

ESTABLISHING THE RULE OF LAW IN POST-TALIBAN AFGHANISTAN

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My name is Spence Spencer and I wanted to talk to you about the peacekeeping operations menu, as it were. If we have the broad cultural background, it's also important to look at exactly what specifically can the international community do to promote a culture of respect for the rule of law in Afghanistan. And of course, I must recommend, and as you're walking out, be sure to grab a copy of our fine report, this is CRAFT, the Consortium for Response to the Afghanistan Transition. I apologize for the acronym; I did not make it up. It is actually a new thing, where we've gathered together four NGOs. I'm with International Resources Group, the American Bar Association's Asia Council, the International Foundation for Election Systems and the International Human Rights Law Group all banded together because we felt that, in peacekeeping operations and international community interventions, in situations like this, human rights and governance and rule of law is not really dealing with it in a systematic way, as Ambassador Prosper noted about Kosovo. There was sort of a throwaway line there that Kosovo was far too slow until international judges showed up a year later. That was actually due to the absence of any real systematic policy or even assessment of what was going on in Kosovo.

So what we wanted to do was, again, try to bring whatever resources we could, as NGOs, to develop a study. I hope it's useful. It was our attempt to capture the waterfront of the formal system of Afghanistan. And I want to distinguish that from the tribal and the sharia courts specifically. We wanted to do three things with the CRAFT report. And that is: do the rapid assessment and analysis of these things so that we can get it in the hands of the policy community as soon as possible. We came back on March 12, and we released the document on April 12. So it was a lot of effort, but we recognized it is not the first assessment nor the last. But it's just trying to pull it together for policy. Secondly, we also wanted to provide a platform for Afghan leaders and officials regarding what they wanted to do with their country. A lot of these things, as was noted, for example in the case of Truth and Reconciliation Commissions, or whatever worked well in Kosovo, might not work well in Afghanistan. And so what we wanted to do was reality-check that with Afghan officials.

And lastly, we wanted to come up with practical nuts and bolts ways for the donor community to actually engage on these issues, rather than waiting around for a year for some abstruse solution to pop up.

We met with officials before we left in Washington, New York, with the UN systems, Brussels, and London, on our way and totaled about four weeks in Afghanistan. We released the document, as I said, on April 12th, and right now we are translating the document into Dari and Pashtun. And we hope to have copies released in Kabul City on May 1st.

So, what did we find in this assessment is the first question. And that is, it's important to

think about Afghanistan as being on the rocks for the last twenty-three years. Since the Communists took over in 1978, it has been absolute chaos. You also need to mention the fact that there's been a huge drought and there's been a resulting famine as well. So this is a panoply of bad things happening in Afghanistan. But that said, in the Afghanistan of today, there's a real sense that something fundamental has changed. And Afghan citizens are very excited about the internationals coming, and there's hope for the future. And the Taliban are finally gone. And people go into the streets and fly kites even. That is a very hopeful thing. I've got to caution that there's a sort of anticipation, but it's not necessarily positive. People don't know where the country is headed, and the security situation is so intense. It could be good or it could be bad. There's sort a general excitement about things that are going on.

It's important to note that the Bonn Agreement, which establishes a transition to democracy for Afghanistan over the next two and a half years, is the way forward. And this is actually what people want to see implemented. But the institutions of the Bonn Agreement don't really control anything more than the city limits of Kabul. The rest of the country is dominated by warlords who may or may not have loyalty or fealty to the central government. It doesn't matter - a joke that I was telling one time was - there's a fine line between a warlord and a provincial governor. And that is really the extent of it. They will say they support the government, but in fact everybody's all in on the take and they're running their fiefdom as a way to maximize revenue.

Again, I want to stress: when we had conversations, the word that was cited over and over again was security. And there is a fear - I wish I could communicate this well - there's a fear of American munitions that are so accurate that literally people believe that their specific house can be taken out from the sky. And that really is a fear. But that's not nearly an accurate thing. And this security means jobs. It means education. It means basic commerce. It means the security to move your goods. And bandits right now are all over the countryside. Kabul City is awash in guns and checkpoints. And without confidence in the government, refugees don't return, investment is stifled, and corruption, the drug trade, and criminality all grow. So what I wanted to point out is that we called the report "Filling the Vacuum" to reinforce the message that when governments fail, in all failed states, warlords, drug barons or terrorist groups fill the resulting security vacuum. The U.S. and Coalition forces are fighting a war in Afghanistan because al Qaeda was allowed to set up shop there. If the international community does not fill the current security vacuum in Afghanistan, somebody else will.

Turning to the rule of law: we wanted to focus on the formal legal system as noted. The tribal and sharia law systems have apparently functioned well over the past twenty-three years of law, and need to be factored into any future response to rule of law issues. The bottom line is that there's a legal basis for the formal justice system to operate on. The Bonn Agreement identifies the 1964 constitution as the starting point for post-Taliban Afghanistan. This constitution was one of the most progressive in the Islamic world at the time, in the sixties. The Bonn Agreement also sets out the parameters for the current justice system and interim legal framework. Meanwhile, there's a cadre of institutions and officials rising out of the ashes of the Taliban. Kabul law faculty was a respected institution in the region, and bar associations are being formed. Many refugees from Pakistan, France, the U.S. and elsewhere are returning to their old jobs in the Justice Ministry and in other institutions.

Bonn also calls for the establishment of a judicial commission to oversee the entire justice process. And it calls on the United Nations to provide assistance to the interim authority and "rebuild the justice system." This is a critical institution that has not yet been established. Current thinking at the UN is for the commission to have a broad ambit, including oversight of the police, acting as a filter on judicial appointments and other critical appointments. It will be composed of approximately seven Afghan jurists, and will link into an internationally managed secretariat. This will allow international assistance funds in theory to be linked with the real needs of Afghanistan's justice community.

Lakhdar Brahimi, Special Representative of the Secretary General (SRSG) to Afghanistan, who heads the UN mission to Afghanistan, made a proposal to Chairman Karzai on the jurisdiction, composition and administration of the judicial commission in early April. And there has been no decision made to establish the commission by Karzai to date. One of my friends in the UN said, "Well, we moved the memo, Brahimi actually sent it to Chairman Karzai in early April, and we're not anticipating anything real quick. The civil service commission has yet to be acted on and we sent that memo out in January." So the Interim Authority is a bit slow. However, the UN at the end of the day believed that this judicial commission can be established in time for the emergency Loya Jirga, which is scheduled to open up June 10th.

So turning to the law and the legal basis for this mandated under Bonn: under the Bonn Agreement, the '64 Constitution is supreme, but also according to Bonn, existing laws and regulations are applicable on an interim basis, until the adoption of a new constitution over the next two and a half years. And on January 5th, the Interim Authority decreed that all laws and regulation inconsistent with the '64 constitution were repealed. And of course this also includes all Taliban laws and penalties as well. And this decree also designated the Ministry of Justice as the institution responsible for reviewing the body of laws to develop what is truly an applicable law for the next two and a half years. The good news is that among Afghan legal scholars - and again, I'm talking about the formal system here - there is broad agreement on what specific codes are applicable. Criminal, criminal procedure, commercial and civil codes are all pretty much agreed on, and by and large, are acceptable. These were drafted in a very progressive era of Afghanistan. Most legal scholars note that these codes are part of what they call the Decade of ***448** Democracy in 1964. Under no circumstances have they really been reviewed in any meaningful way. And that's why the Ministry of Justice has to go through these line in, line out, methodically, to actually develop a body of formal law that can be used by the State.

The bad news is that these codes were almost totally destroyed after twenty-three years of war, plus. For example, the Taliban burned the Kabul Law Faculty library. And not because they hated law or anything - it was just for heat. The Ministry of Justice - the minister's office itself has the only collection of laws. We went in there and it's a glass case about this high - and he has about 30 sort of yellowed gazettes - you know, little paperback books about this big, that thin. And that's all that he has. And that is the extent of the law. There's no copies available of the law. And there's a clear need to collect the codes and quickly print and distribute these, and get them into the hands of Afghan legal professionals.

So, going down through the tour of what the international community can do here - the

first priority of course, is to determine, publish and disseminate the applicable law of Afghanistan. This means providing the text of the laws but also making sure the Ministry of Justice has the tools to define, prioritize and get on with the review.

The second big thing, of course, is the establishment of a judicial commission. And this commission can build confidence, not just in law and order, but also in the political direction of this new government itself. Most of all, the judicial commission can identify the short and long terms needs of the system, and basically try to match that with international assistance. So you have billions of dollars flowing into Afghanistan, and people have one idea or the other, but there is at least a judicial commission that can match this with the needs of real, live Afghan jurists who have a court to run or an institution to manage. And it's important to note too that a judicial commission is not the only thing there. Salaries are a real important issue. And only, I guess, two months - it depends on who you talk to about salaries - but the police have really only received about one month of salary since the new government came into power in December. And so what they're doing is they're shaking down people for fines on the streets. The judges have not been paid; nobody's been paid any money whatsoever. And when you ask, "How does that happen?" It's a Pandora's box. We talked with the State Department and said, "Boy, you guys aren't paying the money fast enough," and the answer we got back from State was, "absolutely - we are totally on time with our payments, and there is no problem. It's the Afghans' fault." And then you go to the Afghan Ministry of the Interior, who can't really come up with any good numbers. It's a real problem just of management. Getting real numbers of personnel combines with real statements of donor interest actually to get the salaries paid. But it is a titanic thing, and it's essential. You know, as much rhetoric as we hear that there can be no peace without justice, or preventing corruption, getting a paycheck is probably a good first step.

Meanwhile, there is nothing there. And basic equipment should be provided just as a signal of support of the international community to legal professionals in the field. It can be anything. Just the sheer act that the U.S. or the international community or the United Nations cares enough even to get some chairs into an office is an important thing. A lot of people sort of disparage that and say "Oh, it's just a bunch of stuff," but in fact, it is stuff. And that's why it's valuable. It sends a political message of support. Meanwhile, what we found that was really surprising is that we got a lot of requests for training. And we got a lot of requests for training in Afghan law and in human rights law. Above all, members of the Supreme Court, which is arguably the most conservative body in Afghanistan right now, they asked for assistance in international instruments, which I was astounded at. And also court administration. And there is a cadre of good Afghan lawyers who have come back, and they're looking for hope. These guys are the ones who need this training, because they've been in Peshawar, they've been all over the world, and they need to come back and find out what it is like to practice law in Afghanistan.

How can the international community help? There's great pride in Afghanistan's laws and institutions. And the international community should recognize the preeminent role of Islam in all aspects of the Afghan system. International assistance is welcome by all, and there's a tremendous reservoir of good will toward the international community. Even the conservative mullahs who are on the Supreme Court - they want the assistance, but they are certainly going to say, "Do not tamper with Afghan law. We have a good body of law here. We're happy to get your assistance; we're happy to work with you on things like

court administration. You can even educate us on Afghan law. But do not try to come in here with a Western agenda and try to push anything down our throats, because it ain't going to work," as has been noted by the previous speaker.

There's two ways the international community can help. And the first is through this material and technical assistance. And rule of law - we've got to say this - is cheap. It's dirt cheap compared to electrification or rebuilding of irrigation systems, or even humanitarian response. Rule of law programs can actually have a huge impact, and the investment is absolutely minimal for governments to do. It's something, compared to hundreds of millions for electrification or even irrigation, this is something on the order of maybe ten or fifteen million. It's a very cheap investment that sends a very strong political message of support from the West.

Most governments, and I wish Ambassador Prosper were here, but most governments have delayed a lot of decisions. There was a nice laundry list at the end of Pierre's remarks about all the different priorities, but really we've been unable to find any real movement on this. As noted, the Italians have the lead on rule of law. We met with the Italians Thursday, and they were very intent on getting the King back to Kabul, and have not made any decisions yet on rule of law. And there are just very few concrete plans right now in the UN, aside from getting this judicial commission going on. Or anything in terms of rule of law. Or even human rights. Waiting for milestones to pass, like the emergency Loya Jirga this June, only solidifies the status quo and perpetuates warlordism. And it undercuts the authority of the Bonn Agreement and allegedly why the international community is even there.

And another point is that people are always focused on this in terms of resources and cash and checks and development contracts. A lot of things these *450 governments can do are highlight rule of law issues in a political context, and say that this is important. And saying that building a justice system is great, and, quite frankly, getting messages where people - actually these are quotes - "the security situation in Afghanistan is absolutely fine and we don't really do nation building." That is really the rhetoric that is coming out, and it's a real crying shame, because if somebody would just say something positive, you've have hundreds of NGOs all beating a path to Kabul, trying to help.

But there's also mixed messages being sent the United Nations. Laktar Brihimi, the SRSV in charge of the UN mission in Afghanistan, has talked about what a light international footprint should be. I don't know anybody who knows what that really means. It has sent another confusing message to the rest of the international community. Is that a qualitative distinction, where it should include Afghan processes? I think that's what he meant, but a lot of people interpret this "light international footprint" as being a quantitative distinction. In other word, nobody goes and does this sort of stuff.

So my final point on this is that the only way to build a culture of respect for rule of law and support the interim administration goals is to stop talking about it and get to work. That starts with the law and builds with the judicial commission, and it ends with legal professionals getting the reinforcement that they need to do their jobs.