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Centre for
Humanitarian
Dialogue

February 2004

report

Assistance to Justice
and the Rule of Law
in Afghanistan

A strategic analysis

“hd Report

The Centre for Humanitarian Dialogue is an independent and impartial organisation, based in Geneva, Switzerland, dedicated to the promotion of humanitarian principles, the prevention of conflict and the alleviation of its effects through dialogue.

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Designed and Printed by
Publish on Demand Ltd, London, UK

Assistance to Justice and the Rule of Law in Afghanistan

A strategic analysis

February 2004

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Assistance to Justice and the Rule of Law in Afghanistan

A strategic analysis

Summary

This document is an independent analysis of the processes involved in reconstructing Justice and the Rule of Law in Afghanistan. Its goal is to establish what existing policies, processes and structures of assistance are currently being provided to this sector, how they might be optimally exploited, and, where necessary, how they might be redesigned. The analysis attempts to contribute to the considerable ongoing efforts of the principal actors. It offers analysis and recommendations that are principally designed for use by the Afghan Transitional Administration, UNAMA and its agencies, donors and technical assistance providers, and the two international security forces, ISAF/NATO and the Coalition.

Independent analyses have the luxury of non-involvement and access to hindsight. However, this should not cloud the fact that the principal actors in this sector are seldom blind to the challenges they face, and are working hard to overcome them, often against stiff odds. Reviews such as this should complement efforts where they are constructive, and offer practicable alternatives where they are not.

1 The Centre is an independent and impartial organisation, based in Geneva, Switzerland, dedicated to the promotion of humanitarian principles, the prevention of conflict and the alleviation of its effects through dialogue. For further information, refer to: www.hdcentre.org.

2 Rama Mani, *Ending Impunity and Building Justice in Afghanistan*, AREU, December 2003; and Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, USIP Rule of Law Program, January 2004.

The analysis was undertaken by the Centre for Humanitarian Dialogue¹ as part of its Justice Reconstruction Project (JRP). This project aims to improve the quality of international assistance to Justice and the Rule of Law in situations of conflict and post-conflict through the provision of strategic advice and support to key actors. The analysis, recommendations, and ensuing follow-up activities contained in this report are an example of that strategic support. The timing of the analysis, immediately prior to the Constitutional Loya Jirga and before the probable elections in 2004, makes it a resource for national and international actors, as they reframe the way they plan to work together during Afghanistan's new, post-Bonn Agreement transitional period.

The report does not describe the context and current situation in depth, relying instead on the reader's familiarity. Although the research looked at the judiciary, police, prisons, human rights, and to a limited degree, civil administration, the report is structured thematically and uses these examples to illustrate the analysis. While recognising that issues such as transitional justice, accountability for past crimes, and narcotics and organised crime, are absolutely critical to this discussion, they are not addressed directly in this report, specifically because they are dealt with by experts in two contemporaneous reports².

This report briefly describes the challenges of working in transitions, and the tensions they create. It offers a functional definition of the Rule of Law sector as comprising the activities of the police, the prosecution, the legal profession, the courts, the corrections system, and human rights institutions, thus encompassing what are generally understood to be those activities and institutions that connect the people with the law. Some may consider this definition to overlap with that of governance. Afghanistan is still considered to be in conflict. Its transition is thus understood as one from a form of government, with almost no international involvement, to a new form of government, with a high level of international involvement, against a backdrop of ongoing, chronic insecurity.

Transitional features of the situation

With no legislative body, and a new Constitution yet to be implemented, assistance providers have had to work with enormous uncertainties, a situation that presents specific challenges and produces mixed results. The Constitution-making process was flawed by deep ethnic divides, and the continued and highlighted presence and influence of known criminals among the delegates. It has, however, provided the transitional period's most powerful marker to date of the importance of Justice and the Rule of Law in the establishment of the state. Afghanistan's chronic factionalism has

not yet been addressed or overcome, which is what keeps the political situation so precarious, and threatens to undermine the fragile prospects for peace and justice. Presidential elections are likely to take place in difficult circumstances between June and September 2004, with Parliamentary elections predicted to follow within one year; election fever could threaten progress in the short-term, weakening government and some donors' resolve to take and enforce difficult decisions.

In general, there is an increasing trend for expanded donor presence in Afghanistan, with political and assistance missions working alongside each other, and donors directly involved in programme implementation. Security, logistics challenges, and the need for organisations to have bases in the capital have led to a predictable focus on Kabul at the perceived expense of the provinces.

The role of Rule of Law in transition

Consensus suggests that the overarching importance of the Rule of Law, as the keystone to establishing a real and present state, was not given the prominence that it required at Bonn in December 2001, or thereafter. Not only is the establishment of the Rule of Law of fundamental importance to the transition from conflict to stable governance, it is also vital to understand it as more than a subset of the all-important achievement of security. Thus establishment of the Rule of Law is a process of the highest political significance, and not simply a straightforward endeavour of reconstruction, development, or legal drafting and training. Its political significance lies in the fact that establishing the Rule of Law is the key to making the government and its institutions real, present, credible and legitimate to the people of Afghanistan.

No strategy for Rule of Law

Hindsight and analysis suggest the Bonn Agreement did not set the stage for a thoughtful, phased Rule of Law strategy. There was no provision for a process of mapping the causes of conflict and its resolution with the existing picture of capacity and practice across the country. Without the risk analysis inherent in such an exercise, planners did not confront the stark realities of political factionalism, and how it would affect programming scenarios. This has led to a tendency to develop idealised scenarios. Without an agreed working understanding of Rule of Law, it was difficult for stakeholders to programme in an integrated, strategic way. If sustainable peace is the projected goal of the transition and beyond, then the relationship between peace, stability and security needs to be analysed, and a realistic approach, which reflects that analysis, adopted. This would include a distinction between short, medium and long-term objectives, recognising that activities aiming at all three may take place concurrently; for example, in the short-term stability might be the priority, legitimacy the medium-term goal, and access to justice

for all and compliance with international norms the long-term goal and defining principle that informs each objective in each phase of development. Such planning must recognise that reform of reconstruction of Justice and the Rule of Law in the context of Afghanistan, is a long-term process. This analysis is only beginning to take place two years into the transition. Constructive efforts like the drafting of a streamlined criminal code have suffered from standing alone, instead of forming part of a broader strategy. There has been a tendency to confuse structure with strategy, and the analysis reveals examples of what can go wrong if structure is treated as an end, rather than the means to an end. Donors refrain from making unsustainable short-term investments in the interests of agreed long-term objectives, a conundrum that lies at the heart of managing transitions in the interests of a future, sustainable peace.

The challenges of a multi-sectoral programme

People's understanding of the Rule of Law varies widely. Clearly it is a multi-sectoral endeavour, requiring a common vision and strategy, and a point of oversight within the government. This does not yet exist, although there are plans for such a position within the President's Office, above the level of the line ministries and Consultative Groups (CGs), and linked to the high-level Security Sector Reform process. The analysis provides examples of linkages between critical areas, like police and the Judiciary, not being adequately forged and supported. Many Justice and Rule of Law challenges are challenges of Civil Service Reform, and the analysis argues that this linkage has not been made strongly enough, and that a focus on Civil Service Reform while finally evident, has been slow to appear.

The underestimated importance of communications

A sound communications strategy underpins any real political strategy, but is often not taken seriously. There is evidence of Afghan civilians' interest in the services and protections the state might provide, but more immediate pressures and lack of strategic planning have tended to lead to reactive behaviour, mostly centred on security. Opportunities to examine how communications might be used to understand, respond to and even create demand for critical Rule of Law-related services, or to instil some kind of Rule of Law culture, have not yet been seized. As part of the general tendency not to focus on generic management and organisational development, training in communications skills as a basis for institutional management have also been under-supported.

Untapped provincial resources

There was a delay among the international community in realising that some structures and capacity persist in the provinces in a range of sectors, not least Rule of Law. Thus, public servants of many

disciplines have been left uninstructed and unsupported during a two-year period when they could have been incrementally building at least a minimal government presence in the provinces. In some cases, where there is risk in leaving them to operate independently, they may be perpetrating corruption or abuse. The recent interest in assessing, co-opting and developing those existing resources comes at a late stage, and was reactive, but is a positive development.

Leadership and co-ordination for the Rule of Law

There is a gap in Afghan high-level vision and leadership for Justice and the Rule of Law that has the sway to cut across factional, personality and institutional turf issues. Without a strong neutral voice from UNAMA on this sensitive issue, the gap becomes more obvious.

The Consultative Group (CG) process is an excellent design for co-ordinating Afghan-led national programming and budgeting, but the success of the groups varies, and the lack of linkages between groups relevant to the Rule of Law is counterproductive. The more functional groups reflect the more functional ministries. More attention could be paid to supporting the national actors in administrative, financial and management matters, thus improving their capacity to participate effectively in the process. Advisory groups suffer, almost by definition, from an inability to effectively access all relevant CGs, and from the lack of enforceable accountability mechanisms.

Structures will always be vulnerable to personalities, and in this case, as perhaps is common in transitions, the role of personalities, both national and international, dominates institutions. The comparative strengths and weaknesses of the CGs are, in part, an illustration of the characters, capacities and experience of the actors around the table, both Afghan and international, but also of the actors' interpretation of their roles.

The role of lead donor is not an easy one. It can become problematic where Afghan leadership in the sector is not strong; it weakens accountability, and places a larger managerial burden on the donor than they may have envisaged. However, where a donor is very strong or active, this can jeopardize national ownership of the reform process. Donors who are not necessarily experienced in sectoral management, are faced with the complex issues of sequencing, prioritisation, pace and absorption capacity in the field in which they work. This includes identifying the best modes of delivery, such as direct implementation, use of expert advisors, sub-contracting to NGOs or consultancy firms. Strategic objectives and competency for these choices are not always evident, nor are monitoring and evaluation of their effectiveness. The widely differing interpretations of what an advisory role means bear

witness to this. The pressure of the situation has a tendency to lead to short-term thinking that undercuts capacity and institution building.

So far UNAMA has not been able to play the role of a powerful, impartial, moderating voice, among the weaker groups associated with this sector partially due to the lack of a Senior Rule of Law Advisor, and Senior Human Rights Advisor to lead the implementation of a well-designed workplan that helps build capacity of the fundamental institutions of government. The arrival of a new Secretary-General's Special Representative (SRSG) provides a crucial opportunity to re-address UNAMA's strategy, resources and modes of implementation in this sector, with the SRSG's leadership as a pivotal driving force.

Almost no one interviewed during the course of this analysis suggested that inadequate financial resources were currently the issue, identifying rather the competency and coherence of the assistance provided.

Conclusion

The unique experience of the Afghan people and the international community as they grapple with reconstructing Justice and the Rule of Law in a period of alarming political precariousness, offers much food for thought to other conflict and post-conflict situations. The constraints are palpable, and the efforts to make progress numerous and energetic, if sometimes disparate.

This second transitional period, from the Presidential elections until Parliamentary elections are held and ratified, should be seen as an opportunity to re-address this fundamental issue, in the framework of the implementation of the new Constitution. For Afghans, it is a chance to seek an Afghan blend of indigenous with formal approaches, with the assistance and oversight of the international community. For the international community, it is a chance to build on existing experience in this relatively new sector, and to bring intelligent programming skills to bear in places where, until now, specialisation in technical details has dominated. Without long-term commitment, and political will from the highest levels, the opportunities available even in these difficult times will be lost.

The work of this sector in establishing the Rule of Law is a deeply political, multi-sectoral project that has to be Afghan-led. It requires clear-sighted contextual, historical, capacity and risk analysis, strategic vision, planning and co-ordination from the highest levels. It demands long-term commitment from all stakeholders, but also flexibility to adapt plans to the changing political and resource situations presented in challenging periods of post-conflict transition. It needs the recognition that technical assistance resources must be reinforced with

matching administrative, financial and management assistance. It also asks of internationals who come to assist, that they lay aside their visions of a neat and tidy world, and make a genuine effort to work progressively, realistically and sensitively with what already exists.

Recommendations

All Key Stakeholders

- Affirm the central importance of establishing the Rule of Law as an overarching, political project that is linked to, but not only a subset of, Security Sector Reform

ATA

- Create a temporary transitional Rule of Law Focal Point or Cell in the President's Office
- Develop a concise Rule of Law strategic plan comprising a strategic vision and programme priorities for the Second Transitional Period to assist the ministries in their work

ATA/UNAMA

- Ensure a key role and strategic submissions for the Transitional Rule of Law Focal Point/Cell at donor and political conferences during the Second Transitional Period

UNAMA

- Strengthen UNAMA's strategic and institution-building support for Rule of Law through the SRSG, Deputy SRSGs, Senior Advisors and a redesigned work plan

International Community

- Share more broadly the burden of donor support for Rule of Law
- Provide ongoing financial, administrative and management training support in tandem with any technical support
- Support Rule of Law Focal Point/Cell, and relevant Consultative Groups through
 - periodic independent analysis, monitoring and evaluation and training missions
 - the creation of external reference groups of experts in key sectoral areas, who can be called on during the transition for advice and support

1

Introduction

This independent exercise was purposely entitled ‘A strategic analysis’. It is not an historical evaluation or a technical needs assessment, but an attempt to understand the driving factors behind ongoing efforts to reconstruct Justice and the Rule of Law in Afghanistan, and thus to present useful analysis and options for that process in the future. These options are principally aimed at Afghanistan itself, hence this report is intended primarily to be of use to the Afghan Transitional Administration, UNAMA and the agencies integrated within it, donors, technical assistance providers, the Coalition and ISAF/NATO in Afghanistan.

Independent analyses have the luxury of non-involvement and access to hindsight. However, this should not cloud the fact that the principal actors in this sector are seldom blind to the challenges they face, and are working to overcome them, often against stiff odds. Analyses such as this should recognise those efforts, complementing and supporting them where they are constructive, and offering practicable alternatives where they are not. Such is the intention of this exercise, and we hope that it will be received in this spirit.

The analysis was carried out by the Centre as part of its recently launched Justice Reconstruction Project (JRP). The project is an offspring of the Centre’s work in mediation and conflict resolution that, in recent years, has made two issues very plain:

- Issues of Justice, the Rule of Law and strategic conflict and post-conflict transitional management are central to achieving sustainable peace; and,
- International assistance for these issues, while developing rapidly, is not yet confident or coherent.

The JRP pilot aims to improve the quality of that assistance to people affected by conflict, and hence their access to and experience of law and order, justice, protection, and their broader human rights through the provision of strategic support for the repair and renewal of the Justice and Rule of Law sector. The analysis, recommendations, and ensuing follow-up activities of this report are an example of that strategic support.

The timing of the analysis turned out to be rich with opportunities for constructive reflection, preceding as it did the implementation of the Bonn process’s two major milestones: the Constitutional Loya Jirga, held from December 2003 to January 2004, and the Presidential elections, which may be held six or nine months later. Between these

two events lies a fertile period of months, which may include important donor conferences, and the continuation of the Demobilisation Disarmament and Reintegration process, in which Afghans and the international community will have the opportunity – albeit under some heavy pressures – to reframe the way they will work together in Afghanistan’s new, post-Bonn Agreement transitional period.

1.1. Objectives

Our goal was to identify the existing policies, strategies, processes and structures of assistance provided to Justice and the Rule of Law, how they are integrated, how they might be optimally exploited, and, where necessary, how they might be redesigned. Much is already being done; this analysis is an attempt to contribute and give shape to that ongoing effort. The objectives of this analysis were:

- 1.1.1. To identify strengths and weakness, opportunities and threats in the planning and broad implementation of assistance to Justice and Rule of Law in Afghanistan from early 2002 to date.
- 1.1.2. To make practical strategic recommendations to the Afghanistan stakeholders on how to build on strengths and transform weaknesses, including suggesting revisions to existing action plans of short, medium and long-term priorities that would focus on enhancing the sequencing and synthesising of different types of activities.
- 1.1.3. To improve and disseminate practical understanding of best practice in facilitating the reconstruction of conflict and post-conflict Justice and Rule of Law.
- 1.1.4. To advocate to donors and the international community the fundamental importance of timely, well planned, long-term assistance to Justice and Rule of Law in resolving conflicts and implementing reconstruction after them.

Although the study looked at the judiciary, police, prisons, human rights, and to a limited degree, civil administration, this report is structured thematically, using these sub-sectoral examples to illustrate analysis. There are two critically important areas the report does not directly address: bringing to justice war and other major criminals (transitional justice), and narcotics. The reasons for this, and references to recent analytical reports that do address them, are given below.

2 Background

3 On general background, see for example: Siba Shakib, *Where God Only Comes to Weep*, Century, 2002; Peter Marsden, *War and Religion in Afghanistan*, Zed Books, 2001; Ahmed Rashid, *The Taliban: the story of the Afghan Warlords*, Pan, 2001; Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, Yale, 2002; Jason Elliot, *An Unexpected Light: Travels in Afghanistan*, Picador, 2000; David Ewans, *Afghanistan: a Short History of its People and Politics*, Harper Collins, 2003; Asne Seiestad, *The Bookseller of Kabul*, Little Brown, 2003; Christina Lamb, *The Sewing Circles of Herat*, Flamingo, 2003. For descriptions of the history and current status of Justice and the Rule of Law, refer to the bibliography in Appendix 7.2.

4 See Bibliography under Lau, Martin: *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*.

5 For example, a functioning government with some form of national representative legislative assembly; presence in and control to some degree over its territory and borders, free from external control.

Others with more knowledge than us, have written recently and eloquently of Afghanistan's history, its challenges old and new, and the extraordinary resilience of its people.³ Contemporaneous analytical reports and assessments in the Rule of Law sector, conducted from more specific, technical standpoints by the Afghanistan Research and Evaluation Unit (AREU), and the United States Institute for Peace (USIP), will provide deeper context and broader perspective to our own strategy and process-focused efforts. In addition, the Ministry of Finance's medium-term costing exercise, *Securing Afghanistan's Future*, includes Justice and the Rule of Law as crucial bases on which medium-term reconstruction and development must be built, and its findings will provide a needs-based cost analysis for the sector.

There are also recent reports on the gaps between the reality in Afghanistan, and the ideal standards of international norms and conventions⁴. This should be no surprise, given both Afghanistan's history and the difficulty of bridging such gaps. After all, these can still be found even in developed, industrialised nations that have not been plagued by war or the ambitions and aggressions of others.

Our aim is to complement this ongoing work, and to bring the thinking of strategists and programmers experienced in transitional work to bear on a fundamental and yet often insufficiently supported sector.

2.1. The nature of transition

Transitions are by nature difficult and uncertain times, in recent years often understood by the international community to be passages from a conflict not tidily concluded to a frequently uncertain peace. In Afghanistan's case, the conflict is not yet concluded, and the transition is from one form of government, with almost no international involvement, to a new form of government, with a high level of international involvement, against a backdrop of ongoing, chronic insecurity. This, then, is the definition of transition that we employ in this report: an interim period when the Afghan State does not yet have a minimally functioning set of institutions and attributes that comprise independence and sovereignty that, it is hoped, might lead to a genuine post-conflict situation.⁵ This does not clash with the definition of a transitional period lasting until the National Assembly is inaugurated, given in Article 159 of the Constitution of Afghanistan.

Transitional states are often nominally sovereign, but may be almost entirely reliant on foreign aid and technical assistance. Transitions should lead to, but often cannot actually comprise, the transformation of pre-existing institutions and processes. Hence they generate tension: great hopes precede equally great disappointments; everyone is nominally ready to help, and yet the capacity to absorb that help is often not yet there; just when a people, hoping to see the end of years of conflict and suffering, need time to work out their future path, the international community sets its own momentum, determined by other interests and pressures.

2.2. Working definition of the “Rule of Law sector”

The parameters of what is understood by the Rule of Law are not a matter of consensus, neither among academics, legal practitioners nor practitioners in other relevant fields⁶. For the purposes of our analysis, we have drawn from functional definitions, not conceptual ones, because we aim to provide a framework of analysis that is clear and useful to non-specialists and specialists alike. However, despite using a functional approach, we note the critical importance of understanding that the functions we identify must be underpinned by a commitment to the values and principles of justice and legitimacy. Generous-minded functionalists may consider that establishing Rule of Law embraces the creation of a complete rules-based administration as the basis for a government accountable to its people. However, since the Rule of Law is rooted in the judicial system, we have chosen to focus our analysis on how the actors have worked to foster it through the activities of the police, the prosecution, the legal profession, the courts, the corrections system, and human rights institutions, thus encompassing what is generally understood as those activities and institutions that connect the people with the law. Thus when we refer to the Rule of Law sector throughout the report, we refer to this range of activities and institutions, and to the assumption that, when properly established and functioning, they can create a situation where justice and respect for human rights prevail. For some readers, this may equate to critical elements of governance.

6 See the following for a short, useful discourse by Matthew Stephenson of the Harvard University Department of Government and Law School on formal, substantive and functional definitions of the Rule of Law, and the need to understand the concept as one that has no fixed definition; also for a fuller bibliography on the subject: <http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm>.

3 Methodology

7 See Bibliography in Appendix 7.2.

8 See Team composition and Biographies in Appendix 7.4.

The methodology used was semi-structured interview, observation, and the extensive review of primary and secondary material⁷. The team⁸ was in-country for two weeks, based in Kabul and conducting field visits to Herat and Wardak provinces. Finally, a week's consultation on draft findings and recommendations was held with high-level stakeholders in Kabul in January 2004.

4 Findings

4.1. Transitional features of the situation

The transitional features of the situation are obvious: for example that new laws are created ad hoc, through a process that is not well anchored in the existing legal tradition. Until the adoption of the Constitution in January 2004, there was no fixed timetable for the creation of a legislative assembly and the election of the President. This has necessarily impeded, either implicitly or explicitly, the development of a Rule of Law culture since this is dependent on structures and processes that do not yet exist.

Until the Constitution had been passed, the structure and role of existing fundamental institutions of government, such as the Supreme Court, Attorney General's Office, etc. could not be changed. Assistance providers have been faced with the difficulty of how to go about supporting and developing institutions that urgently need reform, and yet whose future shape is still up for question. Paradoxically, the period when the most money is available to support initiatives, is the one when it is hardest to make programming decisions.

9 That is in terms of the ethnic divides revealed, the continued and highlighted presence and influence of known criminals among the delegates, the interpretative tension between the critical Articles Three and Seven

Whatever the shadows cast by the Constitution-making process⁹ it has created a forceful new agenda for Afghanistan. Until now, the Bonn Agreement period has provided no more powerful or symbolic marker of the central importance of Justice and the Rule of Law to the sustainable establishment of a state.

Presidential elections are likely to take place in difficult conditions between June and September 2004, with Parliamentary elections predicted to follow within one year. Election fever could threaten progress in the short-term, weakening the Government, and some donors' resolve, to take and enforce difficult decisions.

Another transitional indicator is the large physical and financial international presence, despite the UN's deliberate, and often criticised, "light footprint". This strategy has been much discussed, whereby an attempt was made to place more direct responsibility with donors for the reconstruction of Afghanistan and to avoid the pattern of under-supporting the UN and then criticising it for failure. The failings of the strategy in this sector are discussed in more detail in section 4.9.

An increasing trend has emerged for expanded donor presence in-country, with political and assistance missions working alongside each other, and donor staff involved directly in programme implementation. Security, the logistics challenges of Afghanistan's rugged terrain and devastated infrastructure, and the obvious need for principal bases to be located in the capital have led to a predictable and oft-lamented focus on Kabul at the perceived expense of the provinces. Finally, the effects on the economy, security and the Rule of Law of the narcotics trade and related organised crime are significant¹⁰.

¹⁰ While recognising that this is a critical aspect of establishing the Rule of Law in Afghanistan, this analysis does not address policy, assistance and structures in counter-narcotics, as the area is outside the realm of expertise of our team. For a useful discussion on narcotics and organised crime refer to Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, USIP, and the United Nations Office on Drugs and Crime's most recent report, *Afghanistan Opium Survey 2003*.

4.2. The role of Rule of Law in transition

Our remit does not include an evaluation of the well-worn Bonn Agreement that is, in any case, reaching the end of its life. Agreements such as these are fashioned under fierce pressures of time and politics at particular moments in history. Much is always learned in hindsight, and Afghanistan has proved no exception to this. This analysis has revealed some valuable lessons drawn from that hindsight, the first of which is that the overarching importance of establishing the Rule of Law and ending impunity, as the keystone of establishing a real and present state, was not given the prominence that it required at Bonn or thereafter. Consensus confirms that not only is the establishment of the Rule of Law of fundamental importance to the transition from conflict to stable governance but also that it is not merely a subset of the all-important achievement of security. A lack of strategy results in negative impacts in a range of dimensions: criminal, commercial, social and political. It is, in this sense, a process of the highest political significance, and not simply a straightforward endeavour of reconstruction, development, or legal drafting and training. Its political significance lies in the fact that establishing the Rule of Law is the key to making the government and its institutions real, present, credible and legitimate to the people of Afghanistan.

Demobilisation Disarmament and Reintegration (DDR)

As an illustration, the Demobilisation, Disarmament and Reintegration (DDR) process is a cornerstone to ensuring security and the Rule of Law: the immense political risks of its failing, if it does not effectively neutralise illegitimate power holders, will include undermining the already fragile power and reputation of the

government, and playing directly into the hands of those who oppose state stability, democracy and the Rule of Law. However, one of the things that will, paradoxically, make it hard to achieve, is that reintegration, to a large extent, depends on there being a culture and real presence of Rule of Law to support and protect the community in its transition from being at the mercy of individual power-holders to being citizens of a representative and accountable state.

4.3. No strategy for Rule of Law

Hindsight and analysis would suggest the Bonn Agreement did not set the stage for a thoughtful, phased Rule of Law strategy. It should have provided for a deeper process of mapping the causes of conflict and of its resolution, together with the existing picture of capacity and practice across the country. This mapping exercise would have allowed for a sound risk analysis that would have required planners to confront the stark realities of political factionalism and impunity, and how those deep and obvious divisions might play against any technical programming scenario – especially an idealised one. There should have been some attempt to frame a working, functional definition of Rule of Law within which stakeholders could agree to work. These combined elements would have led to a more reasonable strategy for how Rule of Law might be achieved. If sustainable peace is the projected goal of the transition and beyond, then the relationship between peace, stability and security needs to be analysed, and a realistic, step-by-step approach, which reflects that analysis, adopted. Such an analysis would reinforce the understanding that the establishment of the Rule of Law goes well beyond the achievement of stability and security (efforts fraught with issues that may run counter to the establishment of Rule of Law), and that it is a long-term project that requires sustained commitment. This analysis is only beginning to take place two years into the transition. This delay has led to narrow and non-strategic thinking, for example:

Narrow concept of the police force

While receiving significant short and longer-term training inputs from the US and Germany, the police force still construes itself narrowly as an extension of the security forces, in a way that does not differentiate its role significantly from that which it held in prior eras. Thus, its critical role in the establishment of the Rule of Law is not defined as clearly separate from those security concerns that come under the remit of the Army or international assistance forces.

Dearth of capacity assessments, especially administrative & fiscal

Assessments of technical capacity, as well as management and administrative capacity within the permanent institutions of Justice

(Ministry of Justice/MoJ, Office of the Attorney General/OAG, Supreme Court/SC, Ministry of Interior/MoI) were not systematically undertaken. Thus direct support to those institutions has been limited and piecemeal, and in terms of administrative and management skills, almost non-existent. Thus it is hard for them to participate effectively in essential processes like the Consultative Group Process (see section 4.9.1).

Strengths and weaknesses in the AIHRC

It is interesting to note by way of comparison, that the Afghan Independent Human Rights Commission (AIHRC) has fared better in terms of receiving technical and non-technical support. Possible reasons for this are that, now (although this was not the case at the outset) it receives dedicated support from a single part of the UN, advisors to the Commission are physically based inside it, and it is clearly independent of government institutions. There is a general danger that national human rights commissions become the darling of donors, satisfying their enthusiasm to support human rights while obviating the need to strengthen the capacity and commitment of formal government institutions that such commissions are intended to monitor, not replace. This lesson, drawn many times elsewhere, should inform planning on human rights assistance, but was not evident in this case.

It has also achieved much greater presence in the provinces than other commissions or institutions, although its work is obviously constrained by the unstable and insecure physical and political environments in the regions. Had its roll-out been accompanied by more integrated Rule of Law programming, the impact of its attempts at confidence-building and a gradual change in culture might have been much magnified.

Short-term strategy impedes long-term goals

The need for institutional reform in Afghanistan requires little argument. The successful implementation of reform depends, at least in part, on political will. It is an often-noted issue in Afghanistan that many parts of government lack that political will, largely due to the bedevilment of politics and public administration by factionalism. In a pragmatic response to this, the Government has deliberately teamed professionals, or Maslakis, with non-professionals to maintain stability in various departments¹¹. This can, however, result in paralysis, where groups or individuals are in a position to block decisions. This reveals how progress can, in fact, be impeded by having only stability as an end-goal. Another clear example, discussed at length in the AREU paper on Transitional Justice¹², and hence not unpacked in detail here, is the failure to make a meaningful effort to bring the more notorious major criminals to justice, or even to communicate why this has not happened.

¹¹ In one province we visited, an educated Pashtun is governor, while his deputy is a Panjshiri mujahed.

¹² Rama Mani, *Ending Impunity and Building Justice in Afghanistan*, AREU.

No one would dispute that the establishment of Rule of Law is a very long-term project. And yet evidence that any type of short or medium-term activity is premised on a long-term vision or real long-term commitment, or on a rational, if tough, prioritisation exercise, is scant. The Italian effort to produce a streamlined criminal code is a positive example of a practical, strategic and sensibly prioritised action, but one that stands alone rather than as part of a broader strategy.

4.4. The confusion of structure and strategy

Furthermore, the lack of strategy uncovers a tendency to confuse structure with strategy, or to allow structure to take the place of strategy. For example:

The overburdened Judicial Reform Commission

The Judicial Reform Commission (JRC) could be described as a structure set up in place of a strategy. It was a sensible attempt to provide a neutral conduit to the separate permanent institutions, and an independent locus for the important work of law reform. In practice, it was not able to overcome factional, institutional and personality issues among the permanent Justice institutions that were well-known to the key players from the outset. It was not given, nor did it make a formal relationship of any kind with the police sub-sector. It was not given the political or resource power, nor the capacity and mandate, to implement serious institutional reform. It has struggled with its self-identity, between facilitating implementation, as was intended, and implementing directly itself – often with solid practical success, but equally often without the full involvement or real support of the permanent institutions¹³.

¹³ For example, the training of young judges and prosecutors, courthouse rehabilitation, the judicial infrastructure survey, the review of certain laws, the collection and distribution of existing laws.

4.5. The challenges of a weightsectoral programme

Another point of consensus is that, as a weightsectoral endeavour, establishment of the Rule of Law involves activity on a number of different fronts simultaneously. It requires the co-ordination of the plans of different permanent, and sometimes temporary, institutions. For this to be managed effectively there are two pre-conditions, firstly, a common vision and the identification of shared strategic objectives as suggested above, and secondly, a single point of oversight within the government. These conditions are not yet in place in Afghanistan, although plans exist for their realisation, in the form of some kind of Rule of Law Advisor or Cell within the President's Office, linked to the National Security Council. Neither the permanent institutions of the MoJ, SC and AGO, nor the JRC in current or possible future form, have the political clout, freedom from factional influences, leadership or cross-

14 See below section 5.9.1 on CGs.

sectoral vision or overview to fill this role. In the Consultative Group structure, there is no reference point to pull together the different groups working on Justice, National Police and Law Enforcement, Afghan National Army, Public Administration and Economic Reform, and the Human Rights Advisory Group¹⁴. This results in linkages between critical areas not being forged and supported, for example:

Disconnects between sub-sectors

Particularly notable is the lack of real connection between the police sub-sector, under the Ministry of Interior (MoI), and the judicial sub-sector, which might be evidenced by formal liaison functions, joint trainings, etc. The problems with the transfer of responsibility for the Prisons Service from the MoI to the MoJ have created another potential disconnect, as the commission designed to facilitate the transfer was not set up, resulting in an inadequate transfer of resources and skills to the MoJ. This transfer also inferred the assignment of a new lead donor, in this case Italy, which was then required to start work on this sub-sector at a late stage (March 2003).

This multi-sectoralism makes the job of sub-sectoral lead donors significantly more complicated.

4.6. The under-supported Independent Administrative Reform and Civil Service Commission and its links to Rule of Law

Of the commissions set up under the Bonn Agreement, the Independent Administrative Reform and Civil Service Commission (IARCSC) is at once one of the most important and the most neglected. It is now receiving dedicated support from the World Bank, UNDP and DFID, but its progress to date has been limited. The Commission's priorities are of as much crucial relevance to public servants in the police and the judiciary as to other sub-sectors, and yet available documentation indicates that those particular public servants may not be included within reform plans. Priority areas identified in the Commission's plans that would be of critical value to Justice and Rule of Law-related public servants are:

- Revising the civil service legal framework
- Institutional and functional streamlining and development
- Initial work on the establishment of a management and administration training and development function
- Recruitment and appointment procedures for civil servants
- Civil service pay and salary review
- Accelerated budget execution and transfer of funds to the provinces

- Increased funding for the Priority and Reform Restructuring Programme to fund reform and salary expenses
- Development of a major public sector re-skilling and re-deployment programme

Of these priorities, civil service remuneration is undoubtedly the hottest topic, which is only being taken up one year into the Commission's existence, a year in which, inevitably, the corruption that stems from the failure to pay civil servants a living wage, has spread and taken root. Nowhere is the international community's unwillingness to make unsustainable short-term investments in the interest of long-term objectives more evident.

4.7. The underestimated importance of communications

The central importance of communications is revealed when we realise what failure to manage expectations can lead to in terms of insecurity and de-legitimisation of the state. With no strategic goal and objectives for the Rule of Law sector, the Government has not been able to come up with any communications strategies with which to inform or solicit the needs and opinions of the people, 80% of whom reside outside the infamous "Kabul bubble". At the time of writing, and within the frame of its uncertain future, the JRC is trying to launch a public awareness programme on its activities, but, as already described, this worthy effort will not include messages that cut across the spectrum of Rule of Law institutions.

15 As evidenced in AREU/World Bank: *How the Government Works in Afghanistan* and Human Rights and Advocacy Consortium: *Speaking Out: Afghan Opinions on Rights and Responsibilities*.

Innovative thinking on how to encourage growing interest in what the state might provide in this area¹⁵ has been lacking under the pressure of reacting to what are understandably perceived as more immediate concerns. Neither the Government nor the international actors have yet come up with a coherent plan for how to create a demand for the services that government could provide in this area. There does not yet seem to be consensus about whether to respond to existing demand, wherever it can be found, with services; to create demand for services through public education and awareness programmes and subsequent service provision; to create demand through provision of services; or to respond to insecurity by the provision of services. The new pragmatic integrated regional strategies finally show a push towards the latter.

Misunderstood delays in payment of police salaries

An illustration of how lack of communication can make a difficult situation worse comes from the police sub-sector. Money has been disbursed by UNDP through the Law and Order Trust Fund mechanism to the Ministry of Interior for salary payments. However, due to difficulties with administering the payroll system,

which is different from the system for other civil servants, police salaries have not been paid. There is confusion and disaffection about the responsibility and reasons for this. Given the precarious state of police morale, integrity, physical equipment and public image, further erosion of these is not advisable.

4.8. Untapped provincial resources

There is an increasingly pressing sense that not enough is known about the blend of traditional/customary, religious, and formal/secular practices in the different parts of the country. This is now changing with the increasing experience of the international community and its interaction with Afghans, with some studies underway¹⁶, and with the JRC's work on formalising, to some degree, alternative dispute resolution. It is becoming a platitude to note that there is no homogeneity of approach to these issues outside Kabul, although it is clear that there are forms of Justice, or at least dispute resolution, functioning universally in the provinces.

As is often the case, it has taken a while for actors to recognise that structures and some capacity persist in the provinces in a range of sectors. The new AREU/World Bank report on provincial public administration¹⁷ exposes some of the tabula rasa assumptions that often characterise international assessments. This means that public servants of many disciplines have been left uninstructed and unsupported during a two-year period when they could have been incrementally building at least a minimal government presence in the provinces. For example:

¹⁶ Thomas Barfield, *Afghan Customary Law and Its Relationship to Formal Judicial Institutions*. This forms the preliminary part of a project in which the Fletcher School at Tufts University, together with USIP and HDC will conduct case studies in a range of countries on customary practices and their relationships with formal justice systems.

¹⁷ AREU/World Bank: *How the Government Works in Afghanistan*.

Positive and negative aspects of existing provincial judicial staff

In practice, there are judges who act, believing themselves to be within the formal system, or, as in some cases, consciously becoming part of the traditional system. However, they lack enforcement capacity, which undermines their position and the principles they attempt to uphold. Furthermore, this means that much hinges on the skills and education level of the individual judges and the availability of legal resources, which appear to vary widely. This is an example of the failure to capture and exploit existing resources; however, it may be more than an omission, since it may also be construed as a failure to prevent the negative, corrupting influences of allowing inappropriate staff to continue malfunctioning in important, visible positions.

¹⁸ This refers to integrated provincial strategies now being attempted in Gardez and Kandahar, in direct response to the security and alienation problem.

The recent interest in assessing, co-opting and developing those existing resources comes at a late stage, and was driven reactively, by the imperative of security and concomitant alienation¹⁸. This is a positive development, but useful time has been lost.

4.9. Leadership and co-ordination for the Rule of Law

As described above, there is a lacuna in high-level Afghan vision and leadership for Justice and the Rule of Law, that has the sway to cut across factional, personality and institutional turf issues. Focussed political backing, national and international, is lacking for the overarching political project of establishing Rule of Law. Ownership is vital: legitimacy, respect and a shared culture of Rule of Law are the result of a properly formed contract between people and government, a contract that cannot be formed, although it could be sensitively facilitated, by outsiders. The powerful voices on this issue are not issuing from the obvious institutions, and hence cannot carry full force. The repetitive debate on whether Afghanistan must face a simplistic choice between peace and justice has had the effect of diluting or entirely suppressing strong messages on the subject.

4.9.1. Strengths and weaknesses in the Consultative Group process

¹⁹ Consultative Groups (CGs) are the key vehicles to support ministries in their preparation of the National Development Budget. There are 16 CGs, each corresponding to one of the National Programmes that make up the structure of the Budget. Each CG is headed by a Chair Ministry, with support from a donor or UN agency focal point. The rest of the Group is made up of representatives from the other ministries concerned with the particular National Programme, along with officers from major donors, UN agencies and NGOs. Advisory Groups (AGs) have been established to ensure that cross-cutting issues (gender, environment, humanitarian affairs, human rights, M&E, and counter-narcotics) are mainstreamed effectively in the work of the CGs, and thereby reflected in policy framework and the Development Budget. See: <http://www.afghanistangov.org/cg/index.html>.

²⁰ UN SG A/58/616: *The Situation in Afghanistan and its implications for Peace and Security*, December 2003.

The Consultative Group structure¹⁹ is a commendable design to channel and organise the different actors along lines that support a rational, nationally-owned, and internationally-comprehensible process. The latest report of the Secretary-General to the Security Council notes that the process has succeeded in becoming the main co-ordination mechanism for government, donors and UN agencies²⁰. The Aid Co-ordination Unit in the Ministry of Finance has made continuous efforts to improve the process, including organising a workshop in August 2003 at which many of the issues below were discussed.

The fact that the groups relevant to the Rule of Law sector are spread, but not connected, across several groups, bears witness to the lack of integration. Furthermore, those sub-sectoral groups are not normally characterised among the success stories, especially the Justice and National Police and Law Enforcement CGs. Successful groups share characteristics with what are seen as the successful ministries: strong, reformist national leadership, sound international advice provided tactfully, ideally by consultants with some shared cultural background with their Afghan counterparts, a manageable-sized group of key actors. The criteria for success in this case do not tend to include strong links to or understanding of the will of the people; some opinion-makers tend to explain that it is too early for this. Others, with longer-term and more sustainable vision, contend that it is never too early to start.

Advisory groups suffer, almost by definition, from an inability to effectively access all relevant CGs, and from the lack of enforceable accountability mechanisms.

“ The creation of a transitional focal point is essential... an individual of proven strategic vision, political weight and the trust of the President.

Structures will always be vulnerable to the personalities that do (and do not) fill them. In Afghanistan, as in perhaps all transitional or weak states, the role of personalities far outshines the role of institutions. This is as true of the international community as of the national one. Thus the comparative strengths and weaknesses of the CGs are, in part, an illustration of the characters, capacities and experience of the actors around the table, both Afghan and international, but also of the actors' interpretation of their roles.

Finally, the functionality of the weaker CG's would be markedly improved were there more focus on providing administrative, financial and management skills to the key Afghan institutions involved in them, presumably through the CG Support Group.

4.9.2. The role of international actors

Each CG has a lead donor whose role, laid out in a broad Terms of Reference, is to provide support to the Afghan leading institution of the group. The lead donor role was designed to take up the slack deliberately left by UNAMA's light footprint approach. Roles were assigned through self-selection, and not through a process conditional on meeting competence criteria, with predictably mixed results. Where government capacity and vision is weak, the lead donor inevitably takes on an even more vital and difficult role. Lead donors can become isolated: while on the one hand they are calling for commitment and assistance from other donors, those others may assume that, given their lead position, the lead donor has the situation covered. Given the different experiences, cultures and priorities of donors, there is a need to co-ordinate and support them, and to find diplomatic ways in which to hold them to account where there is no strong government counterpart to provide the appropriate check and balance.

4.9.3. UNAMA's subdued voice

It is into this gap that UNAMA, the neutral voice of the international community and guardian of the Bonn process, might be expected to step; but, in the absence of a dedicated senior voice at this level in the person of the Senior Rule of Law Advisor, supported by the Secretary-General's Special Representative (SRSG) and his or her two Deputies, the opportunity has not yet been seized. In their absence a strategic plan of work aimed at building government institutions and ensuring political support for key reforms has failed to materialise. It has not proved easy to identify a person with the appropriate blend of seniority, relevant substantive background and political skills to match the needs of this position, and who is willing to commit two years to living in Kabul.

Complicated UNAMA human rights structures provide a further example: the diverse structures and reporting lines for different

21 For example, advisors within different pillars of UNAMA, advisors to the AIHRC and Human Rights Investigators.

22 Investigators, normally, through DPKO – the UN’s Department of Peacekeeping Operations, and Advisors, through OHCHR, the UN’s Office of the High Commissioner for Human Rights.

types of UNAMA human rights officers²¹, recruited through different channels²², and the addition of human rights responsibilities to the roles of the Political Affairs Officers, have contributed to fragmentation and frustration, high turnover and extended position vacancies. With no clear policy or strategy, these issues have remained unresolved for two years, and UNAMA has been criticised for failing to act as a leader on human rights issues. Structural designs for tighter integration are now under consideration, and provide a good opportunity to consider what objectives and functions those new structures would be used to achieve. However the Senior Human Rights Advisor position still remains vacant after six months.

The arrival of a new SRSG, and the re-orienting of the UNAMA mission to the new transitional phase must surely offer an opportunity to put renewed weight and vigour behind these issues, with the establishment of the Rule of Law as the crowning principle of a work programme aimed at supporting the institution-building of government.

4.9.4. Resources and mechanisms for delivery

Interestingly, almost no interlocutors suggested that financial resources were currently the issue, but more the competency and coherence of the assistance provided.

Donors do not claim to be the sole arbiters of best practice but, like everyone else, actors with good intentions and insufficient resources, learning as they go, working to solve difficult problems in a challenging environment. However, it may not always be easy for donor countries, especially a donor unused to direct implementation or de facto sectoral programme management, to handle the complex issues of sequencing, prioritisation, pace and absorption capacity in the field in which they work. The choice of modes of delivery, whether direct implementation, appointment of expert advisors, sub-contracting to NGOs or consultancy firms, should ideally be driven by strategic objectives and competency of the delivery mechanism in question. Such rationales are not always evident. Short-term thinking can also create difficulties, such as the concentration of capacity-building and other resources on the JRC with no exit or transition strategy; this has led to neglect and further disaffection of the permanent institutions of Justice.

Advisory roles

Much assistance is delivered through the appointment of advisors. Interpretation of the advisory role is always a stumbling block. In conflict and post-conflict nation-building assistance, concerns about sensitivity, ownership and cultural respect further, and rightly, complicate matters. The net result is often watered-down

“...establishing the Rule of Law is a deeply political, multi-sectoral project that must be Afghan-led.

interpretations that focus more on information gathering and transmission to advisors' own line management than on actual training and mentoring. The other end of the spectrum can be the over-bearing and domineering provision of advice that seeks to go beyond its mandate and run the system by itself, paying scant attention to national and local capacities and concerns. Self-evidently, a role is only as good as the person who fills it. Kabul is packed with foreign advisors and consultants, and inevitably, some are excellent and some less so. The ability to transfer skills, and to push progress tactfully without coercing it, is a rare talent. A simple test of how effective and involved advisors to national institutions are is how much time they spend physically within the institution they are mandated to assist. It is almost universally the case that where advisors work principally among those they advise, they are more effective and certainly have better relationships, for example the current situation at the AIHRC.

5 Conclusion

The unique experience of the Afghans and the international community as they grapple with reconstructing Justice and the Rule of Law in Afghanistan offers much food for thought for other conflict and post-conflict situations. The constraints are palpable, and the efforts to make progress numerous and energetic, if sometimes disparate. Actors are working feverishly under a spotlight of international interest that is expected to wane soon, despite a political situation of alarming precariousness.

Transitions such as these are times of special needs and gifts. In Afghanistan, still struggling to emerge from conflict, the continuing transition could provide an opportunity for forging a new social contract through the implementation of the Constitution, an Afghan blend of the indigenous with formal approaches, with the assistance and oversight of the international community. Justice and the Rule of Law, the underpinnings of the nation state, are at the heart of this contract. The United Nations, far from being irrelevant, belongs at the forefront of such an effort, with its particular experience in transitions and nation-building, and its unique status. For donors and technical assistance providers, there are important opportunities to build on existing experience in what is still considered a relatively new sector of assistance, and to bring solid, intelligent programming skills to bear in places where, until now, specialists in technical details have set the agenda.

The work of this sector in establishing the Rule of Law is a deeply political, multi-sectoral project that must be Afghan-led. It requires clear-sighted contextual, historical and risk analysis, strategic vision, planning and co-ordination from the highest levels. It demands long-

term commitment from all stakeholders, but also flexibility to adapt plans to the changing political and resource situations presented in challenging periods of conflict and post-conflict transition. It needs the recognition that technical assistance resources must be backed up with matching administrative, financial and management assistance resources. It also asks the internationals who come to assist, to lay aside their visions of a neat and tidy world, and to make a genuine effort to work progressively, realistically and sensitively with what already exists.

Afghanistan's troubles did not begin with 9/11, nor will they end with the new Constitution or elections. However, these important milestones provide crucial opportunities to take stock, to take advantage of what hindsight has suggested, and to forge a path for the reconstruction of Justice and Rule of Law in Afghanistan that is both deeply strategic and rigorously practical.

6 Recommendations

All Key Stakeholders

- Affirm the central importance of establishing the Rule of Law as an overarching, political project that is linked to, but not only a subset of, Security Sector Reform

ATA

- Create a temporary Transitional Rule of Law Focal Point or Cell in the President's Office
- Develop a concise Rule of Law strategic plan comprising a strategic vision and programme priorities for the Second Transitional Period to assist the ministries in their work

ATA/UNAMA

- Ensure a key role and strategic submissions for the Transitional Rule of Law Focal Point/Cell at donor and political conferences during the Second Transitional Period

UNAMA

- Strengthen UNAMA's strategic and institution-building support for Rule of Law through the SRSG, Deputy SRSGs, Senior Advisors and a redesigned work plan

International Community

- Share more broadly the burden of donor support for Rule of Law
- Provide ongoing financial, administrative and management training support in tandem with any technical support
- Support Rule of Law Focal Point/Cell, and relevant Consultative Groups through

- periodic independent analysis, monitoring and evaluation and training missions
- the creation of external reference groups of experts in key sectoral areas, who can be called on during the transition for advice and support

6.1. Affirm the central importance of establishing the Rule of Law as an overarching, political project that is linked to, but not only a subset of, Security Sector Reform

This is a generic recommendation, applicable beyond Afghanistan, and is the central message of this analysis. It calls on all stakeholders to consider, from the very outset, what they understand by “the Rule of Law” and its role in achieving and maintaining peace while reconstructing war-ravaged institutions of state. This affirmation should be used to inform strategic thinking across sectors by administrations and those that aim to assist them in rebuilding societies sapped by conflict.

6.2. Create a temporary transitional Rule of Law Point or Cell in the President’s Office

The creation of a single focal point is essential, especially after the JRC’s tasks under the Bonn Agreement are completed. The creation of a Cell within the Office of the President will provide the necessary political guidance. The Cell could include the Advisor Minister for Legal Affairs, with advisory support from the Policy and Oversight function of the National Security Council, and others identified by the President’s Office to ensure both sufficient weight and linkage with the Security Sector Reform programme.

Given the destabilising effects of having single persons entrusted with such highly important and political roles, the oversight function from the NSC will be vital, as will clear communication of the fact that the role is temporary until the inauguration of the National Assembly (although it could be reviewed and renewed beyond that). In a functioning democracy, such a cell would be unnecessary. The Cell’s transitional role is to empower and build consensus between the relevant permanent institutions of government such that they can implement technical programmes according to their competence and the priorities set.

The terms of reference of this Cell could include:

- a. draw up through consultation with stakeholders, principally those in government, UN and relevant lead donors, a simple strategic vision and clear short, medium and long-term priorities for the “Rule of Law” project; this would include plans for the implementation of key Rule of Law-related clauses in the Constitution.

- b. advise and lead relevant government institutions on the use of these priorities as a basis of institutional plans of action that would include the public investment programmes they prepare and submit to the national budget process;
- c. form and lead a Strategic Review Committee of those institutions with the responsibility to review, adapt and amend those institutional plans according to changing circumstances (financial, political, security, etc.);
- d. review and amend the strategic priorities according to experience during the transitional period;
- e. liaise with the relevant CG structures, providing advice and emphasis according to the strategic priorities agreed at the higher level. The CG's role remains to provide policy recommendations, to review projects and programmes for compliance with policy and strategic priorities, and to prepare and monitor submissions for the National Development Budget;
- f. ensure preservation of institutional memory of JRC, and appropriate transfer of its work to permanent institutions.

Thus, for example, the Cell would be able to ensure that institutional priorities served a common purpose, that geographical priorities equally reflected political needs, and that a balance was struck between the reinforcing objectives of attainment of stability, security, and access to justice.

The Cell would benefit from leadership by an individual of proven strategic vision, political weight and the trust of the President. This leadership would ensure understanding of the political context within which the Rule of Law project is developed, and the prioritisation of a pragmatic response to the needs of a delicate transition towards a stable and empowered government and state. The option of an international advisor to this individual should also be considered. Such an advisor should be of sound and proven experience, tact, and substance, with a broad-based political understanding of Rule of Law issues and the ability to act where required as a hands-on mentor.

6.3. Develop a concise Rule of Law strategic plan comprising a strategic vision and programme priorities for the Second Transitional Period to assist the ministries in their work

Discussions during the run-up to the Presidential elections, should lead to the development of a strategic vision and programme priorities whose implementation could begin before the elections, given that they will be in the interest of any future President. The distinctions between short, medium and long-term objectives

are fundamental to any transition activities, no more so than in the Rule of Law. Activities aiming at all three may take place concurrently. It is suggested, for example, that in the short term stability should be the priority, with legitimacy in the medium term, and access to justice for all and compliance with international norms as the long-term goal and defining principle that informs each objective in each phase of development. Those distinctions and their rationale need to be understood and accepted by the Cabinet and relevant state institutions, and by the international actors that support them. The stability phase needs to be particularly carefully monitored and worked through, as stability is a rationale that can provide a fertile breeding ground for abuses.

The development of a short strategic vision statement would allow for some debate as to what the nature of the new state should be (for example, enabling, centralised, etc.) but with an emphasis on what is practicable and realistic. It should allow for a phased approach, such that the priorities that flow from it can be adjusted to the context as necessary, providing room for differently tailored solutions, or priorities, for different geographical areas. Thus the differences in custom and practice across a range of areas of life in parts of Afghanistan would be taken into account. In principle, it would seek to avoid the rightly abhorred, although still not infrequently implemented, “template approach” to solutions in the Rule of Law, while recognising that lessons from elsewhere are always useful if adapted to the current situation.

With a strategic vision to provide a framework, tools should be developed to help stakeholders diagnose problems and envision solutions within a phased strategy. In this way, stakeholders can be facilitated to set priorities according to which ministries’ institutional work plans should be designed. A workshop with key stakeholders could take them through this process, including the identification of practical benchmarks, timelines and programming options for stability, legitimacy and the Rule of Law.²³ Through the process of this analysis, HDC has developed some preliminary tools that may provide a useful start in this regard.

This report does not set out to make substantive, programmatic recommendations; however, to give an example, in the “stability” phase, the priority should be on training, equipping, and deploying to the areas of greatest need, the police and judiciary, while rationalising structures around strategic principles at the central level. In the “legitimacy” phase, the focus shifts to the capacity building of institutions to deliver services and the orientation of people inside and outside the institutions towards the delivery of and access to services.

While implementation of plans must always be a matter of political priority – and in this case of promoting stability – the principles of law must be those attracting universal respect. This is consistent with

²³ Examples of such indicators might be: timely indictment and due process according to existing codes and procedures, increased range and quality of formal services available, increased rate of take-up of those services, human rights violators suspended from positions and prosecuted in fair trials, improved perceptions of personal safety and security, improved community confidence in police ability to prevent and investigate crime, and to protect human rights, etc.

the Constitution, and is consistent with a phased approach. Law must reflect universal principles, and must be consistent with the state's international obligations. It is up to government to manage the development of state institutions and the application of these laws in a manner consistent with the protection of its citizens and the maintenance of national security.

6.4. Ensure a key role and strategic submissions for the Rule of Law Focal Point/Cell at donor and political conferences during the Second Transitional Period

This would be a priority task of the Rule of Law Cell, with assistance from the key donors involved in the Strategic Review Committee and CG, and from UNAMA. The Cell should play a key role at any major conferences, and should be in a position to advocate for increased donor buy-in (from both existing and new donors) to the plans presented through them. This will be a critical step in working with donors to re-envision how they will work with the Government and each other on these issues during this phase. A major donor conference with some limited political elements is expected to take place in March or April 2004.

6.5. Strengthen UNAMA's strategic and institution-building support for Rule of Law through the SRSG, Deputy SRSGs, Senior Advisors and a redesigned work plan

This effort should be led by the new SRSG, among whose key attributes must be a commitment to and proven ability to drive this issue. S/he should exploit the opportunity of his or her arrival to establish the Rule of Law as the crowning principle of the mission's work programme aimed at supporting the institution-building of government. Not only should this inform the mission's internal work plan, but it should also be a strongly communicated message to the ATA and the donors. Backed up by two Deputy SRSGs, as currently envisaged, to focus on political and institution-building issues respectively, a Senior Rule of Law Advisor will still have an important role to play in providing the linkage between UNAMA and the Rule of Law Cell, and in being purely dedicated to this issue.

Thus, UNAMA should design an internal programme of work to enable it to engage more vigorously on Justice, Rule of Law and human rights issues. A primary task would be supporting the new Rule of Law Cell in its strategic oversight role, and providing guidance and shape to the new CG support groups in the relevant fields; this could include networking and convening expert groups

to act as sounding boards and resources to feed into CG discussions, given that CGs will not always have technical or programming specialists among their members. Another task might be to review and revise the role and output of UNAMA technical advisors. Critical to leading this effort is the leadership of relevant DSRSs together with the Senior Rule of Law Advisor and the Senior Human Rights Advisor. UNAMA should redouble its efforts to fill these positions. Both advisors should have the personal charisma and background to be perceived as strong, yet neutral. If existing recruitment procedures are not yielding fruit, alternative methodologies like broader advertising outside the system and its networks should be attempted.

6.6. Share more broadly the burden of donor support for Rule of Law

Appropriate donors should be encouraged to shoulder a larger share of the burden, especially given the new emphasis advocated for by the Rule of Law in this report. This could mean both acting as technical and managerial resources for the Rule of Law Cell, but also providing more strategic assistance to the CG and its support group. This does not only entail funding, but also technical and, particularly, political support. The positive gains of the Constitutional Loya Jirga will only be sustainable with continued political support, and donors have a vital role to play here. Furthermore, given the very early stage of development at which Afghanistan stands, there are real opportunities here to make constructive linkages between relief and development that is, rightly, a preoccupation of the donor community. Improved donor relations within this sector in recent months increase the opportunities here.

Possible nations and national groups, with track records in this area, but with different political weights and colours that could be brought to bear on the issues are Canada, the EU and the EC, the UK and the US. In this way, establishment of the Rule of Law can be more closely aligned with Security Sector Reform, while ensuring that it is seen as a strategic objective in its own right.

6.7. Provide ongoing financial, administrative and management training support in tandem with their technical support

Financial, administrative and management back-up support to key national officials must be provided as part of any technical assistance package. Technical advisors must not be put in a position either where they become de facto managers, or where they are providing advice outside the areas of their expertise. This is in recognition of the fact

that technical training is ineffectual if institutions are not being built around the technical expertise. CG working groups should consider implementing reviews of the mechanisms used to deliver assistance to ensure that these organisational development needs are met.

6.8. Support Rule of Law Focal Point/Cell, and relevant Consultative Groups through periodic independent analysis, monitoring and evaluation and training missions the creation of external reference groups of experts in key sectoral areas, who can be called on during the transition for advice and support

The work of the Rule of Law Cell, Strategic Review Committee, the CGs and their support groups (where they request it), would be complemented by periodic visits from an external support team. Modelled on this review team, such a group could be composed of “outsiders” well-versed in Afghanistan and their sectoral specialisms who could provide a useful barometer of progress, offering advice and support in the implementation, monitoring, evaluation, adjustment and integration of the strategic and institutional plans. Such a team could be used as workshop facilitators, etc.

In addition to this, informal reference groups of “wise women and men” could be formed around key issues. These would comprise people of broad experience in relevant subjects whose expert and neutral advice could be called on as required, and who could act as sounding boards and prompts for recognising trends, likely pitfalls etc. Such reference groups should operate during the transitional period, and then have their roles reviewed and revised.

Undoubtedly, useful generic lessons and analysis will flow from their interaction with the Afghan situation.

7 Appendices

7.1. Persons consulted

Afghan Transitional Administration

Abdul Fatah *Director, Kabul Detention Centre*

Abdul Mohammed Daqueeq, *Attorney General, Attorney General's Office*

Abdul Rahim Karimi, *Minister, Ministry of Justice*

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Mosefan Ehsan Rohani, *Herat Regional Office, Ministry of Women's Affrs.*

Roz Mohamad Dalili, *Governor, Wardak Province*

S.A.J. Qazawatwol, *District Judge, Wardak Province*

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Oscar Schlyter, *Political Officer, EU*

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7.3. The Centre for Humanitarian Dialogue (HDC): A brief description

The Centre for Humanitarian Dialogue is an independent and impartial organisation, based in Geneva, Switzerland, dedicated to dialogue on humanitarian issues, the resolution of conflict and the alleviation of its effects.

It was officially launched in January 1999, registered under Swiss law as a Geneva-based independent international institution for promoting humanitarian dialogue. Its work is guided by:

- The belief that dialogue about humanitarian issues can unite the divided, create a common vision and build trust between people.
- The recognition of the intrinsic value of dialogue with its respect for individuals and their different views.
- The belief that dialogue can lead to the discovery and acceptance of a peaceful means of resolving dispute.

Its objectives are:

- To provide a pragmatic, practical and informed voice in the dialogue on policies affecting those involved in conflicts; and to contribute to the identification and dissemination of policy solutions.
- To contribute, through the facilitation of humanitarian mediation, to the reduction of identified humanitarian consequences in certain specific conflicts.

- To establish an international reputation as an organisation that is reliable, discreet, astute and informed by humanitarian integrity. It aims to become the first choice for conflicting parties who see value in humanitarian mediation, and who seek a neutral, independent and impartial facilitator.

Modus operandi

The Centre's comparative advantages lie in its agility, independence and its knowledge, understanding and experience of humanitarian issues. Its financial base, staff skills and governance relations are designed to foster this approach. Discretion and the maintenance of a low profile are indispensable to humanitarian mediation, and the Centre's reputation is likely therefore to become known principally in professional, political and humanitarian circles rather than to a wider public. Its work on policy issues, inevitably more public, must take this into account.

Programmes

Mediation work is ongoing in Aceh (Indonesia), Philippines, Myanmar, Sudan and the Middle East. Policy programmes include the Small Arms and Human Security Programme, the Humanitarian Negotiators' Network, Dialogue on Armed Groups and Humanitarian Action, and Politics and Humanitarianism, the Justice Reconstruction Project, Dialogue on Monitoring Mechanisms for International Humanitarian Law.

Venue

The Centre also provides a venue in Geneva for other organisations to conduct meetings of a humanitarian nature, free of charge.

Funding

The Centre is supported by donors including the Governments of Denmark, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

7.4. Team member biographies

Martin Griffiths

Team Leader

British lawyer by training, he worked in UNICEF in Asia, in the British Diplomatic Service, and in British NGOs, latterly as Chief Executive of ActionAid. In 1994, he rejoined the UN as Director of the Department of Humanitarian Affairs (which became OCHA) in Geneva, and then from 1998 as Deputy to the UN Emergency Relief Co-ordinator in New York. During this period he also served as UN Regional Humanitarian Co-ordinator for the Great Lakes

(1996-97) and UN Regional Co-ordinator in the Balkans (1999) with the rank of UN Assistant Secretary-General. Since 1999 he has been Director of the Centre for Humanitarian Dialogue in Geneva.

Christian Ahlund

Judicial and Legal Expert, Deputy Team Leader

A senior partner in the Swedish law firm Sju Advokater, he is the chairman of the Human Rights Commission of the Swedish Bar Association, and of the Human Rights Committee of the Council of Bars and Law Societies of the European Union; Comité Consultatif de Barreaux Européens (CCBE). Since September 2002, he has been Executive Director of the International Legal Assistance Consortium (ILAC), an international NGO whose objective is rebuilding judicial systems in post-conflict areas around the world. Since the mid '80s he has conducted frequent assignments in the fields of human rights and international law for the Swedish Government, the International Commission of Jurists and the OSCE, in South Africa, Central America, and Bosnia-Herzegovina. His work with ILAC has taken him to a range of post-conflict countries including Angola and Afghanistan.

Natalie de Oliveira

Human Rights and Prisons Expert

A French and Canadian citizen, she has an academic background in Political Science and History sciences (Université de la Sorbonne-Paris). From the mid-90s she has worked on monitoring and advocacy on human rights abuses with Amnesty International, and with UN Human Rights Missions in Haiti, Rwanda, Burundi and Bosnia-Herzegovina. In 2001, she joined Penal Reform International, to open their office in Burundi and implement a new penal reform programme in the Great Lakes region. She is now based in Paris, and continues to lecture and publish on human rights issues, and conducting research on peacekeeping and human rights protection mechanisms.

Zelda Holtzman

Police Expert

A community and anti-Apartheid activist since 1976 until the unbanning of political organisations in South Africa, she has been engaged in community development work in the fields of community law and restorative justice whilst working as a Project Manager for the Community Peace Foundation, an NGO affiliated to the University of the Western Cape. She was recruited and integrated to the South African Police Service in 1995 to facilitate the transformation of the police service through policy and strategy development, drafting of implementation plans and processes and engaging in advocacy work. She was appointed Deputy Provincial Commissioner of Police in the Western Cape and served in both

operational and support capacities until May 2003. She currently acts as Executive Director of the Restorative Justice Initiative, an NGO involved in the training of communities at street level in alternative dispute resolution and problem solving techniques.

Bashir Ghazialam

Judicial and Legal Expert

Born in Afghanistan, he emigrated and completed his education in the USA from the mid-80s. His educational background includes history and comparative international law, and he now practices as a lawyer in California. He has maintained close links with his home land, participating in the December 2002 one-week Rome-based roundtable and conference entitled, "The Role of Law in a Modern Afghanistan", sponsored by the International Development Law Organization, working as consultant and advisor to the Ministry of Justice and Judicial Reform Commission from January to April 2003 in Kabul, and acting as a volunteer director and general counsel to two non-profit organizations in San Diego, whose purpose is to provide basic relief and educational supplies to vulnerable groups in Afghanistan through Afghan-American communities based in California.

Antonia Potter

Co-ordinator

With a Masters in Voluntary Sector Organisation from the London School of Economics, she has worked for eight years for a variety of humanitarian and development NGOs in institution-building, policy and advocacy work, and programme development and management. Starting out with the team setting up Médecins du Monde's USA operations in New York, she then moved to work with Save the Children UK and Health Unlimited in Cambodia, before becoming Concern Worldwide's Country Director in East Timor, and briefly, in Afghanistan. Since mid-2002 she has worked as a consultant, researching humanitarian and development aspects of peacekeeping operations for a DFID-funded study run by Kings College London, developing projects for the Centre for Humanitarian Dialogue in Geneva, and acting as Concern Worldwide's Representative in Geneva.

At the preparatory and wrap up workshops, orientation, expert review and advice were provided by:

Peter Marsden

Afghanistan Expert

An Arabist by discipline, Peter Marsden has worked for the past fifteen years as Information Co-ordinator of the British Agencies Afghanistan Group, where he has provided information to NGOs, UN agencies, donors, the media and academics on humanitarian

needs in Afghanistan and on the wider political, economic and cultural context. He has undertaken extensive research on Afghanistan and is author of *The Taliban: War, Religion and the New Order in Afghanistan*, published by Zed Books (recently updated under the title *The Taliban: War and Religion in Afghanistan*). Another publication is *Afghanistan: Minorities, Conflict and the Search for Peace*, published by Minority Rights Group. He was a Research Associate at Queen Elizabeth House, Oxford from 1995-2000 where he contributed to a study on the social and economic impact of conflict that was published in 2001.

**AFGHANISTAN
ADMINISTRATIVE DIVISIONS**



