan.

<sup>409</sup> See, Bangalore Principles of Judicial Conduct, Value, 2.1 and IAP Standards, Rule 3.

<sup>410</sup> For the principle of confidentiality see above, Part I, 4.3.1.

<sup>411</sup> See also Article 11 of the Regulation of Judicial Conduct stating: *"Every litigant shall have the right to freely attend a court proceeding; hence, a judge shall not allow any type of limitation in the enjoyment of this right upon any litigant. In addition, the judge shall not allow the security officers to bring the accused handcuffed or in chains into the hearing*

- The juvenile judges;
- The juvenile prosecutor;
- The accused child;
- The child's defense counsel;
- The child's legal representative;
- The witnesses and
- The persons who have sustained property losses.

However, the Juvenile Code provides that if the presence of the child's legal representative is not to the child's interest, or if his presence can disturb the proceeding of the trial, the court can order his expulsion from the trial session (Article 34 para 1, al.2).

The court can also allow the participation of professionals and experts in education and welfare of children for research and study purposes in the proceeding of the trial (Article 34 para 2).

The court cannot prevent any one from providing testimonies that yield information about the psychological development of the child, his/her personality and living environment in the court (Article 34 para 3).

The Court proceedings are conducted according to the following order as required by Article 53 of ICPC:

1. At the opening of the hearing the Court reads out the act of indictment;
2. When the accused is under detention the Court shall immediately assess the legality of the arrest and order the liberation of the accused when realizes that the arrest was unlawful or not necessary;
3. The Prosecutor makes an oral presentation of the case and of the findings of the investigations;
4. The judicial police officers who have conducted the investigations make oral reports of the activities accomplished;
5. The first witness to be heard is the victim;
6. Then the other witnesses and the experts are heard;

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*session. However, in exceptional cases, the judge may order the adoption of necessary security measures to avoid the escape of the accused or to preserve order in the courtroom."*



7. The accused can testify if he does not avail himself of the right to remain silent and the accused or his defense counsel can ask questions to the witnesses and the experts;
8. In case the witness cannot be present for health reasons the Court can hear him in his domicile;
9. The prosecutor and the defense lawyer can ask question to the accused.
10. The Court can, at any time, address questions to the accused, to any witness in the hearing and order confrontations.
11. The accused can refuse to answer the questions of the Court consistent with his right to remain silent.

#### **3.2.4.2. Inquiry on the personality of the accused child**

At this stage and in the framework of the social inquiry report (the importance of which has been mentioned above), it is necessary to conducting a psychological research of the accused child's personality.

The need for researching the child's personality appears a soon as it is established that s/he is the offender of the crime. So, the research of his/her personality is important to check if the child can follow the trial (if s/he understands the procedure against him/her) in order to be able to defend him/herself (even if others can follow for him) and this derives from the principle of personality of the trial:

- In order to assess his/her responsibility, and
- In order for his/her personality to be appreciated by the court while deciding the sentencing.

According to Article 38 of the Juvenile Code, if the child looks to have irregular behavior during the court proceeding, the prosecutor's office and the court can issue an order to refer the child to a mental health institution for diagnosis and treatment.

### **3.2.4.3. Presentation of evidence**

As mentioned above, this is the stage where all the evidence gathered during investigation is presented to be evaluated by the court this time.

According to Article 17 of the Regulation of Judicial Conduct:

*"The parties have the right to freely present their evidence before the court; hence, the judge shall be required to take all necessary legal measures to ensure that sessions are held in a manner in which the parties may enjoy this right with a peaceful and confident spirit. To ensure this right, the judge shall maintain order in all court proceedings in which the judge is involved".*

As we mentioned above, in every trial, the parties enjoy equality of arms, and have the equal right to freely present all documents, testimony, and other information relevant to the proceeding. Therefore, the judge must ensure that the parties, whether or not they are represented by an attorney, have a full and equal opportunity to present, in an orderly, efficient, and respectful manner, all evidence and arguments that the judge considers relevant to the proceeding. At the same time, the judge must take whatever action is appropriate and necessary to maintain order and the dignity of the court proceeding.

Regarding the presence of witnesses and experts there is a strict obligation deriving from Article 49 ICPC to attend the hearing: *"1. Witnesses and experts are duty bound to be present in the hearing indicated in the notification served on them. 2. If they do not appear without grounded justifications the Court orders their accompaniment by the police imposing on them a fine up to 500 Afghani".*

While Article 34 of the Juvenile Code allows the attendance of witnesses at the hearing the court retains the power to regulate the manner of the hearing under Articles 49 through 53 of the ICPC. Therefore, the court may order witnesses to wait outside of the courtroom prior to their testimony and order them to not discuss their testimony with other witnesses until the trial is concluded. This simple measure can prevent most of the coordinated lying undertaken by witnesses seeking to mislead the court. It is best to always

include a request that witnesses be excluded from the courtroom prior to their testimony in each defense statement.

It is very important for a judge to remember that his/her **judgment should be based upon facts and evidence that have been admitted through the court proceeding** (Article 4 Regulation of Judicial Conduct). Hence, the judge should not rely upon his or her personal information while considering a case, or, except when allowed by law, consider any evidence that has not been properly admitted in the case and discussed openly by the parties<sup>412</sup>.

In his or her capacity as a decision maker, a judge is not an investigator, and must rely, in making his or her decision, on the information and evidence submitted by the parties during the proceeding. Except when allowed by law, a judge cannot take into consideration, in making a ruling, personal knowledge or information, or evidence that has not been properly submitted in the case<sup>413</sup>. According to the principle of fair trial and the right to defence, the parties in a court case have a right to know all the facts and evidence being considered by the judge(s), and respond accordingly.

If a judge relies on personal knowledge, the parties will not know it, and will be denied this important right.

#### **3.2.4.4. Behaviour of judges in the courtroom**

As already mentioned, a judge should avoid impatience, anger and impolite behavior toward attorneys and parties. Instead, a judge should be patient, dignified and courteous to all. This behavior sets an example for all in the courtroom. Rude and abusive behavior includes<sup>414</sup>:

- Becoming angry or upset;
- Vulgar gestures;
- Profanity;

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<sup>412</sup> See above on the issue of unlawful evidence.

<sup>413</sup> This principle is reaffirmed, for example, in article 248 of the Civil Procedure Code of the Islamic Republic of Afghanistan. See, USAID, Training Course on the Regulation of Judicial Conduct, Oct.2007.

<sup>414</sup> See, the commentary under Article 19 on personal conduct of the judge of the Regulation of Judicial Conduct. USAID, Training Course on the Regulation of Judicial Conduct, op.cit., p.48.

- Body language, such as:
  - Roll eyes;
  - Smirk;
  - Frown;
  - Shake head;
  - Yawn;
- Mouth words of disdain;
- Use of demeaning tone;
- Use of ill-advised humor (which can be interpreted as irony);
- Repeatedly interrupting a witness or attorney; and
- Name-calling.

A judge should avoid any of the above mentioned behaviour or else it is likely that he/she is accused of partiality.

### **3.2.5. Conclusion of the Trial**

First of all, before reaching the verdict the court should identify any eventual violations of the rights of the accused. On that issue, Article 16 of the Regulation of Judicial Conduct requires that: *"Whenever it is noticed by a judge while considering a case that the basic rights of the accused were violated during the investigation and detection of the crime, upon the conclusion of the case, the judge shall be required to issue a decision identifying the violation and forward the decision to the appropriate authority for further proceedings and possible prosecution"*.

If, during the proceedings, the judge determines that the police or the prosecutor violated the fundamental rights of the accused child, the judge, should consider that violation in reaching a verdict. Upon the conclusion of the case, the judge must issue a decision identifying the violation, and forward that decision to the appropriate authority for further proceedings and possible prosecution<sup>415</sup>.

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<sup>415</sup> See, USAID, *Training Course on Regulation of Judicial Conduct*, Oct. 2007.

Then, at the conclusion of the hearing, according to Article 33 JC, the juvenile court should issue its decision after hearing the statements and reasons of the child, witnesses, legal representative, prosecutor, defence counsel, staff of social services institutions, views of experts, in the presence of the child.

The Prosecutor will express his opinion requesting the Court to make a decision of dismissal or sentence, indicating the kind and the amount of punishment he deems adequate (Article 58 ICPC). Then, the accused or the defense counsel, when present, submits to the Court his arguments in rebuttal of the accusation.

If the charges against the arrested child are not substantiated for the juvenile court, the court orders the release of the child (Art.33 para 2 JC). This order will not stop the victim from claiming his rights. The Code provides that the juvenile prosecutor can appeal against this decision.

If the issues discussed during trial harms the child psychologically, the court can continue the hearing in the absence of the child, provided that the summary of the trial is communicated to him/her later.

### **3.2.5.1. Time limits for issuing order**

According to Article 30 of the Juvenile Code the Juvenile Court disposes a very limited time to study the file. Indeed, **the Court has three days upon receipt of the file to study it.** In case defects are noticed in the file, the court returns the file to the juvenile prosecutor for completion of investigation and resolving the defects. The prosecutor is obliged to notify the legal representative of the accused about the issue immediately.

Then, the prosecutor is obliged to resolve the defects **within one week and resend the file to the relevant court** (Art.30 para 2).

**Upon receipt of the file, the Juvenile Court is obliged to issue its decision within 10 days** (Art.30 para 3).

As mentioned above, a judge is required to show timeliness, diligence and promptness in handling a case.

Article 13 of the Regulation of Judicial Conduct requires that a judge should conclude the consideration of all cases within the legal timeframe. *"If action required to be taken by the judge in the exercise of his or her judicial duties is not subject to a legal timeframe, the judge shall act with reasonable promptness in taking the required action. In the event of delay in the consideration of a case resulting from violation by another authority of an order of the court, the judge may issue a decision identifying the violation and forward the decision to the appropriate authority for further proceedings and possible prosecution".*

### **3.2.5.2. Reporting the pending cases (unprocessed doesn't make sense)**

According to Article 31 of the Juvenile Code the judicial board or judges in the juvenile court are duty bound to **report the pending cases every 15 days** to the head of the court with the reasons for the delay. The head of the court is obliged to take necessary measures in this regard as soon as possible.

### **3.2.5.3. Adoption of the decision**

According to Article 35 of the Juvenile Code, depending on the situation, the Court has the authority to adopt one of the following measures against the accused child:

- Performing social services;
- Sending the child to special social services institutions;
- Issuance of warning;
- Postponement of trial;
- Conditional suspension of punishment;
- Home confinement;
- Surrender of child to his/her parents or those who have the guardianship right; or
- Sending the child to the juvenile rehabilitation centers for confinement.

However, while adopting its decision the juvenile judges are obliged by Article 36 JC to give special consideration to the following issues contained in Article 17 of JC:

- 1) Age (day, month and year of birth);
- 2) Degree of psychological development;
- 3) Character and aptitude;
- 4) Reasons and causes for committing crime;
- 5) Education level at the time of committing crime;
- 6) Circumstances and living environment at the time of committing crime;
- 7) Disgrace and intensity of crime;
- 8) Previous criminal record;
- 9) Behaviour while committing crime and thereafter;
- 10) Type, proofs, means, intention, time and location of crime;
- 11) Level of danger caused to the victim of the crime;
- 12) Existence of accomplices, and those who encouraged the crime; and
- 13) other circumstances that can affect determining the punishment.

In any case, there are minimum requirements on the content of the decision. Article 61 of ICPC requires that the decision contains other than the identification of the accused a specific motivation of the verdict. Thus, the decision should contain:

- The description of the facts and of the circumstances included in the accusation;
- A terse exposition of the reasons of the same decision with reference to facts and law provisions; and
- The verdict.

### **3.2.6. Adjudication of guilt**

*"An adjudication of guilt is more than a factual determination that the defendant pulled a trigger, took a bicycle, or sold heroin. It is a moral*

*judgment that the individual is blameworthy. Our collective conscience does not allow punishment where it cannot impose blame. Our concept of blameworthiness rests on assumptions that are older than the Republic: man is naturally endowed with these two great faculties, understanding and liberty of will. Historically, our substantive criminal law is based on a theory of punishing the viscious [sic] will. It postulates a free agent confronted with a choice between doing right and wrong, and choosing freely to do wrong*<sup>416</sup>.

Before reaching the adjudication of guilt the court must see if all the components of the crime have been fulfilled:

In Afghanistan, every crime has three components which are: legal, material (objective) and moral (subjective).

- Legal Component:

The crime is defined by the law. This is known as the "*principle of legality (or lawfulness) of the crime*". The legal component of a crime is the description of a criminal act and its related punishment in the law.

- Material Component:

A crime is considered to be realised when there is definite intention to do so, and the necessary action to commit it. Therefore, for a crime to materialise, committing or refusing to commit an act for which a punishment has been defined in law is necessary. This act or refusal should be material and actual. Thinking about committing a crime is not in itself a crime.

- Moral Component:

In addition to an act or refusal to act, the existence of an intention to commit crime is also necessary. Criminal intent is the willingness of the perpetrator of a crime to do or refuse to do an act for which the law has defined a punishment. Criminal intent is actually "wanting" to violate the law and "knowing" that the act is a crime.

On the basis of intention, crimes can be divided into two categories—deliberate and unintentional. The deliberate crimes contain the full intention of the offender. In principle, all crimes are deliberate unless it is proved

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<sup>416</sup> *United States v. Lyons*, 739 F.2d 994, 995 (5th Cir. 1984) (Rubin, J. dissenting).



otherwise. On the contrary, an unintentional crime can be defined as a punishable mistake, a punishable negligence, or a civil mistake.

In all cases except those involving minor offences, before sentencing the child, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority (Beijing Rule 16.1). This is why the role of social workers is very important.

Having established the three components of the crime and having examined the social inquiry report, the judge is ready to give his/her decision.

According to Article 18 of the Regulation of Judicial Conduct:

*"To be able to adjudicate fairly and equitably, a judge shall be knowledgeable of all international laws, treaties, and conventions to which Afghanistan is a signatory, and stay committed to their implementation. A judge shall take reasonable steps to maintain and enhance his or her knowledge and skills necessary for the proper performance of judicial duties, taking advantage for this purpose of training which will be made available by the judiciary".*

Judges must make their decisions in accordance with the Constitution and laws of Afghanistan, and all applicable international laws, treaties, and conventions.

Taking into consideration all the principles that apply during this phase, the judge will reach his/her decision free of any influences.

Article 5 of the Regulation of Judicial Conduct safeguards the right of a judge to express freely his or her opinions. *"In collective adjudications, a judge shall not impose his or her opinion on the rest of the judges, or follow the opinion of the other judges contrary to his or her own will. A judge shall be independent of other judges with regard to decisions that the judge is to make. A judge shall not meddle in any case that is being considered by another judge. A judge shall not make any comment in public or otherwise that might reasonably be expected to affect the outcome of a proceeding or the right to a fair trial of any person or issue".*

Judges in the same court are free to discuss pending cases among colleagues. However, a judge should not attempt to influence another judge in the making of such decisions, and the judge making the decision must not accept any influence. In collective deliberations, a judge should not attempt to impose his or her opinion on the other judges, and should not accept the opinion of another judge contrary to his or her own will.

After the pronouncement of the decision the judge is obliged to inform the defendant of his/her right to appeal against the decision according to Article 14 of the Regulation of Judicial Conduct<sup>417</sup>.

### 3.3. Sentencing

*Priority of sanctions should be rehabilitation not punishment*

Sentencing does not necessarily mean imprisonment, even if in Afghanistan practice shows that it tends to identify with.

Depriving a person of their freedom, restricting their movement, excluding them from family, social and community relationships and activities; disrupting their livelihood; and placing them at-risk of health problems is a serious intervention by the state in a person's life. It must not be undertaken lightly or without sound reasons and proper justification.

Loss of liberty is a very serious penalty, incurring serious pain and significant hardships. Upon entry into detention or prison, people should not lose their humanity or their human rights and dignity. As we mentioned above, according to international instruments, imprisonment should be the last resort to which a judge should run up in the process of sentencing of a child offender. This principle in sentencing child offenders is encountered by Article 8 of JC stating that: "*Confinement of a child is considered to be the last resort*

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<sup>417</sup> The judge shall be required to educate the losing party about the timeframe and legal procedures of protestation against the court's decision.

*for rehabilitation and re-education of the child. The court shall consider minimum possible duration for confinement based on the provisions of this Code”.*

On the occasion of the twentieth anniversary of the adoption of the Convention on the Rights of the Child, the UN Special Rapporteur on torture recalled<sup>418</sup> that the language contained in the Convention is unambiguous when it comes to the detention of children. *“No child should be detained unless as a last resort. Detention should be only for the shortest appropriate time and should be imposed only if no other alternative measure contributes to the reintegration and rehabilitation of the child”.*

### **3.3.1. Purposes of sentencing**

There are a number of reasons for sentencing a person who is found guilty of committing a crime. The main reasons are: punishment, crime reduction, and reparation.

The purposes of sentencing include:

- Reparation: making amends for the harm to victims or the community; and promoting a sense of responsibility in offenders;
- General deterrence (deterring others from committing similar crimes);
- Individual deterrence (deterring the offender from committing further offense);
- Incapacitation and Protection of the public: offenders are “removed” for the risk they represent to society; the public is protected from the offender during the period of imprisonment;
- Rehabilitation: reduces future criminality by treatment to change an offender’s behaviour and prevent further offences;
- Retribution: in order to punish offenders for their misdeeds; offenders should pay back to society to make things even.
- Denunciation of unlawful conduct: expresses society’s disapproval of the offence.

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<sup>418</sup> See the report of the UN Special Rapporteur on torture, A/64/215, of 3 August 2009.

The purpose of sentencing is not for society to take revenge for the wrong made by the child offender, but rather to hold the child accountable for the offence committed. The purpose also of sentencing is to impose fair sanctions that have meaningful consequences for the child and promote his/her rehabilitation and reintegration into society<sup>419</sup>. In consideration of each case, the well-being of the juvenile shall be the guiding factor (Beijing Rule 17.2 (d)). Reintegration into society is central to the fundamental principle of the dignity of the child that should guide the treatment of every child that is alleged as, accused of, or recognized as having infringed the penal law in accordance with article 40(1) of the Convention on the Rights of the Child (CRC). Measures should take into account *"the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"*<sup>420</sup>

Restrictions on the personal liberty shall be imposed only after careful consideration and shall be limited to the possible minimum (Beijing Rule 17.1 (b)). This implies that strictly punishment-based approaches are not appropriate. In juvenile cases the consideration of punishment should always be outweighed by the interest of safeguarding the well-being and the future of the young person (Beijing Rules, Commentary on Rule 17.1).

### **3.3.2. Factors that should influence the decision on sentencing<sup>421</sup>**

Only the gravity of the offence is not a reliable indicator for the punishment. Before deciding the type of sentencing a judge should take into account various factors, such as:

- The extent to which the child participated in committing the offence;

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<sup>419</sup> UNICEF, Juvenile Justice Manual, Module 6.

<sup>420</sup> "Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process", Beijing Rule 24.1.

<sup>421</sup> See, Juvenile Justice Manual Module 6.

- The harm done to victims and whether the child intended to cause it or could reasonably have foreseen that it might occur;
- Any previous findings of guilt relating to the child;
- The child's age;
- Number of prior convictions and age at first conviction;
- Severity of prior criminal convictions;
- Eventual history of childhood abuse or neglect;
- Eventual history of drug or alcohol abuse and circumstances of this abuse (check if e.g. given by third persons);
- Eventual history of education, employment, family and social factors;
- Antisocial attitudes, values and beliefs;
- Antisocial peers and associations;
- Educational deficiencies;
- Vocational deficiencies;
- Mental health issues;
- Life skills and social skills deficiencies;
- Character defects (anger, aggression, impulsivity, etc.);
- Dangerousness (Risk of repeating offence, risk to community, fear).

***Other factors referring to circumstances that may have occurred before sentencing which may decrease the severity of the sentence are:***

- Any reparation made by the child-offender to the victim or the community;
- The amount of time that the child may have spent in pre-trial detention<sup>422</sup> (both during police arrest and in pre-trial detention in the Juvenile Rehabilitation Center) as a result of the offence;
- Any other aggravating and/or mitigating circumstances related to the child or the offence, such as the nature and circumstances of the offence, the personal history, social circumstances and personal characteristics of the child.

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<sup>422</sup> According to Art.39 para 2 of the Juvenile Code.

### 3.3.3. Principles of sentencing

Certain principles articulated in the Juvenile Code and International Law must be considered every time a child is sentenced.

A judge should always bare in mind the basic principles of international juvenile justice, as mentioned above:

- The best interest of the child;
- Treatment against punishment and
- The principle of individualised treatment.

Furthermore, from the principles of justice prevailing in juvenile cases, other than the principle related to confinement as a last resort, as well as the interdiction of death penalty, corporal punishment and life imprisonment to juveniles, the determination of the sentence should be guided by a cluster of fair principles, as we have mentioned above<sup>423</sup> and mainly by:

- Proportionality (: the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the child for the particular offence);
- Non discrimination;
- Respect of human rights;
- Efficiency; and
- Effectiveness<sup>424</sup>.

According to the primary international law standards directed specifically at the sentencing of children:

(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of

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<sup>423</sup> See above under Part I, 4.

<sup>424</sup> See, Juvenile Justice, Module 6.

persistence in committing other serious offenses and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

Therefore, detention is not justified simply because alternatives are not in place<sup>425</sup>.

### 3.3.4. Sentencing options

The judge should explore the different sentencing options and identify which should be the best option for implementing it. However this process should be realized within the framework of the fundamental principle prevailing in punishment which is the interdiction of any cruel or inhuman punishment as this is safeguarded by the international instruments<sup>426</sup> and also by Article 29 para 3 of the Afghan Constitution<sup>427</sup> and Article 4 (2) of the Afghan Criminal Code<sup>428</sup>.

Under Afghan laws, sanctioning of adult offenders may vary between:

- Execution<sup>429</sup>;
- Imprisonment (continued<sup>430</sup>; long-term<sup>431</sup>, medium-term<sup>432</sup>, or short-term<sup>433</sup> imprisonment); and
- Fines<sup>434</sup> (: cash punishment).

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<sup>425</sup> Beijing Rules 17.1 (c). See, also UNODC, *Strategies and Tactics...*, p.65.

<sup>426</sup> "Juveniles shall not be subject to corporal punishment", *Beijing Rule 17.3*.

"No child or young person shall be subjected to harsh or degrading correction or punishment measures at home, in schools or in any institutions", *Riyadh Guidelines 54*.

<sup>427</sup> Art. 29 para 3 of the Afghan Constitution states: "*Punishment contrary to human dignity shall be prohibited*".

<sup>428</sup> Article 4 (2) of the Afghan Criminal Code provides that: "Any punishment which is discordant to human dignity is not permitted".

<sup>429</sup> See Art.98, Penal Code of 1976 (1355), according which execution is realised by the hanging of the convicted person.

<sup>430</sup> See Art.99, Penal Code of 1976 (1355), according which a continued imprisonment is from sixteen to twenty years.

<sup>431</sup> See, Art.100, Penal Code of 1976 (1355), according which the duration of long imprisonment cannot be less than five years and more than fifteen years.

<sup>432</sup> See, Art.101, Penal Code of 1976 (1355).

<sup>433</sup> See, Art.102, Penal Code of 1976 (1355).

<sup>434</sup> See, Art.104, Penal Code of 1976 (1355).

However, for juveniles, according to Article 35 of the Juvenile Code, depending on the situation, the court has the authority to adopt only one of the following measures against the accused child:

- Performing social services;
- Sending the child to special social services institutions;
- Issuance of warning;
- Postponement of trial;
- Conditional suspension of punishment;
- Home confinement;
- Surrender of child to his/her parents or those who have the guardianship rights;
- and (as a last resort): Sending the child to the juvenile rehabilitation centers for confinement.

### **3.3.5. Length of sentences**

In most cases the Penal Code allows the judge substantial discretion to determine the length of imprisonment and other conditions of the sentence. If a crime is punished by “long imprisonment” the sentence imposed can be anywhere between five and fifteen years, meaning that the judge’s discretion can make a difference of ten years<sup>435</sup>.

The general rule for child offenders is that their sentence should not exceed the sentence that an adult would receive and as we mentioned above, children cannot be convicted to continued imprisonment (life imprisonment) or death penalty.

The Juvenile Code contains specific provisions for the sentencing of juveniles to confinement. According to Article 39 of JC:

- The sanctions for children who have completed **12 years of age and have not completed 16 years** of age **cannot exceed one third of the maximum sentence stipulated in the Penal Code for those above 18 years of age for the same crime.**

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435 Article 100, Penal Code of 1976 (1355).



- The sanctions for children who have **completed 16 years of age and have not completed 18 years** of age **cannot exceed half of maximum** sentence stipulated in the Penal Code for those above 18 years of age for the same crime.

So, the judge should give particular attention to the age of the child offender at both the beginning and at the end of the trial. At the beginning, the judge should check the child's age for criminal responsibility and at the end (at the time of adjudication) he/she should take into account the child's age if s/he decides to impose confinement.

### **3.3.6. Deprivation of liberty as a last resort**

International human rights law and standards provide for specific measures for particular categories of detainees, responding to the special situations and needs of such groups. Furthermore, particular consideration should be given to non-custodial measures in relation to groups made vulnerable in detention because they are more likely to experience increased suffering<sup>436</sup>.

According to cautious estimates<sup>437</sup>, currently more than one million children are deprived of their liberty and are held in police stations, pre-trial facilities, prisons, closed children's homes and similar places of detention. The vast majority of these children are accused of or sentenced for petty offences. Contrary to popular belief, only a small fraction is held in relation to a violent crime. Most of them are first-time offenders.

The human rights of children deprived of their liberty deserve particular attention owing to the dual vulnerability of such children: firstly, owing to their detention and like all other detainees, they depend on the State for care; secondly, owing to their age, their psychological stage of development and their physical fragility, what is at stake is not only the well-being of the child at the moment of deprivation of liberty but also his or her further

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<sup>436</sup> See the report of the UN Special Rapporteur on torture submitted to the UN General Assembly, A/64/215, of 3 August 2009.  
[http://www.juvenilejusticepanel.org/resources/?act=res&cat=&nod=\\_root\\_&id=UNrapporteurTorture2009&start=1](http://www.juvenilejusticepanel.org/resources/?act=res&cat=&nod=_root_&id=UNrapporteurTorture2009&start=1)

<sup>437</sup> See Report of UN Special Rapporteur, A/61/299, para. 61.

development. From a developmental and psychological perspective, children are in their “formative years”, making their time in detention particularly influential on the rest of their lives.

This is why we should underline that child’s liberty shall always be a last resort and only for the shortest possible time<sup>438</sup>.

The number of juveniles detained in closed facilities should be small enough to allow for individualized treatment, and the facility shall provide bedding in small group dormitories or individual bedrooms, and respect the need of the juvenile for privacy (Havana Rules, Rule 32).

While any deprivation of liberty must fulfil considerable safeguards, the threshold for detaining a child is even higher. Prior to initiating any judicial process and throughout the following proceedings, serious consideration shall be given to extrajudicial solutions, such as diversion<sup>439</sup>. Detention pending trial shall be limited to exceptional circumstances and whenever possible be replaced by alternative measures, such as close supervision or placement with family<sup>440</sup>. The imprisonment of a child is only permissible if its overall aim, the reintegration and rehabilitation of the juvenile, cannot be achieved through any other measures. Non-custodial measures such as probation, counselling or vocational training programmes, shall be encouraged<sup>441</sup>. At all stages, the child has the right to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth<sup>442</sup>.

Reviewing the experience of his fact-finding missions, the UN Special Rapporteur<sup>443</sup> on torture has unfortunately come to the conclusion that too many children are deprived of their liberty, in violation of the above outlined standards. In many countries, the juvenile justice system, if it exists at all, is rudimentary and does not live up to human rights standards. Extrajudicial interventions or non-custodial measures are more often than not

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<sup>438</sup> See above under Part I, 4.1.2.

<sup>439</sup> See Beijing Rules, rule 11.1.

<sup>440</sup> See Beijing Rules, rule 13.2 and Havana Rules, rule 17.

<sup>441</sup> United Nations Standard Minimum Rules for Non-custodial Measures (the “Tokyo Rules”); see also art. 40, para. 4 of the Convention on the Rights of the Child.

<sup>442</sup> See art. 40, para. 1 of the Convention on the Rights of the Child.

<sup>443</sup> Committee on the Rights of the Child, general comment No. 10, para. 32.

underdeveloped or not considered seriously enough, all of which makes the detention of children a regular procedure instead of a matter of last resort. Furthermore, in many countries the criminal justice system functions as an ill-suited substitute for a lacking or dysfunctional welfare system, resulting in the detention of children who have not committed a crime but who actually require welfare assistance, such as street children.

In general the Special Rapporteur is alarmed by the very low age of criminal responsibility in many countries. During his missions, he came across boys and girls as young as 9 or 10 years old who were deprived of their liberty, many of them in prolonged pre-trial detention. In this respect, the Special Rapporteur wished to reiterate the opinion of the Committee on the Rights of the Child according to which the age of 12 years should be the absolute minimum age of criminal responsibility, and that the minimum age should be raised.

It needs to be noticed that the Court after announcing the sentence to the defendant is obliged to inform hi/her about the possibilities of review of the case<sup>444</sup>.

### **3.3.7. Statistics**

The incarceration rate as per 100,000 population among 217 countries ranks first the USA with 760 per 100,000; second the state of St. Kitts and Nevis with 660 (a small state counting only a total of 42,696 inhabitants as in 2000); and third the Russian Federation with 626. Greece is ranked in the 121<sup>th</sup> position with a rate of 109 per 100,000 population<sup>445</sup>. Afghanistan was ranked in the 194<sup>th</sup> position<sup>446</sup> with a rate of 44 per 100,000<sup>447</sup> based on an estimated national population of 28.2 million at mid-2008 (from United

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<sup>444</sup> For the right to recourse see above Part I, 4.2.4.

<sup>445</sup> Out of a total number of 12,300 prisoners in November 2008 the rate for juveniles in confinement was 3.5%.

<sup>446</sup> See, *Prison Brief - Highest to Lowest Rates*, International Centre for Prison Studies, School of Law, King's College London, [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate)

<sup>447</sup> With a total number of prisoners reaching 12,500 in November 2008. Officially a 44.3% of this population is on pre-trial detention.

Nations), out of which **4.0%** is estimated to be juveniles; showing that the incarceration rate is not that high comparing to other countries.

### **Case study**

Mohammed is 17 years old and he is from Kabul. He is accused under article 455 of the Penal Code with committing larceny with a gun. He denied the crime to the police and now declares he wants to remain silent at the trial. The Prosecutor tells his lawyer that he will present documents at the trial that prove the accused has been convicted twice in the past of committing fraud. Mohammed says to his lawyer he was never convicted of any crime in the past.

*\_What effect could these past convictions have to the case?*

## **PART III: Decompression of the formal juvenile justice system: Rehabilitating juvenile offenders without repressive measures**

Juvenile Courts are required to consider the minimum possible duration for confinement based on the provisions of the Juvenile Code, and other appropriate alternatives instead of detention, such as verbal/written warnings from a police officer, community mediation, or counseling<sup>448</sup>. Where detention is ordered, juvenile offenders must be held in rehabilitation detention centers, and there should be a facility in each province<sup>449</sup>.

However, it has been reported that notwithstanding statutory guarantees, the justice system for juveniles accused of crimes is largely non-existent in the

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448 See Article 2 (1), 7, 10, 35, 39, 40 of the Juvenile Code. The law also requires that juveniles be able to have contact with their families and be accommodated separately from adult prisoners. Confinement of juveniles is considered to be the last resort as the emphasis is on rehabilitation and re-education, and wherever possible re-education, is required to take place in a family environment. Note that in June 2008, the Ministry of Interior, the AGO and the Ministry for Labor and Social Affairs signed an agreement on 'Referrals and Cooperation between Social Workers, Police Officers, and Prosecutors' formalizing the role of social workers in the juvenile justice system. See, UNAMA, *'All for Justice' - A quantitative assessment of the criminal justice system and international donor assistance across Afghanistan*, p.38.

449 Article 10.4 of the Juvenile Code. A child is no longer permitted to be detained in the same lock-up facilities as adults.

afghan provinces and the system is completely failing juveniles who come into conflict with the law. The Juvenile Code is not being implemented for a number of reasons, primarily because the capacity of the juvenile justice institutions has not yet been developed. The human capacity and infrastructure referred to in the legislation does not exist making the implementation of the Juvenile Code impossible<sup>450</sup>. The alternative measures and sanctions provisions of the Juvenile Code cannot be applied because viable alternatives to the detention of juvenile offenders, which are professionally implemented and monitored, have also not been put in place, limiting the juvenile court in considering alternatives to detention. Furthermore, it has been reported<sup>451</sup> that children in conflict with the law experience particularly high levels of abuse at the time of arrest and in police custody. The conditions in detention facilities are generally bad and children are often detained with adults. There is almost no practical experience of crime prevention programmes or diversion in the formal system, and little support to help children returning to their communities to become socially reintegrated after detention. The urgency is obvious to adopt and implement measures that could lead to deviation from the formal retributive model of juvenile justice, either by adopting specific alternatives to confinement or more general processes that could divert the solutions outside the judiciary juvenile justice system and even adopt a totally restorative justice model in some cases. The objective is to make confinement in the area of juvenile justice the very last resort as prescribed by international and national laws. In this part we have chosen to examine alternatives to confinement in the first section as they represent a more concrete solution provided already by the existing national model of juvenile justice, regardless of the fact that in practice they do not seem to apply. In the next section, we examine prevention together with diversion and restorative justice as they all fit in a non retributive model of justice based more in the active contribution of

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<sup>450</sup> UNAMA, *ibid.*, p.39.

<sup>451</sup> Interagency Co-ordination Panel on Juvenile Justice, *Protecting the rights of children in conflict with the law*. Programme and Advocacy Experiences from Member Organisations of the Inter-Agency Coordination Panel on Juvenile Justice, 2004, p.43.

society. Prevention is first to examine in the second section, since all the focus should be placed there if in the long run we aim at the decrease of juvenile delinquency.

## 1. Alternatives to confinement

*"Here we might not have to work hard, but it is still a prison..."*

*(17 year old boy held in JRC Kabul)*

Among the main international texts that suggest alternatives measures to confinement are:

- The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990);
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985); and
- The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985).

The United Nations Convention on the Rights of the Child underlines the urgency to finding alternatives to the imprisonment of children by providing that:

*"[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."* [(article 37 (b)]. The Convention, together with other instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), give indications about how this can be achieved. The Beijing Rules underline in particular, that the aims of juvenile justice should be two-fold<sup>452</sup>: the promotion of the well-being of the juvenile and a proportionate reaction by the authorities to the nature of the offender as well as to the offence. They encourage the use of diversion from formal hearings to appropriate community programmes.

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<sup>452</sup> UNODC, *Afghanistan : Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Assessment Report, May 2008, para 4.4, p.30; [http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan\\_Implementing\\_Alternatives\\_Imprisonment.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf)

Where diversion is not appropriate, they rule that the detention of the juvenile should be used as a measure of last resort, for the shortest period of time possible and separate from adult detention. They underline that deprivation of liberty should only be imposed after careful consideration for a minimum period and only for serious offences and that the institutionalization of juveniles should only be resorted to after consideration of alternative disposition measures. Criminal justice officials dealing with juvenile cases should benefit from continued specialized training. The release of juveniles from detention should be considered both on apprehension and at the earliest possible occasion thereafter<sup>453</sup>.

According to the Vienna Guidelines for Action on Children in the Criminal Justice System<sup>454</sup>: "*A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence*".

### **1.1. Criticism on the effectiveness of correctional measures**

There is a lot of criticism on the effectiveness of correctional measures<sup>455</sup>.

Progressive Criminology advocates the use of non-institutional over institutional treatment. Little or no difference has been found in terms of the success of institutionalization as compared to non-institutionalization<sup>456</sup>. The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.

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<sup>453</sup> Ibid.

<sup>454</sup> UN Economic and Social Council, Resolution 1997/30 of 21 July 1997.

<sup>455</sup> See, D. Lipton, R. Martinson, J. Wilks, *The effectiveness of correctional treatment*, N.Y., Praeger, 1975.

<sup>456</sup> See Commentary of Beijing Rules.



Already, since 1910 criminologists<sup>457</sup> have pointed out that the institutional treatment of juvenile offenders disables gradually the sound judgment of juveniles and at the same time renders them incapable of surviving in the exterior environment. Furthermore, some of the arguments against institutionalisation can be summarized as follows:

- Institutions are costly and their cost is not counterbalanced by their rehabilitation capacity<sup>458</sup>;
- Institutionalisation stigmatises forever the child contributing this way to a secondary deviation of its behaviour<sup>459</sup>;
- The incarceration of juveniles develops an increased rivalry towards the penitentiary institutions and in general towards law enforcement authorities<sup>460</sup>; and
- Incarceration is deeply anti-productive since it contributes more to criminalisation than to rehabilitation<sup>461</sup>.

The criticism against incarceration of juvenile offenders has led to the support of theories of diversion of the justice system, of deinstitutionalisation and of the implementation of alternative measures to confinement.

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<sup>457</sup> See, Hart, H., *Preventive Treatment of Neglected Children*, New York, Charities Publication Committee, 1910.

<sup>458</sup> See, Rutherford, A., Bengur, O., *Community-based Alternatives to Juvenile Incarceration*, Washington, D.C., National Institute of Law Enforcement and Criminal Justice, 1976.

<sup>459</sup> Edwin Lemert developed the idea of primary and secondary deviation as a way to explain the process of labeling. Primary deviance is any general deviance before the deviant is labeled as such. Secondary deviance is any action that takes place after primary deviance as a reaction to the institutions. When an actor commits a crime (primary deviance), however mild, the institution will bring social penalties down on the actor. However, punishment does not necessarily stop crime, so the actor might commit the same primary deviance again, bringing even harsher reactions from the institutions. At this point, the actor will start to resent the institution, while the institution brings harsher and harsher repression. Eventually, the whole community will stigmatize the actor as a deviant and the actor will not be able to tolerate this, but will ultimately accept his or her role as a criminal, and will commit criminal acts that fit the role of a criminal. Primary and Secondary Deviation is what causes people to become harder criminals. Primary deviance is the time when the person is labeled deviant through confession or reporting. Secondary deviance is deviance before and after the primary deviance. See, Lemert, Charles, Winter, Michael (Ed.), *Crime and Deviance: Essays and Innovations of Edwin McCarthy Lemert*, Rowman & Littlefield Pubs. Inc., Boston, 2000.

<sup>460</sup> See, Cressey, D.R., *The Prison*, N.Y., Holt, Rinehart & Winston, 1960; Sykes, G.M., *The Society of Captives*, N.Y., Atheneum Press, 1965.

<sup>461</sup> See, Lipton, D., Martinson, R. & Wilks, J., *The Effectiveness of Correctional Treatment*, N.Y., Preager, 1975.

## 1.2. Purposes of alternative (non-custodial) sentencing

According to OHCHR<sup>462</sup> *“the purpose of non-custodial measures in general, and the Tokyo Rules in particular, is to find effective alternatives to imprisonment for offenders and to enable the authorities to adjust penal sanctions to the needs of the individual offender in a manner proportionate to the offence committed. The advantages of individualizing sentencing in this way are evident, given that it permits the offender to remain at liberty, thereby also enabling him or her to continue work, studies and family life”.*

According to the Commentary to the Tokyo Rules, non-custodial measures are of *“considerable potential value for offenders, as well as for the community”*, and can be an appropriate sanction for a whole range of offences and many types of offenders, and in particular for those who are not likely to repeat offences, those convicted of minor crimes and those needing medical, psychiatric or social help. In these cases, imprisonment cannot be considered an appropriate sanction, since it severs community ties and hinders reintegration into society and thereby also reduces offenders’ sense of responsibility and their ability to make their own decisions. On the other hand, non-custodial measures have the unique characteristic of making it possible to exercise control over an offender’s behaviour while allowing it to evolve under natural circumstances<sup>463</sup>.

Non-custodial sentences<sup>464</sup> are considered as:

- More appropriate for certain types of offences (minor offences) and offenders (age and personal circumstances);
- Promote integration back into the community as well as rehabilitation;

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<sup>462</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 9, The Use of Non-Custodial Measures in the Administration of Justice, p.373.

<sup>463</sup> *Ibid.*, p.375.

<sup>464</sup> According to the Tokyo Rules (Rule 2.1) the concept of “non-custodial measures” means any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice.

- More humane and
- Less costly than sanctions involving punishment.

### **1.3. Principles in applying non-custodial measures**

The Tokyo Rules promote considerable flexibility in the development and use of non-custodial measures. The flexibility in non-custodial measures implies that they can be used at any stage of the proceedings respecting however the following principles:

- Non-custodial measures must be applied fairly and objectively; they must not involve discrimination. Differences in treatment are lawful only if they have a reasonable and objective justification.
- Authorities must ensure consistent sentencing when resorting to non-custodial measures.
- Non-custodial measures should be used in accordance with the principle of minimum intervention; all excessive measures must be avoided.

When resorting to non-custodial measures, the competent authorities must consider (Tokyo Rules, Rule 2.3):

- the nature and gravity of the offence;
- the personality and background of the offender;
- the protection of society (the prevention of crime); and
- the avoidance of unnecessary use of imprisonment.

The non-custodial measures can be much more flexible than pre-trial detention, for instance, and this is the potential recognized by the Tokyo Rules (Rule 2.3). However, consistency is clearly in the interests of fairness and justice and sentencing guidelines that establish the equivalencies among the various types of non-custodial measures would assist those imposing such measures<sup>465</sup>.

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<sup>465</sup> OHCHR, *ibid.*, Chapter 9, p.378.

## 1.4. Proposed measures

Non-custodial measures are flexible tools that can be used at all stages: pre-trial, trial and sentencing and also at post-sentencing stage. They should always be considered in the light of the principle of minimum intervention.

At **pre-trial stage**, the interest of the offender in seeing the proceedings dismissed has to be weighed against:

- the protection of society;
- crime prevention/the promotion of respect for the law; and
- the rights of victims.

Dismissal of proceedings is a common non-custodial measure at this stage.

At **trial** and **sentencing stages**, recourse to non-custodial measures should consider:

- the rehabilitative needs of the offender;
- the protection of society; and
- the interests of the victim.

The victim should be consulted whenever appropriate.

At **post-sentencing stage**, the authorities should have a wide range of non-custodial measures at their disposal in order to ensure the prisoner's earliest possible release to assist his or her reintegration into society.

### 1.4.1. International measures

The Beijing Rules<sup>466</sup> and the UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) provide a large variety of disposition measures, allowing the competent authority to have enough flexibility to avoid

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<sup>466</sup> Rule 18.1 of Beijing Rules attempts to enumerate some of the important reactions and sanctions that have been practised and proved successful thus far, in different legal systems. On the whole they represent promising opinions that deserve replication and further development. The rule does not enumerate staffing requirements because of possible shortages of adequate staff in some regions; in those regions measures requiring less staff may be tried or developed. The examples given in Rule 18.1 have in common, above all, a reliance on and an appeal to the community for the effective implementation of alternative dispositions. Community-based correction is a traditional measure that has taken on many aspects. On that basis, relevant authorities should be encouraged to offer community-based services.

institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

- Verbal sanctions e.g. admonition, reprimand & warning;
- Conditional discharge;
- Status penalties;
- Care, guidance and supervision orders;
- Financial penalties, compensations and restitution;
- Probation;
- Community service orders;
- Intermediate treatment and other treatment orders as referral to an attendance center, house arrest;
- Orders to participate in group counseling and other similar activities communities or other educational settings;
- Orders concerning foster care, living communities or other educational settings.

Rule 18.2 of the Beijing Rules points to the importance of the family which, according to article 10, paragraph I, of the International Covenant on Economic, Social and Cultural Rights, is *"the natural and fundamental group unit of society"*. Within the family, the parents have not only the right but also the responsibility to care for and supervise their children. Rule 18.2, therefore, requires that the separation of children from their parents is a measure of last resort. It may be resorted to only when the facts of the case clearly warrant this grave step (for example: child abuse).

The placement of a juvenile in an institution should always be a disposition of last resort and for the minimum necessary period (Beijing Rules, Rule 19.1). According to this Rule institutionalization seems to be restricted in two regards: in quantity ("last resort") and in time ("minimum necessary period"). Rule 19 reflects one of the basic guiding principles of Resolution 4 of the Sixth United Nations Congress: a juvenile offender should not be incarcerated unless there is no other appropriate response.

Non-custodial measures should also be considered at the post-sentencing stage. As mentioned above, according to the Tokyo Rules the competent

authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society (Rule 9.2). This rule is based on the principle that reducing the length of imprisonment can reduce the risk of offenders becoming institutionalized and thus unable to cope with society once they have been released. Consequently, it can be of advantage to grant offenders early release, while subjecting them, if necessary, to supervision. Rule 9.4 also promotes the idea of releasing offenders from an institution to a non-custodial programme at the earliest possible stage.

Rule 9.2 enumerates the following post-sentencing dispositions:

- furlough and half-way houses;
- work or education release;
- various forms of parole;
- remission; and
- pardon.

Some of these measures are substitutes for imprisonment. The offender is still under the authority of the prison administration but spends his or her days outside the prison working or undergoing training. The advantage of such an arrangement is that he or she can earn money that can be used to help meet family commitments, or saved to assist with reintegration upon release. In a half-way house, the offender is still technically under the supervision of the prison authorities but lives in "semi-freedom", readjusting to life in the community<sup>467</sup>. Among the above mentioned measures, parole and remission, could be considered as the main alternatives to prison, to be applied at post-sentencing stage<sup>468</sup>.

The Tokyo Rules do not specify the conditions that may be set for the release of sentenced prisoners, and, therefore, provide no guidance on the institutional arrangements necessary to facilitate this alternative to imprisonment. The Council of Europe's 2003 recommendation on conditional

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<sup>467</sup> OHCHR, *ibid.*, p.387.

<sup>468</sup> UNODC, *Afghanistan: Alternatives to Imprisonment*, op. cit., Section 3.2.4., Post-sentencing alternatives, p.16.

release (parole)<sup>469</sup> suggests the inclusion, (in addition to the standard requirement that the offender does not re-offend during the remainder of the sentence), of individualized conditions such as:

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

#### **1.4.2. National measures: The alternative measures contained in the Juvenile Code**

Despite the fact that in practice the only “measure” imposed against juvenile offenders is confinement to the closed rehabilitation centers, in theory, the Juvenile Code provides a series of alternative measures as contained in <sup>Article 5</sup> 2 (1), 7, 10, 11, 21, <sup>35, 39,</sup> and 40.

##### *i.) Alternatives while issuing a pre-trial detention order*<sup>470</sup> :

The juvenile court has the authority, **at the time of issuing the pre-trial detention order, to consider other appropriate alternatives instead of detention** (Article 10 para 3 of JC).

The Code provides also of the possibility for the prosecutor and the judge to release a child on bail without monetary deposit, unless his/her situation requires detention (Article 11 para 3 JC). The legal representative can request the release of the child on bail or bail’s extension during the course of investigation or trial. If the court does not deem detention of the child

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<sup>469</sup> Recommendation Rec(2003)22 of the Committee of Ministers of the Council of Europe to member states on conditional release (parole) adopted on 24 September 2003.

<sup>470</sup> See also, UNODC, *Criminal Justice Assessment Toolkit, Custodial and Non-custodial Measures, Alternatives to Incarceration*, 2006, p. 8.

necessary, it can issue the child's release order without bail (Article 11 para 4 of JC).

*ii.) Reconciliation during investigation:*

According to Article 21 para 1 of the Juvenile Code the prosecutor can invite the directors of the juvenile rehabilitation centers and the social services institutions to advise and encourage the child's legal representative and the one who has incurred losses to settle the conflict. However, the Code refers only to a conflict "**which should not be illegal**", provided that the child has not committed misdemeanour or felony<sup>471</sup>. In other instances the prosecutor is obliged to complete the investigation as per provisions of article 15 of the Juvenile Code and transfer the file to the relevant court.

In case the legal representative of the child and the one who has incurred losses agrees to reconciliation and reparation the prosecutor can decide to close the file (Art.21 para 2).

*iii.) Alternatives at the point of adopting the decision:*

As mentioned before, depending on the situation, the court has the authority to adopt one of the following measures (Article 35 of JC) against the accused child:

1. Performing social services<sup>472</sup>;

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<sup>471</sup> See the UNODC Assessment of the juvenile justice system undertaken in 2006/2007, and conducted in seven provinces of Afghanistan which included interviews with police officers, prosecutors, judges, penitentiary staff, lawyers, human rights workers and professionals working with juveniles in conflict with the law. According to this assessment, 45 per cent of interviewees stated that prosecutors would try to prevent formal court process, by facilitating reconciliation between the victim and the accused. 43 per cent stated that no measures were taken to divert cases by the prosecutors. UNODC, *Assessment Report on the Implementation of the Juvenile Code*, May 2007, p.39. Also: UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*, op. cit., p.31.

<sup>472</sup> This measure refers to Community Service. Community Service provides a way in which the non-violent offender can compensate the community for the wrong s/he has done by carrying out a number of hours of work for the public good. Persons working under a Community Service order are sent to a public institution (such as a school, hospital, clinic, public place) to carry out voluntary work for a number of hours. Usually they carry out much needed work than no one else is employed to do (so they do not take away jobs). It should



2. Sending the child to special social services institutions;
3. Issuance of warning;
4. Postponement of trial;
5. Conditional suspension of punishment;
6. Home confinement;
7. Surrender of child to his/her parents or those who have the guardianship rights.

Only as a last resort the Court has the right to sending the child to the juvenile rehabilitation centers for confinement.

*iv.) Suspension of confinement:*

Article 40 of the Juvenile Code provides that if the duration of confinement of the child is not more than 2 years, the court can introduce the child for spending that specific period in one of the social services institutions<sup>473</sup>. **In addition to this**, the court can order to one or more than one of the following obligations:

- Periodical stay;
- Performance of specific tasks (e.g. not to engage in particular conduct; or to report on a daily or periodic basis to a court, the police or other authority);
- Education and training;
- Movement restricted to specific locations/areas (e.g. remain at a specific address; or interdiction to leave or enter specified places or districts or interdiction to meet specified persons);
- Enrolment in an institution with social rehabilitation programs;
- Obligation to apologize and to compensate the damage caused to the victim;

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be noted that community service can **only be applied with the agreement of the person convicted**; otherwise it is considered as compulsory labour. It should also be carried out without payment and, if conscientiously carried out, it should not lead to acquisition of a criminal record. See, Penal Reform International, *Community Service as an Alternative to Custody*, (mainly the Zimbabwe Experiment): [www.penalreform.org](http://www.penalreform.org).

<sup>473</sup> Unfortunately the inexistence of social services institutions and the unwillingness of many parents to take responsibility of their own child leads the court to impose almost exclusively confinement.

- Accept supervision by a person or an agency appointed by the court (e.g. surrender of child to parents or someone who has the right of guardianship over him/her. In this case the court issues necessary instructions concerning the care of the child. If the legal representative does not perform the obligations, the court can transfer such supervision to other social services institutions).

The Code provides that if the child is not corrected with the above mentioned measures, the court has the right to issue warning for more severe sanctions (compared to the original punishment).

However, to our view, the above mentioned provision is not correct. The Law should provide for the possibility of the court either to send the child to the social institutions or to choose between one or more of the above mentioned obligations, or even to suspend the sentence.

Instead, the suspension of the confinement is provided only if the child has committed a **crime punishable with confinement for more than 2 year and less than 3 years**. In this case, the court can order the suspension of the confinement and if the child during this period does not commit another offence, then the sentence is considered as *"removed and regarded as abolished"*.

The abolition order of the sentence is issued by the court that has ordered the suspension of the sentence.

If a convicted child violates the condition of the suspended sentence and commits a new crime, the court can introduce the child for supervision to one of the social services institutions to perform humanitarian services throughout the period of suspended sentence.

After the hearing of the case, the court has the authority to suspend the procedure of the trial in order to further assess the child's personality. The trial is suspended for a **period not exceeding one year for misdemeanours** and **three years for felonies**. In this case, the Juvenile

Code foresees that the child will be surrendered to one of the social services institutions for observation, treatment and support<sup>474</sup>.

The court has the authority to dispose additional obligations in its order with the aim of repairing consequences of the crime and encouraging reconciliation with the victim. Suspension of the trial can be nullified if the conditions for the suspension are continuously violated by the juvenile (para 3).

According to Article 41 of the Juvenile Code, the court has the authority to probate its decision **with or without obligation for one year in case of misdemeanour and for two years in case of felony.**

Orders for provisional suspension cannot be issued in the absence of special educational programs and social services. The suspension order should be issued before the trial is concluded. The prosecutor can appeal within three days after the order is issued.

v.) Post-sentencing alternatives:

a) Transfer to the open JRC center:

According to Article 8 of the Decree No. 141 of 11/01/2009 (22/10/1387HS) of the President of the Islamic Republic of Afghanistan on Endorsement of the Law on Juvenile Rehabilitation and Correction Centers: *"In case of positive and observable changes in the behavior of the confined juvenile in the close center, the authorities of the Juvenile Rehabilitation and Correction Centers can transfer them to the open center, by the permission of the relevant court"*. Until now this measure has not been applied yet. It demands parents or legal guardians *"to provide the guarantee for daily summoning"*, and it does not apply (among other things) to children who have committed crimes such as murder, kidnap and drug trafficking or who have escaped from the JRC (Article 9).

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<sup>474</sup> However in practice the child might end up in the juvenile rehabilitation center since there are no social institutions.

b) Conditional release:

Article 36 of the Decree on Juvenile Rehabilitation and Correction Centers provides for the possibility of conditional release but there is no explanation as to the timing and criteria applicable<sup>475</sup>.

It needs to be stressed that according to Rule 28.1 of Beijing Rules, conditional release from an institution should be used by the appropriate authority to the greatest possible extent, and should be granted at the earliest possible time.

Upon evidence of satisfactory progress towards rehabilitation, even offenders who had been deemed dangerous at the time of their institutionalization can be conditionally released whenever feasible (Commentary to Rule 28.1, Beijing Rules). Like probation, such release may be conditional on the satisfactory fulfillment of the requirements specified by the relevant authorities for a period of time established in the decision, for example relating to "good behaviour" of the offender, attendance in community programmes, residence in half-way houses, etc.

According to the Beijing Rules, in the case of offenders conditionally released from an institution, assistance and supervision by a probation or other officer (particularly where probation has not yet been adopted) should be provided and community support should be encouraged.

### **1.4.3. Recommendations**

In the present system, juvenile justice should reserve its most serious intervention for the most serious crimes and reduce the over-reliance on incarceration for non-violent children. It is disturbing that UNODC data<sup>476</sup> from December 2007 show that 57 per cent of juveniles currently held in Afghanistan's prisons, and whose sentences have been confirmed either by

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<sup>475</sup> Conditional release is also provided by Afghanistan's Law on Prisons and Detention Centres, article 50, (a), 4, but without any explanation either.

<sup>476</sup> See UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*, op. cit., Section 4.4.8. p.36. Close to half of the children, whose sentences had been passed either by the Appeals Court or the Supreme Court could be sentenced to alternatives to prison, if such alternatives were available in practice and if judges were trained and willing to use non-custodial sentences.

the Appeals Court or the Supreme Court are eligible for alternative sanctions, including suspension of sentences. Thus, even though otherwise stipulated in the Juvenile Code, judges are not using alternative sentencing options.

**Judges and prosecutors need to be encouraged to use alternatives to imprisonment. They should use discretion in sentencing and alternatives under the law.**

Some recommendations<sup>477</sup> for the amelioration of the juvenile justice system are:

- Support mediation programs to parents to accept their children back home in order to facilitate the functioning of open JRCs.
- Undertake a screening of the current juvenile prison population to initiate the release of juveniles whose imprisonment does not have a legal basis. This effort will also give in depth knowledge of the profile of the juvenile detention population.
- Ensure the implementation of the recommendations on juvenile justice in the UNODC's May 2008 Report on 'Implementing Alternatives to Imprisonment,' in line with international standards and national legislation.

#### **1.4.4. Best practices**

##### **Philippines**<sup>478</sup>

In October 2001 SCUUK formed a partnership with FREELAVA (a well known NGO active in Cebu, the second largest city in the Philippines) to establish a 'Community-based Prevention & Diversion/Mediation Programme for Children in Conflict with the Law'. This set out to divert children from the formal justice system, help them change their behaviour, to reintegrate children after their release from custody and to institutionalise a prevention of offending model.

The project's diversion scheme is for less serious offences, which make up the great majority of cases of children currently arrested and taken into police

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<sup>477</sup> See UNAMA, *ibid*.

<sup>478</sup> Interagency Co-ordination Panel on Juvenile Justice, *Protecting the rights of children in conflict with the law*. Programme and Advocacy Experiences from Member Organisations of the Inter-Agency Coordination Panel on Juvenile Justice, 2004, p.43.

custody. In addition, research in Cebu indicates that 94% of children arrested by the police between 1999 and 2001 were first-time offenders. The project does not view diversion as appropriate for cases of murder, extreme violence, rape, high levels of recidivism or major drugs trafficking. However, the project's reintegration after custody scheme might assist such offenders.

The project now operates in 12 local government areas called *barangays*, which have populations varying from 10-100,000. In each of these a Children's Justice Committee (CJC) has been set up to resolve less serious offences through mediation instead of a child being formally arrested and held in police custody prior to going to court. The CJC has 11 members but it is the appointed chair and vice-chair of the *barangay* justice committee who usually conduct the CJC's business with input from others.

In each of the 12 *barangays*, Community Volunteers and Peer Educators, who are young people who were themselves previously in conflict with the law, advise and assist children brought to the CJC or those returning to the area after release from detention. Both Community Volunteers and Peer Educators have undergone training. There are usually about 10 Community Volunteers and 10 Peer Educators in each local authority *barangay*. An effort is made to choose community volunteers from the different settlements within the *barangay*. The minimum requirements to become a community volunteer are: an interest in helping young people, knowing the law, communication and facilitation skills, and patience.

Their training helps develop these skills. The community volunteers meet monthly and make oral reports which are recorded by FREELAVA. The community volunteers are well-known to the CJC members and they are sometimes asked to attend the CJC mediation and/or to assist a child afterwards.

The peer educators are chosen because they have adopted a positive lifestyle and attitude since their release, often with the assistance of a community volunteer. The peer educators receive sensitisation on the Convention on the Rights of the Child, leadership and the importance of respecting others. Under the guidance of the project staff and the community volunteers, their role is

to support children who have come to the CJC. This frequently means that they participate with these children in sporting and cultural activities. Many of the peer educators have returned to school with the financial assistance of FREELAVA. As yet, there are no Alternative Sanctions girl peer educators; girls make up about 3 per 100 offenders and, unlike boys, are usually assisted by the social welfare department because of their perceived vulnerability.

*Achievements:*

- The local authority leader in one *barangay* reported that 1000 children had been diverted from the formal justice system in the two years since the project started.
- There are about 120 trained Community Volunteers attached to the project and working with the CJs in the 12 *barangays*. The 10 community volunteers in *Ermita barangay* are working with about 200 children in conflict with the law. The success of the project in that barangay has meant there is an urgent need for more volunteers.
- The fact that quite a number of Community Volunteers were elected onto CJs in last year's elections shows that their work is appreciated.
- There are about 100 peer educators. They say that their relationship with the community volunteers has changed their perception of themselves; they now see themselves as having value. They enjoy helping other children by relating their own experiences and bringing them into their activities. The project has both reintegrated peer educators socially and assisted them to play a positive role in the lives of child offenders.
- The police seem to have a positive attitude towards the peer educators.
- The detention cells in the *barangay* centres are no longer used for children. Instead, if necessary, children are kept in unlocked rooms. If apprehended, children are not usually kept overnight.
- The local police now have a sound knowledge of Child Rights, and they do not handcuff children, but rather explain why they are apprehending them and taking them to the CJC instead of the police station.
- Mediation follows a set protocol. A copy of the agreement is given to the victim, the offender, CJC and FREELAVA. Files are kept confidential.

A general report of cases dealt with is sent to the Department of Local Government quarterly.

- A two day meeting with 30 recently released children was held in which they gave their views about their experiences of the criminal justice system.
- FREELAVA is looking at other ways of establishing CJs in the local government system to suit *barangays* that are less progressive and have a different structure.
- FREELAVA is forging links with other NGOs that are involved with child protection and are interested in supporting children in conflict with the law.

### **Questions**

*\_Are prison sentences imposed on children below 18 years of age? If yes, can they be imposed even to children below 12 years of age?*

*\_Are there any alternative measures to confinement? If, yes, name them.*

*\_Has the prosecutor authority to abstain from sending the case to the court and instead, take measures for victim /offender reconciliation?*

*\_Can the court suspend the sentence for a period of time and impose obligations instead?*

*\_Is there a deadline for the issuance of a suspension order?*

### **Case study 1**

Ahmed lives with his parents and up to now has been a good student at school. However one day his friend Mustafa asks him to deliver a package his uncle gave him to a shop near his house. Mustafa claims that he does know the content of the package, but Ahmed does not care to know since it has been given to him by his friend Mustafa. As soon as Ahmed arrives to the shop to deliver the package the Police break in and arrest everyone including him. He is charged for drug trafficking and risks confinement.

*\_Which are the elements that the court should consider in order to order an alternative to confinement measure?*



*\_ Would you recommend that he rather stays at home because he has a stable family environment and can benefit from an alternative such as community service?*

### **Case study 2**

Sayed is 13 years old and is convicted by the Primary Court of burglary for acting as an accomplice. Ever since he ran away from his poor family home in Kunduz and from a violent father, he is living on the streets of Kabul. Ali has given him 1000 Afs to stand in the road and watch for police during a burglary. The police arrested all offenders together with Sayed. During his arrest he learned that his father is dead. The social worker has interviewed Sayed's mother and she is willing to have him move back home. Now that his father is deceased Sayed wants also to go back home to help his mother. However, the social worker noted that the family is very poor and that Sayed's brothers appear to be underfed. The social worker has also discovered that Sayed's uncle is an auto mechanic in Kabul and that he is willing to have Sayed work as his assistant and provide him a place to live.

*\_ What would you suggest in that case?*

## 2. Prevention, Diversion and Restorative Justice

### 2.1. Prevention

“Crime prevention” means an intervention in the causes of criminal acts and related problems, in order to reduce the risk of their occurrence, their evolution and the seriousness of their potential consequences<sup>479</sup>. In other words, crime prevention is any effort, initiative or policy considering to reduce or eliminate the aggregate level of victimization or the risk of individual criminal participation. It includes government and community based programs to reduce the incidents of risk factors correlated with criminal participation and the rate of victimization, as well as efforts to change perceptions.

Criminologists<sup>480</sup> such as *Gottfredson*<sup>481</sup>, *McKenzie*, *Farrington*, *Sherman* and others have been at the forefront of analyzing what works to prevent crime. International Commissions and research bodies, such as the World Health Organisation<sup>482</sup>, United Nations<sup>483</sup>, and others, have analyzed what decreases rates of crime. They all agree that governments must go beyond law enforcement and criminal justice to tackle the risk factors that cause crime because it is more cost effective and leads to greater social benefits than the

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<sup>479</sup> See, Council of Europe Rec (2003)21 of the Committee of Ministers of the Council of Europe to member states concerning partnership in crime prevention.

<sup>480</sup> Sherman, Lawrence, David Farrington, Brandon Welsh, Doris MacKenzie, *Evidence Based Crime Prevention*, New York: Routledge, 2002; [Lawrence Fennelly](#), *Handbook of Loss Prevention and Crime Prevention*, Elsevier Butterworth-Heinemann Inc., Fourth Edition, 2004.

<sup>481</sup> Michael Gottfredson, Travis Hirschi, *A General Theory of Crime*, 1990; Michael Gottfredson, Chester Britt (Eds.), *Control Theories of Crime and Delinquency*, Advances in Criminological Theories Vol.12, 2003.

<sup>482</sup> World Health Organization, *Preventing Violence: A Guide to Implementing the Recommendations of the World Report on Violence and Health*, Geneva: Violence and Injuries Prevention, 2004.

<sup>483</sup> United Nations, Economic and Social Council, *Guidelines for the Prevention of Crime*, New York: United Nations, Economic and Social Council, Office for Drug Control and Crime Prevention, 2002. See also the work of the Commission on Crime Prevention and Criminal Justice a subsidiary body of ECOSOC:

<http://www.unodc.org/unodc/en/commissions/CCPCJ/index.html>; and also the related UNODC Congresses on Crime Prevention: <http://www.unodc.org/unodc/en/crime-congress/crime-congresses.html>.

standard ways of responding to crime<sup>484</sup>. Interestingly, multiple opinion polls also confirm public support for investment in prevention.

Prevention does not only address to children who are in conflict with the law. It has a wider concept including children at risk and also children in need of protection. The aim of prevention is to ensure that children will not come into conflict with the law or if they have already, that they will not reiterate their offences in the future.

In that sense, we can see two types of prevention:

- a) The general prevention which aims at juveniles who have not yet expressed delinquent behaviour (children at risk of adopting delinquent behaviour); and
- b) The individual prevention aiming at inhibiting juveniles in conflict with the law from re-offending.

Traditional penalties cannot effectively prevent re-offending or remedy personality disorders that might be the cause of juvenile offences<sup>485</sup>.

Because the problem has a wide diversity of factors, crime prevention must be a joint responsibility of different sectors of society<sup>486</sup>.

The police and the courts can no longer be regarded as the sole answers to the conflicts of everyday life. **Repression is not the only solution for juvenile delinquency and, in any case, confinement is the worse solution within the repressive system.**

Encouragement should therefore be given to measures outside the justice system<sup>487</sup>. Specific consideration should be given to the role family can play in prevention, as well as social services and institutions at local level.

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<sup>484</sup> See also: Kennedy, David M. (2008), *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction*, Routledge Studies in Crime and Economics.

<sup>485</sup> See, Council of Europe texts: Parliamentary Assembly Recommendation 1583 (2002) on prevention of recidivism in crimes against minors; Assembly Recommendation 1551(2002) "Building a 21st century society with and for children: follow-up to the European strategy for children (Recommendation 1286 (1996))".

<sup>486</sup> See, Save the Children UK (2004), *Juvenile Justice. Modern Concepts of Working with Children in Conflict with the Law*, Chapter 9, p.96.

<sup>487</sup> See, International Centre for Prevention of Crime, *100 Crime Prevention Programs to Inspire Action across the World*, Montreal, 1999.

### **2.1.1. Findings/ascertainments**

As mentioned above, the key factors that contribute to the passing to action and transform a child at risk to a child in conflict with law are related to the following situations:

- Orphans or street children;
- poor children and under economic exploitation;
- lack of education;
- children without a caregiver and in some cases children whose parents are involved in criminal activities;
- coming from family conflict environment;
- exposed to violence;
- gang members;
- making substance abuse;
- lack of equal opportunities;
- social exclusion (belonging to marginalized groups in the country, e.g. migrants); etc.

Worldwide ascertainments<sup>488</sup> for children in conflict with law:

- Adolescence is the most common age period for law breaking throughout the life span of an individual;
- 80% of children in conflict with the law will commit only one offence in their lifetime. There is an estimated 80% likelihood of deterring a “first-time offender” juvenile from re-offending, who represent 90% of children who come into conflict with the law<sup>489</sup>.
- 50-70% of crimes are committed by about 5-10% of the population (including 60-85% of violent crime);
- Majority of offending involves boys and consists of minor property offences;

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<sup>488</sup> International Centre for the Prevention of Crime based on studies in high and low income countries, referred by UNICEF, Justice for Children in Afghanistan Series, Issue 3, Jan. 2009.

<sup>489</sup> According to UNICEF children are mostly arrested for theft. There are some adult professionals who abuse children and involve them in many criminal activities and there are many children addicted to drugs who are used by criminal gangs for smuggling. See, UNICEF, *ibid.*

- Serious offending is infrequent - across many countries around 7% of young offenders are charged with violent offences;

### **2.1.2. International guidelines on prevention**

As repeated already, according to the UN Convention on the Rights of the Child *"in all actions concerning children... the best interests of the child shall be a primary consideration"* (Article 3) and that *"every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner... which reinforces the child's respect for the human rights and fundamental freedoms of others... and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"* (Article 40). By taking into account the age and circumstances of a child in conflict with the law and making decisions in the best interests of the child for his/her protection, survival and development, the juvenile justice system should work to rehabilitate and reintegrate children into society therefore preventing future offending. The reality is that protecting and promoting child rights and preventing juvenile offending are two sides of the same coin<sup>490</sup>.

This is particularly important as it is recognised that *"youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood"* (UN Guidelines for the Prevention of Juvenile Delinquency, No. 5; Riyadh Guidelines, 5-e). Much research has been conducted on what are effective responses for juvenile offenders. In particular it is agreed that in many cases:

- Attacks on the dignity of children in conflict with the law or abuse can increase their chances of re-offending;
- Inappropriate reactions to deviant behaviour can serve to reinforce these behaviours and even legitimise them in the eyes of the juvenile;
- Detention can increase the likelihood of re-offending;
- Placing juvenile offenders together negatively affects their behaviour and can increase their chance of re-offending;

<sup>490</sup> UNICEF, Justice for Children in Afghanistan Series, Issue 3, Jan. 2009.

- Use of detention increases the chances of children in conflict with the law of entering further into the juvenile justice system.

It has been identified that across diverse countries 3-7% to juvenile offenders will go on to become serious and persistent offenders when they are adults. These are the children who the most need support to be prevented from re-offending.

Every child in conflict with the law should be treated differently according to his/her situation and needs – for this reason coordination between police and social workers, is critical in the juvenile justice system. This is both the child's right and the most effective way to prevent the child from re-offending.

According to the Riyadh Guidelines, the prevention of juvenile delinquency is an essential part of crime prevention in society (Riyadh Guidelines, 1). By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminal attitudes. Formal agencies of social control should only be utilised as a means of last resort (Riyadh Guidelines 1 and 6). The juvenile justice system (police, courts, rehabilitation centers) should make best use of limited resources in targeting and supporting these children.

The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promoting of their personality from early childhood (Riyadh Guideline 2).

There should be close inter-agency cooperation (including between health, child-care, labour, education, social and law enforcement agencies) in taking concerted action to prevent juvenile delinquency and youth crime (Riyadh Guideline 9-g).

Programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific findings, and periodically monitored, evaluated and adjusted accordingly (Riyadh Guideline 48).

Furthermore, the Beijing Rules (Rule 1.3.) underline *"to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other*

*community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law”.*

Likewise, the Guidelines for Action on Children in the Criminal Justice System Recommended by UN Economic and Social Council Resolution 1997/30 of 21 July 1997, suggest that projects should focus on strategies to socialize and integrate all children and young persons successfully, in particular through the family, the community, peer groups, schools, vocational training and the world of work. These projects should pay particular attention to children in need of special protection measures, such as children working or living on the streets or children permanently deprived of a family environment, children with disabilities, children of minorities, immigrants and indigenous peoples and other vulnerable groups of children. In particular, the placement of these children in institutions should be proscribed as much as possible. Measures of social protection should be developed in order to limit the risks of criminalization for these children (point 36).

According to the above guidelines, one of the obvious tenets in juvenile delinquency prevention and juvenile justice is that long-term change is brought about not only when symptoms are treated but also when root causes are addressed. For example, excessive use of juvenile detention will be dealt with adequately only by applying a comprehensive approach, which involves both organizational and managerial structures at all levels of investigation, prosecution and the judiciary, as well as the penitentiary system. This requires communication, *inter alia*, with and among police, prosecutors, judges and magistrates, authorities of local communities, administration authorities and with the relevant authorities of detention centres. In addition, it requires the willingness and ability to cooperate closely with each other (point 41).

To prevent further over-reliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for

the diversion of children from the justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes<sup>491</sup>, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors (point 42).

### **2.1.3. Crime prevention methods**

As mentioned already, when referring to prevention we should bear in mind that there are two types of criminal behaviour we wish to prevent:

- a) Pre-criminal behaviour (children at risk of adopting delinquent behaviour) and
- b) Criminal behaviour which reiteration we wish to stop in the future.

Crime prevention methods can be divided in primary, secondary and tertiary prevention techniques<sup>492</sup>.

Primary prevention is directed at tackling root causes of the crime on a large scale, whereas secondary prevention is aimed at particular groups identified to be most at risk of becoming either offenders or victims of particular types of the crime.

**Primary prevention** address individual and family level factors correlated with later criminal participation. Individual level factors such as attachment to school and involvement in pro-social activities decrease the probability of criminal involvement; as well as measures to promote equal opportunities.

Family level factors such as consistent parenting skills similarly reduce individual level risk. Risk factors are additive in nature. The greater the

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<sup>491</sup> See the United Nations Crime Prevention and Criminal Justice Programme Network consisting of the United Nations Office on Drugs and Crime and a number of interregional and regional institutes around the world, as well as specialized centres. The network has been developed to assist the international community in strengthening co-operation in the crucial area of crime prevention and criminal justice. Its components provide a variety of services, including exchange of information, research, training and public education.

The Compendium of United Nations standards and norms in crime prevention and criminal justice contains internationally recognized normative principles and standards in crime prevention and criminal justice developed by the international community in the last fifty-one years: <http://www.unodc.org/unodc/en/commissions/CCPCJ/institutes.html>

<sup>492</sup> See, Ken Pease "Crime Prevention" in: M. Maguire, R. Morgan, R. Reiner (Eds.), *The Oxford Handbook of Criminology*, Oxford: Clarendon Press, 1994, p.659-703. See also the Riyadh guidelines covering measures to prevent juveniles offenders at all three levels.



number of risk factors presents the greater the risk of criminal involvement. **Secondary prevention** uses techniques focusing on at risk situations such as youth who are dropping out of school or getting involved in gangs. It targets social programs and law enforcement at neighborhoods where crime rates are high<sup>493-494</sup>.

**Tertiary prevention** is used after a crime has occurred in order to prevent successive incidents. Such measures can be seen in the implementation of new security policies following acts of terrorism in the United States.

There are many efforts ranging from public awareness to developmental programs to strengthened law enforcement, designed to prevent crime.

When a crime is or has been committed, "**tertiary prevention**" comes in, comprising all efforts either to end the criminal behaviour or to prevent another crime from being committed, including the re-victimisation of victims. Likewise, it is important not to sentence juvenile offenders for minor breaches of legal regulations.

There is also need for proper training of all law enforcement officials in order to assist properly. The training should also take into account the need to consider human rights, as well as child and gender-sensitive issues.

Prevention of persons at risk of becoming in conflict with the law has the first priority. As we have mentioned above, poverty, underdevelopment and lack of equal opportunity are some of the factors that contribute to the creation of the phenomenon of children being at risk.

#### **2.1.4. The active participation of citizens in prevention**

According to the Riyadh guidelines (G.2), the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.

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<sup>493</sup> The use of secondary crime prevention in cities such as [Birmingham](#) and [Bogotá](#), have achieved large reductions in crime and violence. See the Birmingham Community Safety Partnership programmes at: <http://www.birmingham.gov.uk/crime>

<sup>494</sup> See below under the section of Best practices the example of Bogotá, Colombia.

Towards the “western model” of thinking societies become more and more an indifferent pattern where each one has concern only over his/her own interests and the fundamental societal values fade slowly away.

It is still time in Afghanistan to fight against this indifference and become active citizens working as true guardians of values. As active citizens we do not mean to act as an anonymous crowd, but as members of different entities cooperating with each other, such as the family, the local authorities, the school, the existing non governmental organizations and social services, etc.; all of them acting as nuclei through the various roles each one plays. At this point we would like to stress the role of the family and the local authorities in prevention.

#### **2.1.4.1. The role of the family in prevention<sup>495</sup>**

As we mentioned above<sup>496</sup> family is the most important institution in Afghan society and still has a considerable influence in the breeding of children. Family can be a factor of crime prevention but also a major factor for rehabilitation and social integration of the child. Child socialization takes place within the family because of deficiencies in the education system. Thus, individual, social, economic and political rights and obligations are found within the family which guarantees security to each man and woman, from birth to death.

The fact also that families in Afghanistan are multigenerational units that practice close economic cooperation and come together in all life-crisis occasions allows **cohesive in-group solidarity to be maintained**. It also needs to be added that the Afghan family still has common values and personal contacts within its members unlike to many western families that have replaced love, care, communication and the teaching of values with consuming products believing that these can replace their true parental obligations. Inter-personal relations in the western world glide gradually into

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<sup>495</sup> For an extended analysis of the role of the family, see above Part I, 1.3.

<sup>496</sup> Part I, 1.3.

standardization and alienation<sup>497</sup> and juveniles lack solid socio-moral rules which could "armour" them with resistance and inhibition towards delinquency.

The Preamble of CRC attributes a great importance to *"the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community"*.

It is not a coincidence that international trends in juvenile justice suggest to treat juvenile delinquents not with repressive measures but rather with a parental spirit of understanding adopting measures of psychological support and societal guidance.

In case the family is inexistent, this active role should be transferred to societal bodies at local level.

As we mentioned before, the dangers from unreasonable and disproportionate use of repressive measures against juvenile delinquents have been established in various researches<sup>498</sup> showing that juvenile delinquents between 14-18 years do not continue their criminal activities unless they are "stigmatised" as criminals by the justice system or if they are incarcerated to prison or any other institution.

The active participation of the citizens<sup>499</sup> at local level exists already in many areas of Afghanistan. The already existing model of resolving disputes at local level through the type of *jirgas and shuras* should be adapted to a formal prevention model for the location of eventual problems in society and assistance of children at risk. Special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change (Riyadh Guideline 15). Likewise, the UN Committee

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<sup>497</sup> See, D. Riesman, *The Lonely Crowd*, New Haven, Yale University Press, 1950; A. Inkeles, D.H. Smith, *Becoming Modern. Individual Change in Six Developing Countries*, Cambridge, Massachusetts, Harvard University Press, 1974; D. Lerner, *The Passing of Traditional Society. Modernizing the Middle East*, N.Y., 1958; Digby Anderson (ed.), *The Loss of Virtue. Moral Confusion and Social Disorder in Britain and America*, London, National Review Book, published by the Social Affairs Unit, 1992.

<sup>498</sup> See, Fr. Schulenburg, "Minderjährige als Täter von Kraftfahrzeug - Missbrauch", Berlin, Duncker & Humblot, 1973.

on the Rights of the Child<sup>500</sup> suggests that prevention programmes should focus on support for particularly vulnerable families, and also the involvement of schools in teaching basic values (including information about the rights and responsibilities of children and parents under the law), extending special care and attention to young persons at risk.

#### **2.1.4.2. Local authorities: A key role in crime prevention**

Whilst central government has a clear responsibility in establishing a legal framework for crime prevention and repression, for provision of adequate financial resources and a political lead, it is nonetheless at the local level where the problem is most acutely felt and perceived on a daily basis.

As a consequence, local authorities are best able to conduct policies and approaches dealing comprehensively with crime prevention policies, with alternatives to imprisonment, community policing, combating illiteracy, promoting civic education, dealing with research and communication and coordinating the programmes of different partners<sup>501</sup>.

Given their proximity, people see municipal departments as the most approachable and best informed about potential or actual crisis situations.

Local authorities can also play an effective conciliation and mediation role and thus attempt to prevent tension rising before it becomes necessary to call in police and courts.

Local authorities can also play a key role **indirectly**, through influencing the objectives of a range of sectoral policies, for which they are responsible, in

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<sup>499</sup> See the Recommendations of the Committee of Ministers of the Council of Europe Recommendation No. R (83) 7 on participation of the public in crime policy; Recommendation No. R (87) 19 on the organisation of crime prevention; Recommendation No. R (96) 8 on crime policy in Europe in a time of change and Recommendation of the Parliamentary Assembly of the Council of Europe Rec(2000)20 on the role of early psychosocial intervention in the prevention of criminality.

<sup>500</sup> UN Committee on the Rights of the Child, Forty-four Session, Geneva, 15 January-2 February 2007, General Comment n. 10 (2007), *Children's rights in juvenile justice*, paragraphs 16-21. See also, ECOSOC, Commission on Crime Prevention and Criminal Justice, Seventh Session, Report of the Secretary General, Addendum, "Use and Application of UN Standards and Norms in Crime Prevention and Criminal Justice", E/CN.15/1998/8/Add.1, 23-2-1998.

<sup>501</sup> See, Council of Europe, Manual on Local Authorities and Urban Crime Prevention - CPL (8) 2 Part II: <https://wcd.coe.int/ViewDoc.jsp?id=905225&Site=COE&BackColorInternet=DBD CF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>

order to ensure that they have a security dimension such as urban planning, including public transport, street lighting; the provision of schools, socio-educational centres; out-of-school social and educational services, etc.

At local level, the municipalities can play a decisive role in prevention, because they are best able to organize the strategies to tackle the risk factors that cause crime. The European Forum for Urban Safety and the United States Conference of Mayors have stressed that the municipalities must target the programs to meet the needs of youth at risk and women who are vulnerable to violence.

To succeed, they need to establish a coalition of key agencies such as schools, job creation, social services, housing and law enforcement around a diagnosis. Successful policies to reduce crime in cities such as [Birmingham](#) and [Bogotá](#) –as mentioned above- illustrate this.

Community safety and crime prevention initiatives are summarized as follows:

- Strong leadership from local authorities and alignment of community safety with other local priorities;
- Coordination among all orders of government and appropriate funding for municipalities for initiatives that target root causes of crime<sup>502</sup>;
- Keeping the focus local in setting priorities, establishing partnerships and engaging the public and the private sector;
- Effective use of data, knowledge and information for conducting evaluations to guide decisions on what works and how to apply resources to tackle local problems.

Some of the specific measures that could be taken at local level are:

- Measures for the improvement of education of the children<sup>503</sup>;

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<sup>502</sup> A major challenge to implementing and sustaining coordinated initiatives that was identified is the lack of coordination among levels of government in setting priorities and funding programs that target root causes of crime. As a result, the guiding principles focus on municipal, provincial and federal governments and coordination among them to:

Establish and/ or assist responsibility centres to lead and coordinate crime reduction and community safety strategies; Expand collaboration with municipalities in addressing priorities at the local and community level; Invest more to improve the effective use of knowledge and data; Increase levels of sustained funding for targeted programs; and Provide more avenues for effective public engagement. See, the Municipal Network Recommendations of the Institute for the Prevention of Crime, University of Ottawa:

[http://www.socialsciences.uottawa.ca/ipc/eng/recomm\\_mun\\_network.asp](http://www.socialsciences.uottawa.ca/ipc/eng/recomm_mun_network.asp)

- Measures for the development of skills, useful activities and societal engagement through school according to the children's age;
- Prevention programmes focusing on support for particularly vulnerable families, the involvement of schools in teaching basic values (including information about the rights and responsibilities of children and parents under the law), and extending special care and attention to young persons at risk;
- Measures for the protection of the family (programs on preparing parents in their role);
- A more active role of the social workers working together with the families in order to change mentalities towards the use of violence in the family<sup>504</sup> especially towards girls;
- Awareness raising at local level to make crime prevention and especially juvenile delinquency a priority;
- Mobilisation and enhancing of local structures (e.g. school, health, social services, *jirgas*) to identify and respond to local problems by identifying risk factors and finding solutions before a conflict (or a new conflict) with the law occurs;
- Establishment of a form of "social control" by citizens at local level, in order to avoid social exclusion<sup>505</sup>.

### **2.1.4.3. Prevention and the Police**

It needs to be stressed that the Police have an important role to play also in prevention: mainly that of non intervention especially to minor offences. They need to understand that in juvenile offences they have to use as such

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<sup>503</sup> For the influence of school in preventing delinquency, see: Paul Friday, John Halsey, "Patterns of Social Relationships and Youth Crime: social Integration and Prevention" in: P.C. Friday, V. Lorne Stewart (Eds.), *Youth Crime and Juvenile Justice*, New York/London: Praeger Publishers, 1977, p.148.

<sup>504</sup> See, the measures and mechanisms proposed for the elimination of corporal and other cruel punishment by the UN Committee on the Rights of the Child, Forty-second Session, Geneva, 15 May-2 June 2006, General Comment n. 8 (2006), *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, especially paragraphs 30-52.

<sup>505</sup> See, Rec(2003)21 of the Committee of Ministers of the Council of Europe to member states concerning partnership in crime prevention.

discretion as possible<sup>506</sup> (depending the case) in order to avoid to bring the child into the formal justice system. They should minimize deprivation of liberty and refer (where possible) the child to the parental/guardian responsibility. In minor offences it is not illegal for the Police to give a warning (or police cautioning) instead of referring the case to Court.

The period of initial contact with the police is of great importance. It can profoundly influence a child's attitude towards the state and society. In addition the nature of this initial contact can be instrumental in determining the success of any further intervention.

International research has indicated that children who experience injustice at the hands of police are more likely to re-offend in the future. According to UNICEF<sup>507</sup> at present policing practices in Afghanistan are likely to achieve little in preventing re-offending by children after they leave the juvenile justice system. A child's contact with the police<sup>508</sup> will more often result in increased alienation and resentment.

As it has been previously mentioned, it is reported that in four cities (Kabul, Herat, Mazar-i-Sharif, Jalalabad) a specialised juvenile police has been established<sup>509</sup>. The Juvenile Police officers confirmed that the majority of the committed offences are only of minor importance. However, the first contact of the child with the Justice system is made by the District Police, which has usually not received any specific training on how to deal with such cases.

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<sup>506</sup> UNICEF, *Justice for Children in Afghanistan Series*, Issue 3, Jan. 2009.

<sup>507</sup> Ibid.

<sup>508</sup> A study by Hugo Frühling (Ed.), 2004, *Calles más seguras: Estudios de policía comunitaria en América Latina*, (=Safer Streets: Studies on Community Policing in Latin America), Alfaomega Grupo Editor (Colombia), commissioned by the IDB presents the experience of four Latin American cities that have launched community policing programs. The most important benefit of these initiatives is to reduce abuses by the police. Frühling also cites public opinion polls that show much higher levels of approval toward the police in places where community policing has been introduced. He notes that in four cities where the project has been implemented, the police sought to coordinate their work with other institutions, although these efforts were not as systematic and lasting as they should have been. In Villa Nueva Municipal Citizen Security Council has been created that brought together the municipality, public prosecutors, judges and public defenders to support the community policing project. In Bogotá, one of the central axes of the security policy was cooperation between the local government and the police under an initiative known as the "Bogotá Mission." Belo Horizonte and São Paulo also set up councils to coordinate support from other government agencies and civil society.

<sup>509</sup> See, Terre des Hommes, Report on the Assessment Mission on Minors in Conflict with the Law (MCL) conducted in Afghanistan from 18.07.2008 to 28.08.2008.

A key role can also be played by prosecutors in prevention by their effort to reconcile offender and victim, but we consider that this should be examined below under the following section on diversion.

### **2.1.5. Best Practices**

#### **Bogotá- Colombia**

Bogotá's experience shows that there are reasons for optimism in the fight against violence and crime—even in the most difficult settings. Few countries in the hemisphere have struggled with this problem as much as Colombia. Yet the significant drop in homicides that has occurred in Bogotá in recent years—along with the striking public support for the city's community police program—offer compelling evidence that change is possible.

Why is Bogotá making progress at a time when other Latin American cities seem to be caught in a rising spiral of violence? The answer cannot be reduced to a few paragraphs, but a few key factors are readily apparent.

First, the changes in Bogotá are the fruit of a political commitment that has been sustained over the course of a decade spanning three municipal administrations. This is vital, because the complex institutional and social changes required to reduce violence simply cannot be carried out over the course of a single three- or four-year period.

Second, Bogotá gave priority to improving the performance and professionalism of the police. Bogotá's mayors devoted significant resources and found better ways to integrate the national police into other municipal services. They did so through incentives—such as using city funds to pay for training opportunities for the police—and by fostering a climate of trust and cooperation with law enforcement.

Third, Bogotá's leaders have always conceived of security as only one component of a broad social strategy designed to improve social cohesion and quality of life for all. The law enforcement initiatives were not conceived as a high-profile "crack-down" a strategy that tends to have limited effectiveness over time. Instead, they were designed to complement measures to improve public transportation and road safety, provide safe recreational areas,



upgrade infrastructure in low-income neighbourhoods, offer public services in convenient and decentralized ways, and increase citizens' responsibilities toward their city.

Fourth, the various units of Bogotá's law enforcement community have made an explicit commitment to overcome the bureaucratic rivalries that have prevented coordinated responses to violence and crime in the past. By standardizing procedures, sharing data networks and focusing on results, these units are beginning to improve their effectiveness.

Finally, Bogotá focused intensively on engaging the **participation of local communities** in violence prevention activities such as the innovative "Frentes de Seguridad" (neighbourhood crime monitoring committees). These activities encourage collaborative relationships between community police officers and local residents, and they help to reverse the legacy of mistrust that has hindered crime prevention efforts for so many years.

**The emphasis on coordinated social services, training, decentralization and local participation are all crucial to this approach**, and it is gratifying to see just how fruitful it has been in Bogotá.

Research carried out by the Inter-American Development Bank has shown that violence imposes extraordinary economic costs on Latin American and Caribbean countries: some estimates place that cost at between 5 percent and 15 percent of countries' GDP. The social costs—measured in terms of limited freedom and mobility, lost productivity, constrained human development and consequences for future generations—are equally severe.

Growing awareness of these costs has led many of the region's governments to give new priority to violence prevention efforts.

#### Summarising:

Taking into consideration that all international instruments insist more in prevention than in repression for juvenile offenders; that "preventing is better than curing" as a basic rule to every aspect of life; that the juvenile justice system in Afghanistan is highly repressive; that in practice there are no alternatives and that the main response to juvenile offenders is confinement;

that there are no social services institutions established for alternatives to be applied and that their setting up would take enough time before implementation of such measures could be effective at a country scale; and that any initiative for the establishment of new state institutions needs funds; then it would be preferable, easier and wiser to invest to prevention in juvenile justice.

Social measures should be taken by investing especially in the role of the family, the school, and bodies at local level with measures aiming at the reintegration of juveniles and the creation of opportunities for education and work.

Beyond the measures at local level, the State should commit to a full integration into the comprehensive national policy for juvenile justice of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) adopted by the General Assembly in its resolution 45/112 of 14 December 1990<sup>510</sup>.

Penalties and measures with repressive and stigmatising nature should be avoided, especially measures of deprivation of liberty of the juvenile. On the contrary measures that reinforce the social reintegration of the juvenile such as parental care, or community service are compatible with the spirit of general prevention.

It is only when citizens will understand that only by undertaking positive actions themselves and in collaboration with social institutions and other bodies at local level, within their already existing framework of values will achieve resolving problems that put children at risk and in need of protection. This is the main tool if they really want to fight the risk of children becoming in conflict with the law or the reiteration of delinquency.

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<sup>510</sup> See, the report "Crime Prevention for Children: Developments and Good Practices" in the framework of a side-event organised by the IPJJ Secretariat, in collaboration with the United Nations Office on Drugs and Crime (UNODC), that took place on 21 April 2009 in parallel to the 18th session of UN Commission on Crime Prevention and Criminal Justice (CCPCJ) in Vienna, Austria. The objective of the side-event was to encourage further collaboration amongst governments, civil society and criminal justice agencies to prevent children from coming into conflict with the law.  
<http://www.juvenilejusticepanel.com/resource/items/I/P/IPJJCCPCJSideEventApril09FlyerFINA L.pdf>

Children are the future of society, but they need above all guidance and support in order to become a healthy future of society. This can not be achieved by impersonal measures coming from above (from the State), but by the every day approach of people living together (at local level).

*"Young people do not have bad intentions. They are rather good, because they have not seen yet a lot of examples of corrupted persons. They believe easily, because they have not been deceived often ... and if they are carried away from their anger easily... it is because of egoism; because they can not accept contempt from others and they lose control when they believe that they have suffered injustice... They are big hearted because the struggle for life has not humiliated them yet... besides whoever believes that he is able of accomplishing great things is also big hearted; but this is also believed by persons who still have hope... And if they commit an offense this is due to their inclination to exaggeration and audacity rather than to a bad character..."*

***Aristotle, Rhetoric [1389a 3 – 1389b 14].***

## 2.2. Diversion

*"Jail is just another kind of slavery.  
The law has to not be so quick to lock people up.  
It should get to know them first".*

(15 year old girl in JRC Kabul)

Diversion is commonly practised on a formal and informal basis in many legal systems. According to the Beijing Rules, the term *diversion* means "*removal from criminal justice processing and, frequently, redirection to community support services*". This practice serves "*to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence)*" (Commentary to Rule 11).

In other words, diversion is to find other ways to the formal criminal justice system of achieving Justice.

In a broad sense, diversion can be practised inside or outside the judicial system, covering also all kinds of alternatives to imprisonment and any kind of substitutes to the formal sentencing process. In a strict sense, diversion and alternatives to imprisonment can appear as complimentary. Both aim to sanction criminal behaviour through better processes to achieve more effective outcomes. We have already examined the alternatives to imprisonment above, as non-custodial sanctions aimed to achieve Justice and more effective rehabilitation.

Very often diversion is confused with restorative justice as it refers to processes that are practised outside the justice model and aim rather to the restitution than to retribution for the harm done by the offender. We consider that the term *diversion* is broader than that of *restorative justice*, as the first refers to any kind of process that deviates from the formal retributive model of justice either through a restorative justice model or any other process (e.g. decriminalisation).

### 2.2.1. Diversion as suggested by international texts

The trend today at international level is to establish programs of diversion, and to deinstitutionalise as much as possible.

According to the UN Committee on the Rights of the Child<sup>511</sup>, **two kinds of interventions** can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law:

**a) measures without resorting to judicial proceedings** and

**b) measures in the context of judicial proceedings.**

Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (as stated also by Art. 40 (1) of CRC). As already underlined, the arrest, detention or imprisonment of a child may be used only as a measure of last resort (Art. 37 (b) of CRC). It is, therefore, necessary -as part of a comprehensive policy for juvenile justice- to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed<sup>512</sup>.

As already mentioned, according to Article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law **without resorting to judicial proceedings**, whenever appropriate and desirable<sup>513</sup>. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to social services should be a well-established practice that can and should be used in most cases.

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<sup>511</sup> UN Committee on the Rights of the Child, forty-four Session, Geneva, 15 January-2 February 2007, General Comment n. 10 (2007), *Children's rights in juvenile justice*, paragraphs 22-27.

<sup>512</sup> Ibid., paragraph 23.

<sup>513</sup> The Tokyo Rules also state that: "Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence & for the protection of society and the victim" (Rule 6.1). This entails the obligation of the State to provide for other solutions.

In the opinion of the UN Committee<sup>514</sup>, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as minor theft or other property offences with limited damage, and first-time child offenders. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

According to Rule 11.2 of Beijing Rules, the **police**, the **prosecution** or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, **without recourse to formal hearings**, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules. In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for **community programmes, such as temporary supervision and guidance, restitution, and compensation of victims**, (Beijing Rule 11.4). Rule 11.4 recommends the provision of on viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.)<sup>515</sup>.

The rules also state that the competent authority shall have the power to discontinue the proceedings at any time (Beijing Rule 17.4). At any time circumstances may become known to the competent authority which would

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<sup>514</sup> UN Committee on the Rights of the Child, *Children's rights in juvenile justice*, op. cit., paragraphs 24-25.

<sup>515</sup> See, OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, op. cit., p.431. Also, UNODC, *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*, op. cit., para 4.4, p.31.

make cessation of the intervention appear to be the best disposition of the case.

### 2.2.2. Types of diversion

Diversion can be mainly seen in the following forms<sup>516</sup>:

- **No further action:** In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to any alternative (social) services might be the optimal response for some cases (Commentary to Rule 11, and to Rule 17.4, Beijing Rules). This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner. In the type of no further action diversion might coincide with **decriminalisation** of some behaviours.
- **Decriminalization:** It means that the undesirable behaviour is no longer treated as crime by the law. This means that either there is no further legal action for the specific behaviour, or that sanctions other than criminal are taken (: other type of intervention outside the criminal justice system), such as settlement or reconciliation. This type of diversion is specifically recommended by international texts for status offences.
- **Caution/Warning:** This is considered as the first and simpler example of diversion applied mainly to petty offences (e.g. minor theft). The caution or warning is generally left to the power of the Police and it addresses not only to juvenile offenders but also to juveniles that are at risk in order to discourage them from offending. The caution can be left also to other bodies, such as community councils (*jirgas* and *shuras*). Another form of caution: Conditional Cautioning, enables offenders to be given a suitable disposal without

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<sup>516</sup> Save the Children UK (2004), *Juvenile Justice. Modern Concepts of Working with Children in Conflict with the Law*, p.55-57.

the involvement of the usual court processes. Where rehabilitative or reparative conditions (or both) are considered preferable to prosecution, Conditional Cautioning provides a statutory means of enforcing them through prosecution for the original offence in the event of non-compliance. The key to determining whether a Conditional Caution should be given – instead of prosecution or a simple caution – is that the imposition of specified conditions will be an appropriate and effective means of addressing an offender's behaviour or making reparation for the effects of the offence on the victim or the community.

- **Settlement/mediation:** Mediation is the way of resolving a dispute either with or without the interference of a third party<sup>517</sup>. If arranged by a third party it can take the following forms:
  - The mediator intervenes to assist the parties reach an agreement either by taking himself a decision in favor of one of the parties or by arranging only the meeting between the parties and standing only as objective observer so that the parties find a solution themselves. It aims at finding a solution that satisfies both sides. In its first form it is similar with the judicial procedure, (since a third person decides on the case), but it does not have the stigmatizing effect of the justice system and does not seek to punish, but rather to make the offender understand the harm done by his action, restore it (if possible) and ask for forgiveness.
  - Mediation takes the form of a settlement if a third party does not intervene but the dispute is resolved solely by a meeting between victim-offender. A settlement might be seen in the type of reconciliation between offender and victim<sup>518</sup>; a

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<sup>517</sup> [Faget, Jacques](#) (2000), *Mediation, criminal justice and community involvement. A European perspective*".

<sup>518</sup> In Austria, an out-of-court settlement for adolescents has been introduced in 1988 and until now more than half of cases concerning theft, burglary, and unauthorised use of vehicles are treated this way. See, Save the Children, *ibid.*, p.58.



compensation<sup>519</sup> or restitution of the damage caused by the offender or through other processes.

Settlement and mediation programmes aim at the education of the offender in order to become aware of his negative behaviour and avoid reiteration of the offence in the future. It also helps people to rebuild relationships. A settlement can also take place inside the justice system: a) before a legal action has initiated; b) at the stage of investigation by the initiative of the prosecutor, and c) at the court before the issuance of the decision by the court<sup>520</sup>. This type of diversion is used in many countries for crimes against property or in injuries<sup>521</sup>.

- **Family group conferencing<sup>522</sup>:** This type of diversion refers mostly to the type of settlements made by the *jirgas* or *shuras*. It gives however priority to the family as an integral part of the whole decision-making process.

In family group conferencing (FGC), in addition to the primary victim and offender, participants may include people connected to the victim, the offender's family members, and others connected to the offender (for example, friends, and professionals). FGC is often the most appropriate system for juvenile cases, due to the important role of the family in a juvenile offender's life<sup>523</sup>. Depending the case, there is a

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<sup>519</sup> However compensation can only be followed by offenders who dispose enough money to do so.

<sup>520</sup> According to the commentary on the Bangalore Principles of Judicial conduct "A judge should encourage and seek to facilitate settlement". UNODC, *Commentary on the Bangalore Principles of Judicial Conduct*, Sept. 2007, p.138, point 207.

<sup>521</sup> In Germany the use of settlement has shown 80% of success. See, F. Dünkel, J. Zermatten (Ed.), «Médiation délinquant – victime et réparation des dommages» in: *Nouvelles tendances sans le droit pénal des mineurs, Médiation, Travail au Profit de la Communauté et Traitement intermédiaire*, Kriminologische Forschungsberichte aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg i. Br., Band 42, Freiburg, 1990, p.21.

<sup>522</sup> Family group conferences have also been called restorative conferences or restorative justice conferences, and community accountability conferences.

<sup>523</sup> Examples of the use of FGC in a juvenile justice setting can be found in the statutory scheme operating in New South Wales (Australia) under the Young Offenders Act 1997, and in New Zealand under the Children, Young Persons, and their Families Act, 1989. The New South Wales scheme has been favourably evaluated by the New South Wales Bureau of Crime Statistics and Research.

wide range of possibilities such as apology to the victim, community work, restitution of the damage (by money or other goods), or whatever the families think appropriate (and lawful of course). The process to involve the families makes the young offender feel more ashamed for his behaviour, but at the same time he does feel excluded from society. It also gives him the chance to reintegrate directly into community<sup>524</sup>. It would be useful if a social worker could take part in this type of conferences. Already, in many provinces in Afghanistan the social workers assist families in similar role<sup>525</sup>.

- **Pre-trial community service:** This type of diversion requires that the juvenile offender consents in serving the community for a recommended number of hours instead of going to court (specified in the decision). The placements where the service will be performed should be public (e.g. municipalities, hospitals, etc.). The consent of the juvenile is an absolute requirement, otherwise this is a forced labour and contradicts the ILO Convention signed by Afghanistan<sup>526</sup>. It also requires that the juvenile (even consenting) has enough time to attend school and is not put to produce heavy work for his age (and he should be over 14 years according to the ILO recommendations). It can be suggested for misdemeanors. In countries that have already introduced this type of diversion if the juvenile does not comply with the conditions set, the case is referred back to the prosecutor or to the court to continue with the legal action. It is very important to know that in countries where this type of diversion has been introduced it has more than 90% of success. Community service provides an opportunity for the offender to see first-hand the indirect injuries caused by his/her offence. In this way, the offender may see the

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<sup>524</sup> In New Zealand it seems that 18% of all juvenile cases (more than 5,000) are dealt by family group conferences with success each year. Save the Children, *ibid*, p.61.

<sup>525</sup> See, AIHRC - UNICEF (2008), *Justice for Children. The situation of children in conflict with the law in Afghanistan* op.cit.

<sup>526</sup> Convention No.105, adopted on 25 June 1957 by the General Conference of the International Labour Organisation at its fortieth session.

reasons for the limits of social tolerance. Moreover, the offender is provided with a constructive, proactive means of repairing the injuries caused by his/her crime, with the potential to improve the offender's overall sense of self-worth. It makes the juvenile understand the importance of contributing to community and the value of work. Sometimes it can also be a useful tool of vocational training if through the service the juvenile learns or develops a skill (e.g. gardening in public gardens).

All the above processes can either fit within the formal justice system or outside this system as part of a restorative model of justice. For instance, the possibility of the prosecutor, according to the Juvenile Code, to divert the legal procedure towards a victim-offender reconciliation can be considered as part of the formal justice system. On the contrary, a victim-offender reconciliation before the formal justice system takes any action, e.g. in the framework of the *jirgas* can be considered as part of a restorative justice model (as we will see in the next section, Afghanistan already uses *Shura* and *Jirga* in some situations).

### **2.2.3. Safeguards**

It needs to be stressed that all international instruments suggesting diversion (Convention on the Rights of the Child, the Beijing Rules, the Guidelines of Riyadh, etc.), agree that any extra-judicial treatment of the juvenile should be implemented only in condition that children's human rights and legal safeguards are fully respected and protected.

As far as full respect for human rights and legal safeguards is concerned, the UN Committee<sup>527</sup> refers to the relevant parts of article 40 of CRC and emphasizes the following:

- a) Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits

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<sup>527</sup> Committee on the Rights of the Child, forty-four Session, Geneva, 15 January-2 February 2007, General Comment n. 10 (2007), *Children's rights in juvenile justice*, paragraphs 22-27.

responsibility<sup>528</sup>, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;

- b) The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years. As already said above, absence of the consent of the child would contradict the ILO Abolition of Forced Labour Convention. However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile.
- c) Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of dispositions involving young offenders by a "competent authority upon application". The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process.
- d) Diversion must not be mandated to order deprivation of liberty in any form.
- e) The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination.
- f) The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities.
- g) The child offender should always retain the right to a court hearing or judicial review.

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<sup>528</sup> UNICEF, Justice for Children in Afghanistan Series, Issue 3, Jan. 2009.

- h) The case must be referred to a normal court system if no solution acceptable to all can be reached or if the options at the disposal of the alternative system are not appropriate<sup>529</sup>.
- i) The completion of the diversion by the child should result in a definite and final closure of the case. It is very important to stress that although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration of this event takes place, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.
- j) In addition, any diversion or alternative measure **should not be of indefinite duration**, but its time limit should be expressly mentioned in the decision.

#### **2.2.4. Best time and authorities for applying diversion**

According to Rule 11(2) of the Beijing Rules, *“the police, prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules”*. This means that *“diversion may be used at any point of decision-making”* by the responsible authorities, and may be exercised by one, several or all of them. Moreover, recourse to diversion in relation to juveniles *“need not necessarily be limited to petty cases, thus rendering diversion an important instrument”* in dealing with juveniles in trouble with the law.

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<sup>529</sup> UNICEF, Juvenile Justice Manual, Module Three, 2.

However, if diversion could be adopted from the Police stage already, this could certainly divert a considerable number of cases -which are estimated to more than 50%<sup>530</sup>- that do not need to be directed in the formal system.

### **2.2.5. The role of Police and Prosecutors in diversion**

The Tokyo Rules emphasize the need to reduce criminal prosecution, when not strictly necessary for the protection of society, while taking into account the rights of the victims. Indeed, the number of complaints received by the police and prosecutors would overload the criminal justice system if they were all prosecuted. In many countries, in practice, the police and prosecutors divert offenders from the criminal justice system, as a matter of course, using their own discretion. In order for discharge or diversion to be possible, members of the police force and prosecutors need to have clear guidelines as to the extent of their discretionary powers and a set of established criteria to take a decision of discharge.

Based on such criteria and guidelines, police and prosecutors may themselves issue a formal caution and take no further action, divert suitable cases to an alternative programme, without referring the case to courts. Other than the alternatives we have mentioned above, the options available to the police and prosecutors could include:

- Absolute or conditional discharge;
- Verbal sanctions;
- An arbitrated settlement;
- Restitution to the victim or a compensation order;
- Community service order;
- Victim-offender mediation/reconciliation;
- Family group conference;
- Any other restorative process.

According to Afghanistan's criminal legislation, the Police have no power to divert cases away from prosecution or to issue warnings and discharge a suspect, if the suspected offences fall within the scope of criminal law (obscenities, misdemeanours and felonies). There are no programmes linked

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<sup>530</sup> See, UNAMA, *Arbitrary Detention*, op. cit.; UNICEF-AIHR, *Justice for children. The situation for children in conflict with the law in Afghanistan*, op.cit.

to the formal justice system—e.g. restorative justice programmes— to which police and prosecutors could divert appropriate cases<sup>531</sup>. However, many interviews and reports indicate that cases (mostly civil, but also criminal) are being diverted to the informal justice system by prosecutors and courts, for settlement on an informal basis<sup>532</sup>. Data received in Kabul in December 2007 shows that 57 per cent of juveniles currently held in Afghanistan’s prisons, and whose sentences have been confirmed either by the Appeals Court or the Supreme Court are eligible for alternative sanctions, including suspension of sentences<sup>533</sup>. Thus, even though otherwise stipulated in the Juvenile Code, judges are not using alternative sentencing options. However, it seems that judges and prosecutors are mostly unaware of alternative possibilities.

A suggestion was to consider placing trained and independent juvenile officers or legal assistants at police stations to ensure that the proper authorities are alerted and diversion to families or social service providers is seen as the first priority for children in conflict with the law<sup>534</sup>.

The Family Response Units, which started in Kabul District 10 and have since reportedly expanded to five more police stations, also have potential to prevent women being detained unnecessarily and unjustly<sup>535</sup>.

### **2.2.6. The lack of appropriate prevention, diversion and other alternatives for girls in the Justice system**

Alternative measures and diversion programs have to be designed to fit the competencies and special needs for girls<sup>536</sup> also, particularly in education, trauma recovery, family relationships, suicidal thinking, substance abuse, medical needs, etc. Programs must also be shaped by the issues confronting

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<sup>531</sup> UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, op. cit., Chapter 3.2.1; Diversion from prosecution, p.11.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid., section 4.4.8.

<sup>534</sup> Ibid, p.88.

<sup>535</sup> Ibid., executive summary, p. x.

<sup>536</sup> American Bar Association and the National Bar Association (May 1, 2001), Report on *Justice by Gender. The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*.

minority girls, and must seek out and embrace cultural resources available in ethnic communities.

In many countries, of the inexistent programs that currently exist, most are modelled to serve boys<sup>537</sup>. Access to gender-specific services requires development of collaborative approaches between levels and branches of government (i.e. judiciary, state and province), as well as development of advocacy practices for programs and attorneys representing girls in the system.

A developmentally sound, culturally competent system of care for at-risk and delinquent girls from arrest to commitment must individualize services to meet girls' educational, emotional, health and family needs. Related goals of accountability and community safety can be met best when social workers working with girls and their families focus on girls' individual strengths.

Given that girls are more likely to be detained for minor offences than boys it is more urgent in their case to implement diversion and alternatives to imprisonment. While it is true that some girls need to be in secure, confined settings, the vast majority of delinquent girls can be more appropriately dealt with in culturally competent, gender-specific programs that are developmentally sound. In this respect some recommendations could be to:

- Promote community safety by raising national awareness of the underlying factors that place girls at-risk of involvement in the juvenile justice system;
- Identify policies and practices which avoid ushering girls into juvenile justice facilities for status offences, charging girls with assault in family conflict situations, detaining girls to "protect" them, and over-utilizing secure facilities for girls, particularly minority girls;
- Re-evaluate risk and other assessment practices for their gender sensitivity, and recommend alternatives that more adequately identify the competencies and needs of at-risk and delinquent girls;

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<sup>537</sup> Chesney-Lind, M. and Sheldon, R. (1998), *Girls, Delinquency and Juvenile Justice*, Thousand Oaks, CA: Sage.



- Identify and re-evaluate the charging and diversion, detention and disposition procedures that do not meet the needs of at-risk or delinquent girls and recommend how to address these problems;
- Map the flow of girls through the juvenile justice system and identify points at which the system can divert or treat girls more effectively; and,
- Services for girls may be used to divert them from the criminal justice system for acts such as running away from home, which are treated as a criminal offence in Afghanistan<sup>538</sup>.

### **2.2.7. Advantages from diversion**

There are more advantages from diversion than from the referral to the formal justice system. Diversion procedures:

- avoid the stigmatizing effect of the formal justice system;
- contribute to speedier and more effective attribution of justice;
- avoid the abruptness of the juvenile from his family environment and from the rest of the society;
- allow the (eventual) continuation of work of the juvenile;
- contribute more to the reintegration of the juvenile;
- avoid the negative effects of institutionalization and
- are less costly to the State.

Everyone benefits from diversion and alternatives to imprisonment:

- Victims and Offenders;
- Children and Families;
- Community;
- Police;
- Prosecutors;
- Judges;
- Detention and Prison staff;

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<sup>538</sup> Recommendations to invest in a range of community services and to form partnerships with NGOs which are able to provide such services in the short term, are among recommendations included in UNODC, *Afghanistan, Implementing Alternatives to imprisonment*, op. cit., Section 10.3.

- Social Workers.

As mentioned before, the increase in imprisonment is related to the quality of work and approaches of the police, prosecutor and courts, as well as to the lack of fair and timely trial procedures. At the current time there are very serious shortcomings in the number and professionalism of judges, lawyers and prosecutors in Afghanistan, which hinders juveniles (as Afghan citizens in general) to enjoy their right to a fair criminal justice process. This has led to the imprisonment of large numbers, following unfair and unclear procedures<sup>539</sup>. Increasing the professional capacity of judges in Afghanistan, including alternatives to imprisonment in their training and encouraging them to use non-custodial measures and sanctions via training, advocacy and sentencing guidelines are key components of a strategy to introduce and improve the implementation of alternatives to prison.

We should repeat however that unless a tight framework of safeguards for the juvenile can be in place for any of the above diversion processes, there should not be deviation from the formal justice system.

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<sup>539</sup> See UNODC, *Afghanistan, Implementing Alternatives to imprisonment*, op. cit., Section 6.1.

### 2.3. Restorative justice

*"For five hundred years, indigenous people have faced oppression at the hands of people of white European descent, forcing us to live under their value system and laws. The understanding that I have now is that working through this conflict and dealing with it in a way that is culturally appropriate, we will re-establish the ethics and morals that we once had. We need to be able to take matters into our own hands and go back to our old ways of justice which have always been restorative"*

(Justice of Aboriginals, Australia)<sup>540</sup>

Many of the processes of diversion can be seen as part of a restorative justice model since not only they represent ways to attribute justice with less intervention of the formal system, but they are also based on the idea of restoring the balance of a situation disturbed by the crime.

Informal justice systems can be used in place of the formal system or to compliment it. Cases can be referred at any time during the formal process.

The objective of this section is not to repeat what has already been written by UNODC<sup>541</sup> in restorative justice, but to highlight those elements that could serve to juvenile justice in Afghanistan.

According to the Vienna Guidelines for Action on Children in the Criminal Justice System<sup>542</sup> *"Appropriate steps should be taken to make available throughout the State a broad range of **alternative and educative measures** at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the **informal resolution of disputes** in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be*

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<sup>540</sup> Eagle, Harley, "A Journey in Aboriginal Restorative Justice", *Conciliation Quarterly*, Vol. 20, No. 3, 2002.

<sup>541</sup> UNODC (2006), *Handbook on Restorative Justice*, Criminal Justice Handbook Series.

<sup>542</sup> UN Economic and Social Council, Resolution 1997/30 of 21 July 1997.

*involved, to the extent that it operates in favour of the good of the child offender. States should ensure that alternative measures comply with the Convention, the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice, such as the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention”(G.15 para 2).*

### **2.3.1. Definition of Restorative Justice**

Over time several different conceptions, or ideas about what restorative justice is, have emerged. All agree that crime causes harm and creates needs and that justice should work to repair that harm and address the needs<sup>543</sup>.

Restorative Justice is a theory of justice (considered to be the contrary to retributive justice) which concept is very old<sup>544</sup> and which focuses on crime and wrongdoing as acted against the individual or community rather than the state. In restorative justice processes, the person who has harmed takes responsibility for their actions and the person who has been harmed may take a central role in the process, in many instances receiving an apology and reparation directly or indirectly from the person who has caused them

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<sup>543</sup> See, [Braithwaite, J., \*Restorative Justice & Responsive Regulation\*](#), Oxford University Press, 2002, p.249; McCold, P., & Wachtel, T. (2003, August), "In pursuit of paradigm: A theory of restorative justice", Paper presented at the XIII World Congress of Criminology, Rio de Janeiro, Brazil. Retrieved October 25, 2007: <http://www.realjustice.org/library/paradigm.html>; McCold, P. (1999, August 7), "Restorative justice practice – The state of the field", Paper presented at Building Strong Partnerships for Restorative Practices Conference, Burlington, VT, USA: [http://www.restorativepractices.org/library/vt/vt\\_mccold.html](http://www.restorativepractices.org/library/vt/vt_mccold.html); Morris, A., & Maxwell, G. (2001), "Restorative conferencing", in: Bazemore, G. & Schiff, M. (Eds.), *Restorative community justice: Repairing harm and transforming communities* (pp. 173–197). Cincinnati, OH: Anderson Publishing Co.; Denborough, D. (Ed.) (1996), *Beyond the prison: Gathering dreams of freedom*, Adelaide, South Australia: Dulwich Centre Publications; Cario, R. (2005), *Justice restaurative: principes et promesses*. Paris: L'Harmattan.

<sup>544</sup> Already in (c.) 2060 B.C. the [Code of Ur-Nammu](#) in [Sumer](#), required restitution for offenses of violence.

harm<sup>545</sup>. Restorative processes which foster dialog between the offender and the victim show the highest rates of victim satisfaction, true accountability by the offender, and reduced recidivism.

The concept of restorative justice is broad enough, encompassing a growing social movement (especially in Western societies) to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights. These range from international peacemaking tribunals such as the South Africa [Truth and Reconciliation Commission](#) to innovations within the criminal and juvenile justice systems, schools, social services and communities and the models of justice known in many parts of Afghanistan by the *jirgas* and the *shuras*.

Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish mutual responsibility for constructive responses to wrongdoing within the communities<sup>546</sup>. Restorative approaches seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all.

Restorative justice sometimes happens inside the formal justice system and sometimes within a community or non-profit organization.

In the justice system, the process might be the following: For petty or first-time offenses, a case may be referred to restorative justice as a form of pre-trial diversion, with charges being dismissed after the fulfillment of the restitution agreement. In more serious cases, restorative justice may be part of a sentence that includes prison time or other punishments.

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<sup>545</sup> Wright, M. (1996 – 2<sup>nd</sup> ed.), *Justice for Victims and Offenders: A Restorative Response to Crime*. Winchester: Waterside Press.

<sup>546</sup> Paul McCold and Ted Wachtel, "A Theory of Restorative Justice", International Institute for Restorative Practices, Paper presented at the XIII World Congress of Criminology, 10-15 August 2003, Rio de Janeiro: <http://www.realjustice.org/library/paradigm.html>

In the community, concerned individuals meet with all affected parties to determine what the experience and impact of the crime were for all. Those called out for offenses listen to others' experiences first, preferably until they are able to reflect and feel what those experiences were for the others. Then they speak to their experience: how it was for them to do what they did. A plan is made for prevention of future occurrences, and for the offender to heal the damage to the injured parties. Community members hold the offender accountable for adherence to the plan.

Restorative Justice posits a paradigm shift that is best understood by asking the oft-quoted "three questions":

While the formal system of justice asks:

- "1. What laws have been broken?,**
- 2. Who did it?,**
- 3. What do they deserve?"**

The system of restorative justice asks:

- "1. Who has been hurt?,**
- 2. What are their needs?,**
- 3. Whose obligations are these?"<sup>547</sup>**

### **2.3.2. The basic principles of Restorative Justice**

The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters<sup>548</sup> underline the necessity of fundamental procedural safeguards guaranteeing fairness to the offender and the victim and in particular (point 13):

*"(a) Subject to national law, the victim and the offender should have the right to consult with legal counsel<sup>549</sup> concerning the restorative process and, where*

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<sup>547</sup> See, [Dennis Sullivan](#) and [Larry Tiftt](#), *Handbook of restorative justice: a global perspective*, London; New York: Routledge, [Routledge International Handbooks](#) Series, 2006; Zehr, Howard, *The Little Book of Restorative Justice* Intercourse, PA: Good Books. 2002; [Gerry Johnstone](#) and [Daniel W. Van Ness](#), *Handbook of restorative justice*, Cullompton; Portland, Or.: Willan, 2007.

<sup>548</sup> ECOSOC Resolution 2002/12, 24 July 2002.

<sup>549</sup> *"Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might*

*necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;*

*(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;*

*(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes”.*

For the rest the main principles of restorative justice could be summarized<sup>550</sup> as follows:

- The response is focused to a positive solution for all parties.
- Those most directly involved and affected by crime should have the opportunity to participate fully in the response if they wish.
- Government's role is to preserve a just public order, and the community's is to build and maintain a just peace.
- Crime, instead of a violation of the law of the State, is defined as violation of the human rights of another person;
- Participants share responsibility through their cooperation with the offender;
- Instead of adversarial relationships and processes there is negotiation and dialogue;
- There is focus in repairing the social injury with a focus on problem solving with viable solutions and obligations in the future;
- Restitution is a means of restoring both parties: victim's rights are recognised and offender is held accountable by taking a positive action and helping restoring what he has done;

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*have an interest in polarising a conflict. A standard that says defendants or victims have a right to have legal counsel present during a restorative justice process seems fine. But a standard that gives legal counsel a right to speak at the conference or circle seems an unwarranted threat from the dominant legal discourse to the integrity of a restorative justice process”. See, Braithwaite, John, “Setting Standards for Restorative Justice”, **The British Journal of Criminology**, 2002, 42:563-577.*

<sup>550</sup> For more details see, UNODC, *Handbook on Restorative Justice Programmes*, 2006, p.33.

- The offender will attain a better understanding of his action through processes of restorative justice;

Restorative programmes are characterized by four key values<sup>551</sup>:

- 1) Encounter: Create opportunities for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath.
- 2) Amends: Expect offenders to take steps to repair the harm they have caused. There appear to be four elements or facets of amends: apology, changed behaviour (not committing crimes in the future)<sup>552</sup>, restitution<sup>553</sup>, and generosity<sup>554</sup>.
- 3) Reintegration: Seek to restore victims and offenders to whole, contributing members of society. Victims often are stigmatized by family, friends and the community, especially girl victims of sexually related crimes. People who should naturally support victims instead attempt to explain away what happened by blaming the victim (directly or indirectly) or wishing he/she would "get over it". This works to separate the victim from loved ones and community members and leads to stigmatization. Offenders also face stigmatization. Incarceration separates them from their families and communities. Upon release, offenders lack stable support structures, and even start-up money for a healthy productive life. At the same time, offenders face discrimination in their attempts to become productive citizens. Reintegration occurs when the victim or offender can become active and productive parts of their communities. To accomplish this, communities should have the following characteristics: (1) mutual respect for all members in the community, (2) mutual commitment

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<sup>551</sup> Van Ness, Daniel and Heetderks Strong, Karen, *Restoring Justice*, Cincinnati: Anderson Publishing, 2003 - 2<sup>nd</sup> ed.

<sup>552</sup> This is why negotiated agreements include elements such as changing the offender's environment, helping the offender learn new behaviours, and rewarding positive change. Attending school and not hanging out in old haunts are ways to change the environment.

<sup>553</sup> Restitution can be realised by returning or replacing property, paying money, or providing direct services to the victim.

<sup>554</sup> Victims and offenders should move beyond simply balancing the books. Offenders may offer to perform services that are not related to the crime or to the victim, but that are understood by the victim as evidence of a sincere apology.



to others in the community, and (3) intolerance for -but understanding of- deviant behaviour by members of the community.

- 4) Inclusion: Provide opportunities for parties with a stake in a specific crime to participate in its resolution. Restorative justice processes are more inclusive than the traditional criminal justice processes. They actively invite all affected parties (victims, offenders, and community members) to participate in resolving the crime. Inclusion seeks the full participation of all parties, and it is accomplished by (1) inviting all interested parties to participate; (2) expecting the parties to pursue their own interests; and (3) being flexible enough to accept new approaches relevant to the particular situation.

### **2.3.3. Restorative Justice Processes**

According to the definition given by the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters: "*Restorative process' means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles*".

Some of the programmes and outcomes typically identified with restorative justice include most of the diversion processes as examined above as well as the following:

- Conferencing (Family Group Conferencing/ Restorative or Community Conferencing);
- Community Restorative Boards;
- Circles (Restorative Circles; Circles of Support and Accountability; sentencing circles);
- Restitution.

Practices and programs reflecting restorative purposes respond to crime by:

- identifying and taking steps to repair harm;

- involving all stakeholders; and
- transforming the traditional relationship between communities and their governments in responding to crime.

As basic conditions and prerequisites for the implementation of each restorative practice there should be:

- Equal protection of all offenders (and victims) against discrimination;
- Due process rights;
- Respect of victim's rights;
- Proportionality;
- Prohibition of physical punishments<sup>555</sup>; and
- Confidentiality<sup>556</sup>.

#### 2.3.3.1. Family Group Conferencing/ Restorative or Community Conferencing<sup>557</sup>

Further to what has already been said above, conferences can provide victims and others with an opportunity to confront the offender, express their feelings, ask questions and have a say in the outcome<sup>558</sup>. Offenders hear firsthand how their behavior has affected people. They may begin to repair the harm by apologizing, making amends and agreeing to financial restitution or personal or community service work. Conferences hold offenders accountable while providing them with an opportunity to discard the "offender" label and be reintegrated into their community, school or workplace.

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<sup>555</sup> UNICEF, *Juvenile Justice Manual*, Module Three, 5.

<sup>556</sup> Some restorative justice systems, especially victim-offender mediation and family group conferencing, require participants to sign a confidentiality agreement. These agreements usually state that anything discussed in the conference will not be disclosed to non-participants. The rationale for confidentiality is that it promotes open and honest communication during the process.

<sup>557</sup> UNODC, *Handbook on Restorative Justice Programmes*, 2006, p.20.

<sup>558</sup> [The International Institute for Restorative Practices](http://www.iirp.org/) (<http://www.iirp.org/>) provides training in restorative conferencing and other [restorative practices](#) throughout the world.

### 2.3.3.2. Community Restorative Boards

A community restorative board, also referred to by other names internationally such as community justice committees in Canada and referral order panels in England & Wales, is typically composed of a small group of citizens, prepared for this function by intensive training, who conduct public, face-to-face meetings with offenders who have been sentenced by the court to participate in the process or who have been referred by police officers on a pre-charge basis or as part of a peripheral, extra-judicial process. Victims of the offender are invited to participate in the process by meeting with the board and offender, or by submitting a written statement which is shared with the offender and the board. During a meeting, board members discuss with the offender the nature of the offense, impact of the behavior, and negative consequences. Then board members discuss a set of actions with the offender, until they reach agreement on the specific actions the offender will take within a given time period to make reparation for the crime. Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement. After the stipulated period of time has passed, the board submits a report to the court on the offender's compliance or a written documentation to the referring police officer, with the agreed upon sanctions. At this point, the board's involvement with the offender is ended.

### 2.3.3.3. Restorative Circles<sup>559</sup>

In some states, Restorative Circles are provided for individual imprisoned people who meet with their families and friends in a group process to address their needs for a successful transition back into the community. One of the needs addressed is the need for reconciliation. A *Modified Restorative Circle* has also been developed and used in Hawaii for individual incarcerated people

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<sup>559</sup> Circles are found in the Native American cultures of the United States and Canada, and are used there for many purposes.

whose loved ones are unable or unwilling to attend full Restorative Circles. Instead other imprisoned friends sit in the Circle and are supporters in developing a transition plan that includes how the incarcerated individual having the Circle may reconcile with those harmed by the crime and/or imprisonment. This process contributes to the decrease of future re-iteration of crime.

#### 2.3.3.4. Circles of Support and Accountability

Circles of Support and Accountability originated as a Canadian project. This innovation is now an internationally regarded, evidence-based practice with a demonstrable capacity to enhance the safe integration of otherwise high-risk sex offenders with their community. In Canada, some sex offenders are released to the community after serving their entire sentence. They have been judged too dangerous to be released on any form of conditional release (e.g. a parole certificate), and have therefore been "detained." Upon further reconviction (and therefore, further victimization), many of these offenders would likely be designated as a "Dangerous Offender," under current Canadian law. Research now indicates that surrounding a 'core member' with between 5 and 7 carefully selected and trained volunteer circle members significantly reduces sexual re-offence by upwards of 50%. Further, a significant "harm reduction" effect has also been noted in those cases where sexual re-offence has occurred. Offences were less invasive and less brutal in nature than previous offences.

#### 2.3.3.5. Sentencing Circles<sup>560</sup>

Sentencing circles (sometimes called peacemaking circles) use traditional circle ritual and structure to involve the victim, victim supporters, the offender, offender supporters, judge and court personnel, prosecutor, defense counsel, police, and all interested community members. Within the circle, people can speak from the heart in a shared search for understanding of the

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<sup>560</sup> UNODC, *Handbook on Restorative Justice Programmes*, op. cit., p.22.

event, and together identify the steps necessary to assist in healing all affected parties and prevent future crimes.

Sentencing circles typically involve a multi-step procedure that includes: (1) application by the offender to participate in the circle process; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle to develop consensus on the elements of a sentencing plan; and (5) follow-up circles to monitor the progress of the offender.

The above process has been applied to property offences, as well as civil and criminal offences. However, it has been deemed as unsuitable for drug offences, sexual assault and domestic violence. South Australia and New Zealand are among two of the areas which have dealt also with juvenile sexual offences. Indigenous regions of Canada have implemented circle sentencing, to tentatively deal with domestic violence. Advocates believe that it may be applicable to these indigenous communities because of the different level of regard and effectiveness they have for a punitive court system compared to non-indigenous persons. However, it is acknowledged that restorative justice has no real, hard and fast rules and regulations, and so caution should be exercised in applying it to these communities.

### **2.3.3.6. Restitution**

In its traditional sense, restitution has been defined as *"a monetary payment by the offender to the victim for the harm reasonably resulting from the offence"*<sup>561</sup>. Restitution can embody both monetary payments and in-kind services to the victim. It proactively involves the victim and offender in repairing the harm done to the victim.

Unlike retributive responses to crime, restitution has the potential to repair the financial and perhaps relational harms that crime has left in its aftermath. Instead of completely ignoring the harm done to individual victims, restitution acknowledges and attempts to repair the injury they have suffered. Whereas retributive and rehabilitative responses fail to address the harm inflicted on

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<sup>561</sup> See, Galaway, Burt and Hudson, Joe (Ed.), *Restorative Justice: International Perspectives*, Kugler Publs. and Criminal Justice Press, 1996, p.34-35.

victims, restitution, when sought as an outcome of a restorative process, has as its primary motivation reparation to the victim. **Thus, restitution is said to better satisfy a victim's need for vindication, as the offender must personally acknowledge and account for the offence.** It provides an alternative sanction with far less stigmatization than incarceration. Four basic types of restitution programmes exist:

- Restitution imposed as an obligation within victim-witness assistance programmes organized by prosecutors;
- Victim-offenders restitution programmes organized by non-profit community support groups seeking restitution as an outcome of a reconciliatory process;
- Restitution/employment programmes operated by probation departments; and
- Restitution as part of a routine probation supervision programme.

#### **2.3.4. The Restorative Justice model already existing in Afghanistan**

Implementing reforms and laws remains a major challenge in Afghanistan. Since the fall of the Taliban in 2001, two parallel structures have emerged. One is the formal state apparatus, with ministries, institutions and representatives at the different regional levels, which are supported by a legal system based on Islamic law. The second structure is a complex system of alliances, traditional practices and customs, divided along tribal lines or allegiances to warlords, which use local councils known as *shura* or *jirga* as mediators or decision-makers to resolve disputes<sup>562</sup>.

While the formal Afghan justice system appears to balance Islamic *shari'a* and modern legal norms, its administration involves long delays, bribery and corruption. Despite progress towards establishing a functioning formal legal system in Afghanistan, currently the central government has limited authority in many parts of the country.

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<sup>562</sup> Rights & Democracy, Afghanistan. Submission to the Universal Periodic Review (UPR) of the Human Rights Council (HRC), Fifth Session of the UPR Working Group (4-15 May 2009), p.3.

As it has been reported by UNODC<sup>563</sup>, many Afghans, particularly in rural areas, avoid contact with state judicial institutions and instead they use traditional institutions of informal justice such as *jirga*<sup>564</sup>, *maraka*, and *shura* to resolve disputes and crimes in ways that are understood and accepted between individuals, families, villages or tribes. A report<sup>565</sup> has suggested that the informal justice system is responsible for resolving around 80 per cent of legal cases in Afghanistan, though this figure is disputed by the Supreme Court and others, such as the AIHRC<sup>566</sup>, which estimate that the percentage would be closer to 50-60 per cent.

The customary laws of Afghanistan vary among different regions and sometimes among different tribes in each region<sup>567</sup>. Generally speaking they consist of a blend of custom, practice and Islamic laws; the latter interpreted in various ways. They are based on the notion of restorative justice rather than retribution, although retribution does also have a role, for example, in the practice of *Qissas*<sup>568</sup>.

According to most customary law in Afghanistan, the right to seek justice lies with the victim or the family of the victim. Justice for a wrong can be pursued through a blood feud, which can be averted by payment of blood money (*Diyat*)<sup>569</sup>. Blood money typically comprises valuable commodities or cash. According to recent studies, most cases that are currently resolved within the informal justice system relate to civil cases, and especially land disputes, although criminal cases are also referred to the informal system which can

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<sup>563</sup> See, UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, op. cit., Chapter 5: Informal justice system and dispute resolution, p.45.

<sup>564</sup> See, Wardak, Ali, "[Jirga. A Traditional Mechanism of Conflict Resolution in Afghanistan](http://www.armans.info/afghanistan/jirga-a-traditional-mechanism-of-conflict-resolution-in-afghanistan.html)", University of Glamorgan, UK: <http://www.armans.info/afghanistan/jirga-a-traditional-mechanism-of-conflict-resolution-in-afghanistan.html>

<sup>565</sup> Afghanistan Human Development Report 2007, Centre for Policy and Human Development, Kabul University and UNDP. In: UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, ibid.

<sup>566</sup> UNODC, ibid., p.45.

<sup>567</sup> International Legal Foundation (2004), *The Customary Laws of Afghanistan*.

<sup>568</sup> *Qissas* refers to retribution and is applicable to physical injury, manslaughter and murder.

<sup>569</sup> *Diyat* refers to compensation and together with *qissas* is applicable to cases of physical injury, manslaughter and murder. The law of *qissas* and *diyat* provides that the punishment must be commensurate with the offence committed.

include cases of murder, theft and assault. In addition, practices vary extremely in different regions, and there is insufficient information from the mainly Pashtun-dominated southern and eastern regions, in terms of current practice.

A number of stakeholders have recently recommended the establishment of pilot projects to test different models of communication and cooperation between the informal and formal justice systems, including especially a hybrid model, suggested in the Afghanistan Human Development Report 2007. The hybrid model put forward in the Afghanistan Human Development Report 2007, proposes a model for justice in Afghanistan in which alternative dispute resolution mechanisms of the informal justice system remain important in providing justice, but under the regulation of state institutions. The model proposes the creation of Alternative Dispute Resolution (ADR) and Human Rights Units alongside existing state judicial institutions<sup>570</sup>. The ADR Unit would be responsible for identifying appropriate mechanisms to settle disputes outside the courtroom, which would include *jirgas* and *shuras*, as well as others, such as Community Development Councils, civil society organizations and private arbitration. While the ADR Unit could address minor criminal incidents and all types of civil disputes (property, commercial complaints, etc.), disputants would have the choice to process these cases either through an alternative dispute resolution institution or through the nearest state court. However, all serious criminal cases (*jenayat*) would be dealt with mainly by the state justice system. Those cases where alternative dispute settlement bodies failed to reach a conclusion satisfactory to the disputants would be taken back to the formal justice system —with minor criminal cases taken to the police and civil cases to the *huqooq* department.

### **Instances where Afghans choose to take different types of legal cases<sup>571</sup>**

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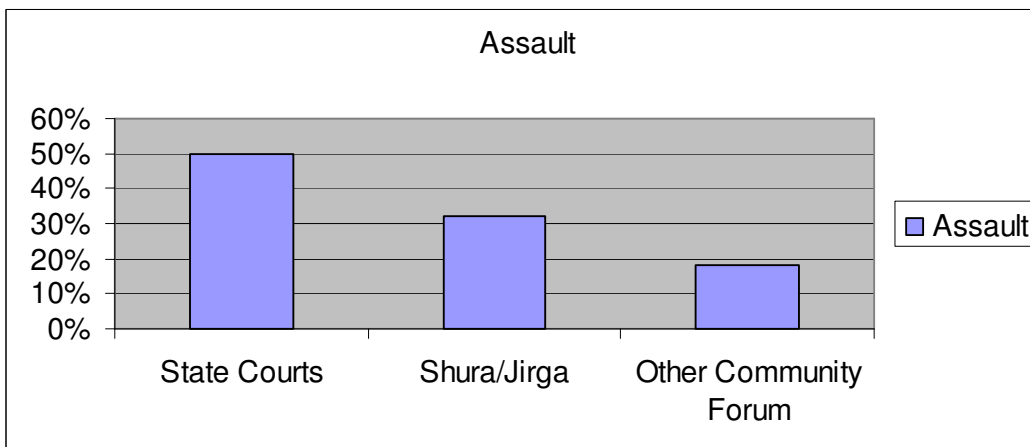
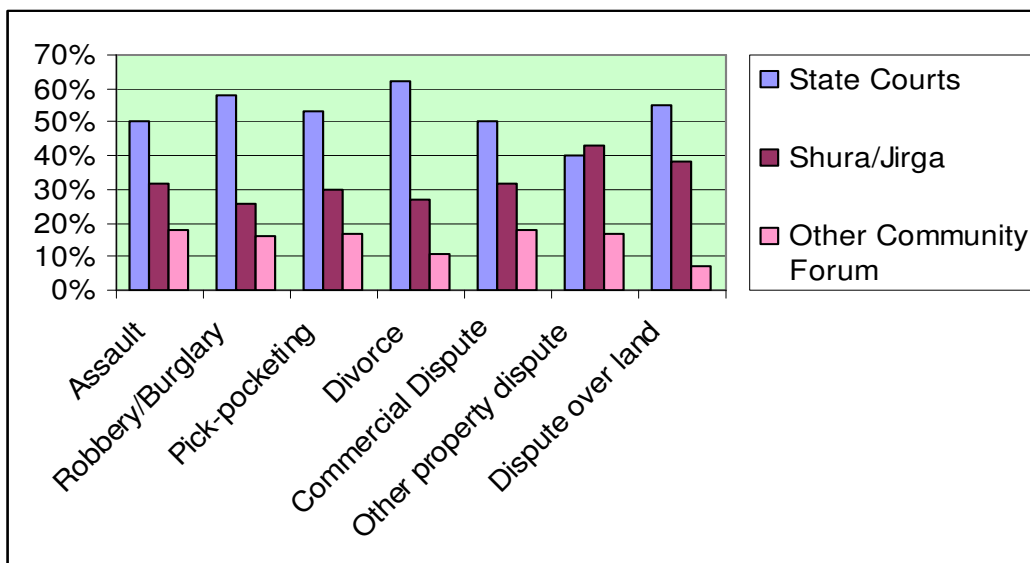
<sup>570</sup> UNODC, *Afghanistan...*, op. cit, p.47.

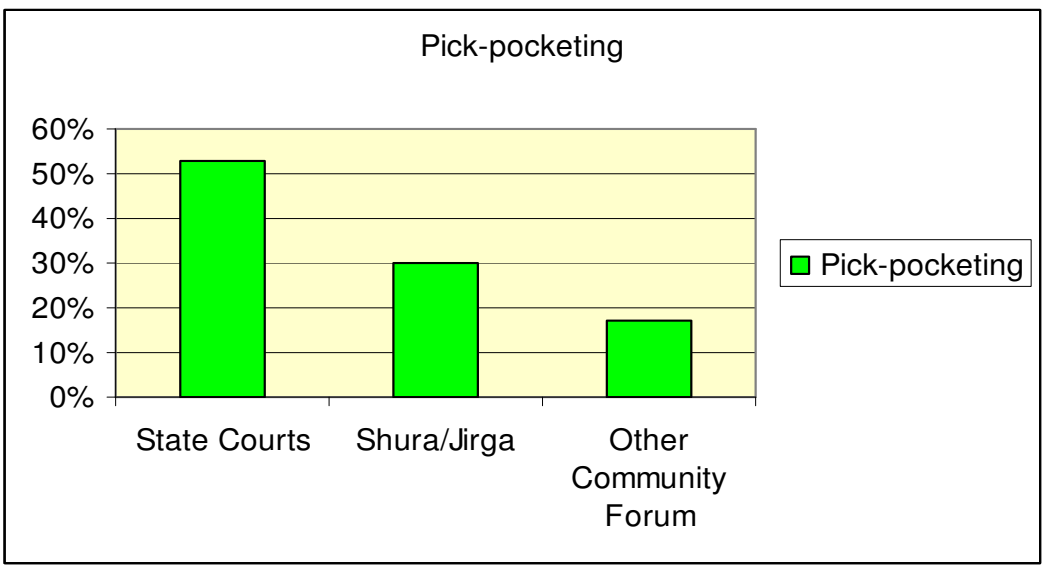
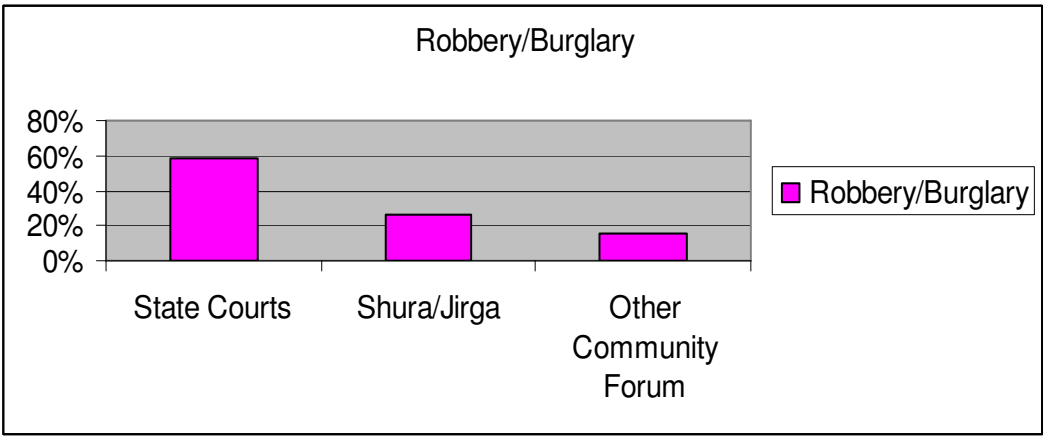
<sup>571</sup> Results based on survey of approximately 6,200 Afghans polled in February 2007. Brookings, Afghanistan Index *Tracking Variables of Reconstruction & Security in Post-9/11 Afghanistan*, January 21, 2009, <http://www.brookings.edu/afghanistanindex>

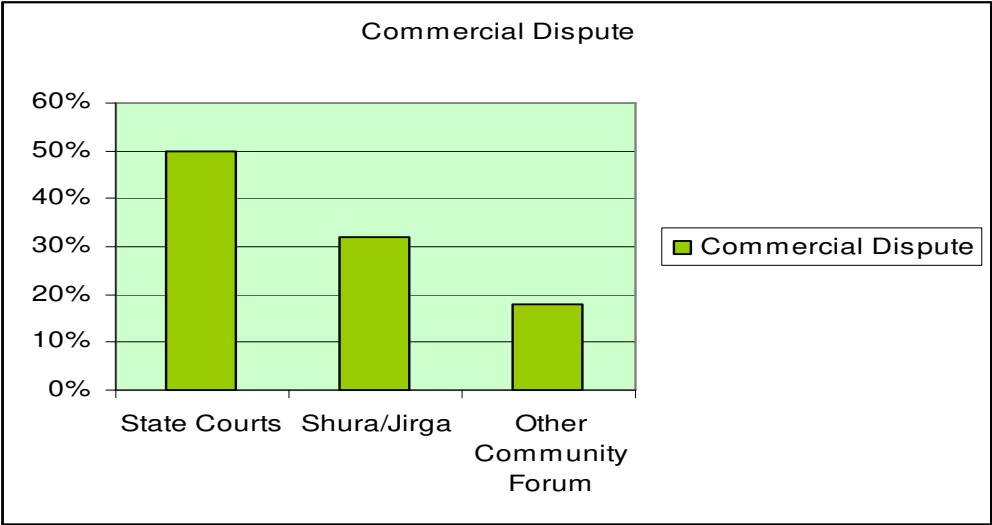
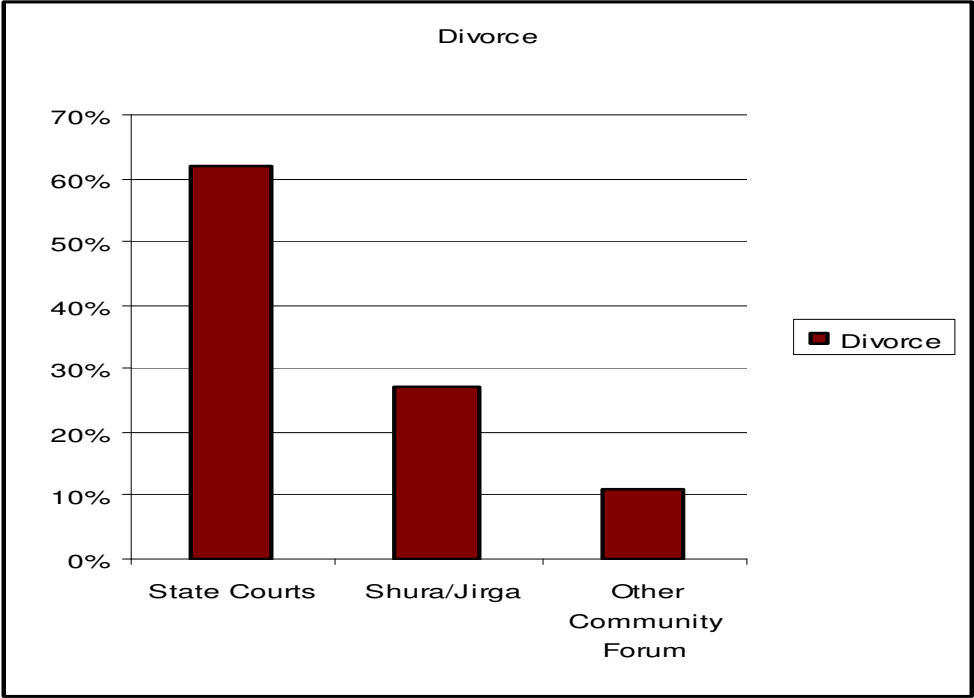


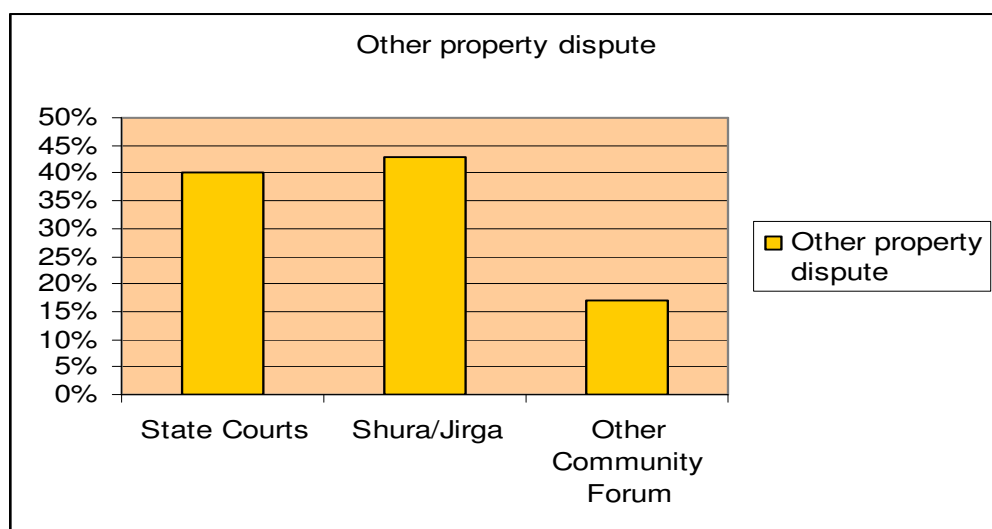
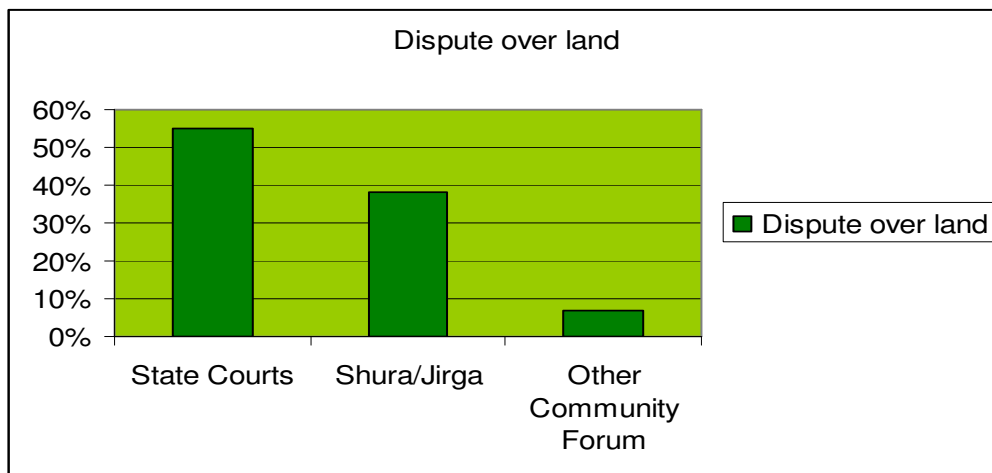
	<b>State Courts</b>	<b>Shura/Jirga</b>	<b>Other Community Forum</b>
Assault	50%	32%	18%
Robbery/Burglary	58%	26%	16%
Pick-pocketing	53%	30%	17%
Divorce	62%	27%	11%
Commercial Dispute	50%	32%	18%
Other property dispute	40%	43%	17%
Dispute over land	55%	38%	7%

The table shows that for criminal issues Afghans prefer the formal justice system. The rates increase according to the gravity of the crime.









### 2.3.5. Advantages and Limitations of Restorative Justice

There appear to be many advantages in using and strengthening an existing informal structure for alternative dispute resolution<sup>572</sup>, instead of resorting to formal court procedures. An additional reason for applying the informal structure in Afghanistan would be that the formal judicial procedures are currently not being applied efficiently, fairly or consistently in most parts of the country, as well as being inaccessible to many Afghan citizens.

<sup>572</sup> See, Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute Publ., 2007.

Indeed, the main arguments used by the supporters of the use of informal justice system mechanisms are:

1. That the formal justice system in Afghanistan is corrupt and dysfunctional and that it will take many years for rule of law to be established in Afghanistan;
2. That most Afghans living in rural areas are unable to access the formal justice system;
3. That most Afghans trust the informal system more than they do the formal, and that they are more satisfied with the outcome of informal dispute resolution<sup>573</sup>;
4. That a person convicted in a state court and sentenced to prison remains a target for retribution even after serving time. The non-state legal System reaches reconciliation as a result of complex processes of public condemnation, forgiveness, and acceptance<sup>574</sup>;
5. That whereas the statutory law seeks the punishment of the perpetrator of a crime, the customary system seeks to compensate for the wrong done and social reconciliation, which results in the satisfaction of both victim and offender. According to UNODC report<sup>575</sup>, even where the state system does intervene, non-state practices are needed in addition to reconcile parties and prevent further conflict.

However, many concerns<sup>576</sup> have been raised towards the implementation of an informal justice system, mainly because restorative justice presents the following limitations:

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<sup>573</sup> UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, op. cit., Chapter 5: Informal justice system and dispute resolution, op. cit., p.47.

<sup>574</sup> This important point is highlighted by the UNODC report as being in keeping with societal customs in Afghanistan and which needs to be taken into account also in the development of formal alternative measures, *ibid*.

<sup>575</sup> *Ibid*.

<sup>576</sup> For the controversies and disagreements on the essential characteristics of a restorative justice programme, see: UNODC, *Restorative Justice Programmes*, op. cit., p.103.

1. Offenses without a readily identifiable victim are less suitable for restorative justice than other crimes.
2. Young offenders are often willing to agree to anything to have the session end. If the restitution is unreasonable, however, a failed restitution agreement may result.
3. There is inability of a weak party<sup>577</sup> to demand settlement from a much stronger one taking into consideration also the influence of militia commanders or other powerful figures in Afghanistan on the decisions of *jirgas* and *shuras*, which put at risk the human rights of the vulnerable especially those of girls.
4. A further limitation relates to the enforcement of the decisions of *jirgas*, though most recent reports suggest that the voluntary principles that underlie the functioning of the system, participation in the process and negotiation, as well as societal pressure play an important role in ensuring that decisions of *jirgas* are adhered to<sup>578</sup>.

However, the main concern has been raised in particular with respect to the history of **human rights violations** resulting from decisions of informal justice mechanisms, **especially towards women and girls**.

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

### **2.3.6. Specific concerns for girls**

Although the restorative aspect of the informal dispute resolution system in use in Afghanistan, is a positive concept in itself, the way crimes and disputes

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<sup>577</sup> "Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimize power imbalance. Young offenders must not be led into a situation where they are upbraided by a "roomful of adults". There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence". Braithwaite, John, "Setting Standards for Restorative Justice", *The British Journal of Criminology*, 2002, 42:563-577.

<sup>578</sup> UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, op. cit., p.48.

are settled can have an extremely harmful impact on the lives of women and girls. Women, who are regarded as the property of men, are used as “valuable commodities” in the settlement of crimes and disputes; while the traditional concept of “honour” puts immense restrictions on women’s sexuality, leading to severe punishments for acts such as extra-marital sex<sup>579</sup>. In addition, *jirgas* are made up exclusively of men, and women are unable to approach the informal justice mechanisms, without the assistance of a male relative, which severely limits their ability to raise issues with the local *jirgas*, even if they would so wish, given that decision makers are all male with their patriarchal attitudes<sup>580</sup>.

Informal ways of addressing rape and sexual violence give little space for the victims’ voice and choice. In numerous cases, in order to avoid ‘shame’ and to reconcile families, tribes or clans, the proposed resolution of the case is an arranged marriage between the rapist and his victim. Needless to say, such arrangements have far-reaching consequences for the woman and, it is feared, will put the concerned woman at risk of domestic violence. Monetary compensation or *baad* is often also part of what is seen as an acceptable solution to all parties. It is reported<sup>581</sup> that when victims, who have gone by through this resolution process want to lodge a formal complaint with state authorities, the latter reject them. This rejection occurs on the ground that they consider such cases to be “resolved”, as if no crime had ever been committed.

*"In Paktya province in 2008, a seven-year-old girl was sexually abused by a 25-year-old married man, who was a relative of the girl's father and was eventually arrested. The girl's family wanted to kill the man, but a shura decided that the perpetrator's family had to pay the victim's family money as compensation. It was also decreed that the child victim should marry the rapist when she grew up"*<sup>582</sup>.

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<sup>579</sup> UNODC, *ibid.*, p.48. See also, UNAMA – OHCHR (8 July 2009), *Silence is Violence. End the Abuse of Women in Afghanistan*.

<sup>580</sup> UNAMA – OHCHR, *ibid.*, p.24.

<sup>581</sup> *Ibid.*, p.25.

<sup>582</sup> From UNAMA – OHCHR (8 July 2009), *Silence is Violence. End the Abuse of Women in Afghanistan*, p.25.

Thus, in effect, the informal justice system as it currently operates cannot be regarded as meeting the needs of half of Afghanistan's population, who may be using it nevertheless. Even in civil cases or petty crimes that involve women as offenders or victims, the assertion of having reached a fair outcome would be highly arguable, even when the women themselves may claim to be satisfied with the result.

Opinion within Afghanistan is sharply divided about aspects of the *jirga* and *shura* systems. Many people have more trust in, and prefer to use the informal justice system, particularly in rural areas. According to UNODC, in the short to medium term it is likely that the *jirga* and *shura* systems will continue to play an important role in providing accessible and enforceable mechanisms of dispute resolution including criminal justice.

It is true that alternative dispute mechanisms used by many western societies are becoming increasingly popular and effective. But all those societies already have a functioning formal justice system. As one Afghan lawyer said "*the formal justice system is very weak. There is a need to strengthen the formal justice system, rather than strengthening the informal. The formal is diseased. It will die, if the informal is strengthened*"<sup>583</sup>.

The implementation of alternatives to imprisonment, in accordance with statutory law, recommended in the UNODC report, requires the establishment of a fair and efficient formal justice system, as well as vast investment to develop rehabilitative programmes in the areas of social welfare, treatment of drug addicts and mental healthcare. Such investment is crucial not only for the implementation of non-custodial measures and sanctions that encourage and facilitate the social reintegration of offenders, but also to prevent crime.

It is argued<sup>584</sup> that there is little evidence to believe that the training of *jirga* members in law and human rights, and the changing of their attitudes towards women, would take a shorter period than that of judges and prosecutors. In addition, the structures that need to be established to monitor

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<sup>583</sup> UNODC, *Afghanistan: Implementing Alternatives to Imprisonment*, op. cit., p.48.

<sup>584</sup> Ibid.



the system and provide the training seem to add an additional bureaucracy and financial burden on a justice system, already with immense resource problems. In a country where the informal justice system has survived partly and precisely because of the lack of authority of the central government, it is also questionable to what extent monitoring can be possible and successful in practice<sup>585</sup>.

According to UNODC, the priority in Afghanistan at the current time is the establishment of the rule of law, based on the authority of the formal justice system. To propose any further investment in the informal justice system, other than for research and evaluation of currently planned pilot projects, when so much yet needs to be done to ensure that the formal system is fair and efficient, appears to represent a channelling of scarce resources into an area where many concerns and uncertainties exist. It is felt that the lack of development of the formal justice system should not be used as an argument to give more attention to the informal, but on the contrary to focus on ensuring that all Afghan citizens have access to a just and efficient formal justice system, in accordance with the benchmarks set out in ANDS.

*"...It is good that we are now having national and international debates on standards for restorative justice. Yet it is a dangerous debate. I worry about accreditation for mediators that raises the spectre of a Western accreditation agency telling an Indigenous elder that a centuries-old restorative practice does not comply with the accreditation standards"<sup>586</sup>.*

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<sup>585</sup> Ibid, p.49.

<sup>586</sup> Braithwaite, John, "Setting Standards for Restorative Justice", *The British Journal of Criminology*, 2002, 42:563-577.

### **2.3.7. Best practices**

#### **Best practice 1:**

##### **Laos**

In 1997 the Laos Government made it a national policy that every village should have a village mediation unit. The Government also set out how mediation units should be organised as well as the participation of members.

Cases of children offenders were heard at village level by the juvenile mediation unit consisting by the village chief (as a chair), a person from the Laos National Front for Reconstruction, one from the Lao Women's Union, one from the Youth Union, two elders from the village, plus the victim, the offender and his family<sup>587</sup>. If the damage of the offence is committed in different village than from the one the offender lives, the case is held in the village where the offence occurred. The village chief from the offender's village and his/her family are asked to attend.

As the settlement of the dispute is done, a plan for the settlement is drawn up and signed by the victim, the parents of the offender and the Chair. The members of the unit and the chair ask the offender and the victim to leave as friends and to the family to pay more attention to their child. They ask them to leave everything behind and not to disclose anything to the community about the offence.

By acting this way they do not reiterate hate and contribute to the reintegration of the offender into society.

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<sup>587</sup> See, the case proceedings of a session held by the juvenile mediation unit in Laos: Save the Children, *Juvenile Justice. Modern concepts of working with children in conflict with the law*, op. cit., p.53.

## Best practice 2:

### Brazil

In Brazil, a style of restorative conferencing inspired by [Nonviolent Communication](#) has begun to be used in the youth criminal justice system and in the schools. Like other restorative conferencing practices, the Brazilian "restorative circles" minimize the role of the facilitator, in the interest of empowering circle participants to own the process and feel that in the future they can use the process without an outside facilitator. The approach strives to break free from the retributive model more fully than is in the case in some other restorative practices by emphasizing thinking of participants as human beings, rather than being an "offender," "victim," or other label, and by focusing on each person's choices and the human needs that motivated them. Each person is encouraged to take responsibility for their part in what happened and co-create what will happen next.

*"The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence. It is therefore critical that restorative justice never be allowed to undermine this constraint.*

*Restorative justice processes must be prohibited from ever imposing punishments which exceed the maximum punishment the courts would impose for that offence.*

*Another critical, albeit vague, standard is that restorative justice programs must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programs where victims are exploited as props for programs that are oriented only to the rehabilitation of offenders are morally unacceptable. Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable.*

*The right to appeal must be safeguarded. Whenever the criminal law is a basis for imposing sanctions in a restorative justice process, offenders must have a right of appeal against those sanctions to a court of law.*

*In general, I think UN Human Rights instruments give quite good guidance on the foundational values and rights restorative justice processes ought to observe.*

*We need a framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values.*

*Restorative justice programs should be evaluated according to how effectively they deliver restorative values which include:*

*Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional*

*Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*

*[Certain highly specific standards are so fundamental to justice that they must always be guaranteed, such as a right to appeal. Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective].*

*Restorative values include the following values to be found in the above international human rights agreements:*

- *Restoration of human dignity*
- *Restoration of property loss*
- *Restoration of injury to the person or health*
- *Restoration of damaged human relationships*
- *Restoration of communities*
- *Restoration of the environment*
- *Emotional restoration*
- *Restoration of freedom*
- *Restoration of compassion or caring*
- *Restoration of peace*
- *Restoration of empowerment or self-determination*
- *Restoration of a sense of duty as a citizen.*

*As a list of specific restorative values this is unsatisfactorily incomplete, for example in the non-inclusion of mercy, forgiveness, which are nowhere to be found as values in these UN documents<sup>588</sup>.*

### **Concluding remarks:**

A healthy society needs all its members, especially its children that represent society's future. We need to understand that punishment by imprisonment does not lead anywhere but to exclusion and hate. It certainly does not reintegrate juveniles back to society. On the contrary, it gives them one more reason to fight back. Prison does not humanise nor socialise people. Especially children that need all the care and understanding society has to give. This world will never get better by fighting and destroying. Justice is to construct, to rebuild what has been damaged and to forgive. If justice is a form of equality how is it possible to treat equally a child that sleeps in the streets and a shop-keeper who has enough to eat and a soft bed to sleep in. Would by punishing by exclusion a minor theft committed by this child in need, the shop-keeper in question will sleep better at night? Or, would not be

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<sup>588</sup> Braithwaite, John, "Setting Standards for Restorative Justice", *The British Journal of Criminology*, 2002, 42:563-577.

better to offer the child a job instead? Not as appraisal for the theft, but for community service and for the child's good. In order to make the child understand the harm done by his action to the entire society, but also to show that we understand how he arrived there.

The point is to try to stop the vicious circle of crime. Because it is by a vicious circle that crime is reproduced again-and-again, by hating and expressing anger and bitterness as a result of the crime suffered. We need to understand that we all are responsible for the behavior of our children. Without guidance and care they will never be reintegrated into society. The formal justice system can not offer this kind of guidance and care. It is not equipped to do so.

The fundamental unifying hypothesis of all alternative and restorative practices is disarmingly simple: that human beings are happier, more cooperative and productive, and more likely to make positive changes in their behavior when those in positions of authority do things with them, rather than *to* them or *for* them. Contemporary criminal justice and educational disciplinary practices rely on punishment to change behavior. As the number of children in prisons and excluded children grows unabated, the validity of that approach is very much in question.

The solution should be to find a functional balance between the already existing Afghan model of restorative justice combined with the principles and safeguards for human rights of the formal justice system.

***"The traditional Afghan informal institution needs to adapt to the new global cultural milieu that is being created by the forces of globalisation; it needs to be a more inclusive institution that represents both men and women and to be more sensitive to the universally accepted principles of Human Rights. Both past and current experiences show that there is reason to believe that jirga has the capacity to bridge tradition with modernity and to face the challenges of the 21st century"<sup>589</sup>.***

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<sup>589</sup> See, Wardak, Ali, "[Jirga. A Traditional Mechanism of Conflict Resolution in Afghanistan](#)", op. cit.

All kind of alternative processes –if applied correctly- can certainly contribute to individual deterrence of crime than retributive justice.

However, better even than to investing to restorative practices is to invest to prevention. The vicious circle of crime will never end unless we decide to put a considerable effort in educating the future generations and in guiding them in a proper manner without discriminations and by offering equal opportunities to all our children.

If the best we can offer to our children is confinement and rejection then we do not deserve having children.

It is very easy to condemn. The difficult thing is to understand...

*"We must understand the relationship of things that may have happened years ago and their bearing on why we are dealing with the present conflict. It allows us to see that we are not alone, but are somehow all connected. Our actions have a greater bearing on a larger community than we may have thought".*

(The Oglala Lakota Nation Mennonite Central Committee Unit)

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