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State-building and rule of law: lessons from Afghanistan?

Sari KOUVO

Research Division • Rome, March 2009

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Sari KOUVO
Brussels, 24 February 2009

EXECUTIVE SUMMARY

This paper provides an analysis of the ongoing stabilization and state-building process in Afghanistan with a focus on rule of law. It has two aims: first, to situate rule of law reform within the framework of the broader stabilization and state-building effort in Afghanistan. Second, to analyze if and how the internationally-supported and implemented strategies for rule of law reform are contributing to the promotion of rule of law in Afghanistan.

Since 2004, the common perception about state-building in Afghanistan has changed from it being viewed as 'almost on track, give or take a few major challenges' to it being defined as 'almost failed, but savable'. Over the same period of time, the common perception about rule of law has shifted from rule of law issues being recognized as marginalized to becoming *the* issues to be addressed if the state-building process in Afghanistan is to be saved.

The sustainability of rule of law reforms is dependent on reforms being efficient, practical, and accepted. According to the synergistic approach to rule of law reform in post-conflict or fragile situations, rule of law reform needs to be related to the overall state-building process and address the political constraints on rule of law. It should be focused not only on formal components of rule of law, but also on the complex task of establishing a rule of law-based society that enjoys wide public legitimacy. Reform efforts must take into consideration the laws, processes and institutions that already exist. If rule of law reform is approached as an integral part of other reform processes, as a process that is equally technical, political and cultural, and that is intrinsically national (and often local), then it is possible that rule of law reforms will become sustainable.

The rule of law structures in Afghanistan, including the formal and informal justice sectors, the prison system and the security sector, have been severely damaged by the consecutive conflicts and repeated changes of government. The conflict-induced refugee flows have resulted in an

exodus of educated and professional people from Afghanistan, and in an erosion of professional knowledge and institutional memory. The many changes of government and the effort by each government to leave its mark on the governance and justice systems have resulted in multiple ideas of governance and often conflicting laws co-existing within the Afghan government and justice institutions.

While governance and the religious laws imposed by the Taliban were extreme, brutal and discriminatory, they were also only one more governance/rule of law structure forcibly imposed by a centralized government in Kabul, or in Kandahar in the case of the Taliban, whose power and legitimacy remained contested. From the perspective of coherent governance and rule of law reform, it is not the brutality of one regime that has the biggest impact, but the attempts by consecutive, short-lived governments to leave their mark on the governance and rule of law structures by plastering new policies, regulations and laws onto already fragmented governance and rule of law structures.

Afghanistan remains a fragmented nation where the power of the central government to impose rules and regulations remains contested. Governance and upholding rule of law and security has never been a consideration for the central government alone in Afghanistan. The power of central governments in Afghanistan has been (and continues to be) dependent on negotiations and tradeoffs with local power structures. Modern and institution-centered approaches to governance exist side by side and are impregnated with tribal governance structures that, although they lack a formal legal basis, are the primary source of authority in large parts of Afghanistan. In a similar vein, both government-centered (formal) and customary and community-based (informal) justice and security mechanisms continue to exist in parallel in Afghanistan. The formal and informal structures are also compounded into each other: formal institutions are marked by the networks and systems of allegiance existing in tribal/informal structures and the decisions by formal justice institutions are often colored by informal justice. Similarly, informal dispute resolution mechanisms can and do adapt to changing formal structures.

Over the past few years, the international community supporting the state-building process in Afghanistan has increasingly recognized that lack of focus on rule of law, including security sector reform, during the early years of the state-building process in Afghanistan have undoubtedly contributed to the boom of organized drug-related criminality and corruption in Afghanistan. It is also increasingly recognized that the compromised disarmament process and the institutionalized culture of impunity have contributed to the declining legitimacy of the government and to the declining security situation. As a consequence, efforts have been made to develop more coherent policies and promote coordination of donor efforts.

The adoption of the Afghanistan National Development Strategy and the strong focus on justice in the National Justice Strategy are positive steps, at least in the sense that there are now coherent policies for justice and security sector reform in Afghanistan. However, the Afghanistan National Development Strategy and the National Justice Strategy are strategies developed for a post-conflict country with a more or less equal level of government presence and development in all parts of the country. They are not suitable strategies for a country returning to conflict and with extreme discrepancies between government presence and development among different parts of the country. For example, the National Justice Strategy lacks the important focus on both justice *and* security sector reform that is necessary for the conflict and post-conflict state. Justice and security are always intimately entwined, but even more so in post-conflict situations where discrepancies between justice and security sector reform can contribute to the establishment of a corrupt and criminal security force and a marginalized justice sector that does not muster to assert its independence vis-à-vis the political and security sector structures.

Reconstructing a rule of law-based society is obviously not an easy task, especially not in situations with weak existing rule of law frameworks and little public legitimacy for formal rule of law institutions and for what can be perceived as foreign ideas, as is the case in Afghanistan. However, rule of law reform in Afghanistan has largely been focused on the formal aspects of rule of law or what could be described as technical

rule of law reform, while largely ignoring the political and value-based dimension of rule of law.

Too often, the international community has failed to demand accountability of the Afghan government on issues of rule of law and justice, and the Afghan government has failed to take a decisive stand on justice related matters. The focus has also been on *bringing* rule of law to Afghanistan rather than on analyzing to what extent existing frameworks can be adapted to serve both the needs of international relations and access to justice for Afghans.

It is easier to identify lessons than to learn them. The legitimacy crisis of the international presence and government, and the extreme security challenges that Afghanistan faces, makes it very difficult to prioritize changes. However, the following are particularly important considerations:

- **A political commitment to rule of law that goes beyond words would have a radical impact on decision-making by both the Afghan government and its international partners.**

- **Efficient rule of law interventions, whether in the justice or in the security sector, should be forceful, based on local needs, and minimalist.**

- **Impunity of government officials is a security concern**.

- **Justice reform should be national- and civilian-led.**

CHAPTER ONE

1.1 Introduction

Recent decades have seen a rise in conflict followed by humanitarian crises and internationally-led or -supported stabilization and state-building processes. One of these sites of conflict and international intervention is Afghanistan.

Rather than clear successes, the post-Cold War international interventions in conflict and fragile state situations have brought about transitions from conflict to awkward peace, and from failed states to dependent states. Immediate transitions from conflict to peace are rare or illusionary. As has been the case with the intervention in Afghanistan, the post-intervention phase is also often marked by a return of past conflicts and it unearths new and sometimes unexpected challenges. While the immediate aftermath of a conflict and the early stages of state-building have received much attention, the consolidation phase, often marked by an increase in corruption, criminality and insecurity, seldom enters into the analysis about if and how international interventions should be conducted. Some of these challenges are due to insufficient understanding in state-building processes about the long spectrum between war and peace and the at best awkward relationships between international and national and local interests in challenging post-conflict environments. The lack of clear typologies makes it difficult to develop prescriptive theories and – consequently – practical and adapted reform and reconstruction strategies.

These observations are certainly true for the post-9/11 intervention and subsequent stabilization and state-building efforts in Afghanistan: seven years after the US-led military intervention to uproot terrorism and oust the Taliban regime, the new Afghan government is facing a legitimacy crisis due to extensive corruption and inability to ensure security and (licit) economic development; the US-led Operation Enduring Freedom continues to conduct counterterrorism and counterinsurgency operations

as part of what was expected to be a short-term intervention; the North Atlantic Treaty Organization (NATO) led International Security Assistance Force (ISAF), together with the Afghan National Security Forces, is engaged in active combat in large parts of eastern and southern Afghanistan as part of what was expected to be a peace-keeping operation; and the United Nations (UN) and the wider international community have been forced to radically change assumptions about how to consolidate the state-building process in the now sovereign Islamic Republic of Afghanistan.

The growing number of international interventions in countries emerging from conflict has led to many hard-learned lessons about the role of the international community and challenges for newly established governments, and about the different steps needed to build peaceful nations. Some of the lessons identified are: that the steps taken in the immediate aftermath of the conflict (the peace agreement) may determine the success or failure of further efforts; that peace is seldom won without at least some justice; that rule of law/justice, governance, and security sector reforms are interdependent; that state-building is as much about politics and ensuring popular buy-in as it is about institution-building; that local ownership is needed, but that local *elite* leadership does not equal local ownership; that short-term and piecemeal approaches to governance, rule of law and security sector reform are likely to yield short-term and contradictory results; and that although the importance of coherent policies and coordination is stressed, developing a common vision and coordinating efforts between civilian and military actors, government and non-governmental actors, and international and local leadership is at best difficult.

Given the complexity and socio-economic consequences of the conflict in Afghanistan, it would have been naïve to expect that the stabilization and state-building process in Afghanistan would be anything but challenging. However, some of the problems that Afghanistan is facing today, including increased socio-economic gaps between the elite and urban and rural poor, corruption, criminality and insecurity, might have been avoided with more coherent policies in the areas of governance, rule of law and security, and policies that are based on what is desirable and

possible from the perspective of the many groups in Afghan society rather than what the Afghan elite and the international presence in Afghanistan (jointly or individually) decided to support. The past years' increased focus on rule of law and on the inter-linkages between rule of law and security sector reform is welcome, but it should be recognized that neither rule of law nor security sector reform are magic wands for change – the success of any strategy is dependent on it broadly benefiting and being accepted by local constituencies.

1.2 Aim and Outline

This paper discusses the ongoing stabilization and state-building process in Afghanistan with a focus on rule of law. Since 2004, this author has in different capacities followed questions of rule of law in Afghanistan. Over this period of time, the common perception about state-building in Afghanistan has changed from it being viewed as 'almost on track, give or take a few major challenges' to it being defined as 'almost failed, but savable'. Over the same period of time, the common perception about rule of law has shifted from rule of law issues being recognized as marginalized to becoming *the* issues to be addressed if the state-building process in Afghanistan is to be saved. This author worries that although the newfound focus on rule of law is based on recognition that a lawless state is not much of a state, the Afghan theatre is also being used as a test ground for new methods of operation for international organizations, including the engagement of international military forces in rule of law reform. If the tests fail they will leave some thorns in the side of the implementing organizations, but the real losers will be the Afghan people.

The aim of this paper is twofold: first, to situate rule of law reform within the framework of the broader stabilization and state-building effort in Afghanistan. Second, focusing on the internationally-supported and implemented strategies for rule of law reform, including strategies supported and implemented by NATO, analyze if and how these contribute to the promotion of rule of law in Afghanistan.

This study is divided into five chapters. Following this introductory chapter, chapter two, Conflict and State-Building in Afghanistan, provides an overview of recent conflict and the last seven years of state-building process in Afghanistan. Chapter three, Rule of Law and State-Building in Afghanistan, discusses key aspects of civilian-led rule of law reform in Afghanistan. Chapter four, The Role of International Military Actors in Promoting Rule of Law, analyses rule of law issues relating to the international military presence in Afghanistan. Chapter five concludes the study and identifies possible lessons to be learned.

1.3 Concepts and Definitions

There are few commonly agreed upon definitions of the key concepts used in this report, such as post-conflict, stabilization, state-building, rule of law, and security sector reform. In fact, the use of these concepts can hide to what extent they are fraught with tensions and the lack of definitions may result in the concepts being over-burdened by explicit and implicit meaning and content, which again may lead to oversimplified policies and practices.

An important lesson identified from the increased international involvement in peace-keeping is that peace-building requires attention to long-term stabilization and state-building. The US-led military intervention in Afghanistan was not a peace-keeping endeavor, but it forced the UN and the wider international community to engage in what is often defined as post-conflict stabilization and state-building.

This paper will not use the concept of post-conflict in relation to the state-building process in Afghanistan. The term post-conflict is usually equated with "the end of organized, armed political struggle" and in the best case scenarios with the signing of a peace agreement.[1] There was pos-

[1] Charles T. Call, ed. *Constructing Justice and Security after War* (Washington, D.C.: United States Institute for Peace, 2007), p. 379.

sibly a lull, but never an end to the organized, political struggle in Afghanistan and no peace agreement has been attempted. This report will instead refer to Afghanistan as a state emerging from conflict. The term emerging is used not as a concept designating a before and after, but as a concept designating a continuum marked by advances and setbacks. The author recognizes that the term emerging may also be too optimistic, as a war is currently being fought in Afghanistan.

The term stabilization is used to cover "…those actions that *expressly* and *purposefully* aim to address conflict risk and minimize the chances of short-term reversion to violent conflict".[2] The term state-building refers to internationally-supported processes focusing on rebuilding of state structures in states emerging from conflict or crisis. The term state-building is used as a framework concept for the many different processes needed to enable a country emerging from conflict to re-establish government functions, including political bodies and government, security sector and justice sector institutions.

At a policy level it is possible to claim that it is the role of the international military to stabilize and for the civilian components to state-build; however, at an operational level the stabilization and state-building efforts mix and mission creep adds to this mixing. It should also be noted that the focus on international military's stabilization role and the international diplomatic and development actors' role in state-building may hide the fact that at the core of both stabilization and state-building efforts are (or should be) the government and the institutions of the host nation; and that the legitimacy of an international stabilization and state-building mission is dependent on the legitimacy of and popular support for that government and its institutions. This author also uses the term state-building with acknowledgment of the inherent tensions between international interests and national interests and between reform and support in the re-building of government structures. It is increasing-

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[2] *UN/World Bank PCNA Review: In Support of Peacebuilding: Strengthening the Post Conflict Needs Assessment*. UN/World Bank (January 2007), p. 5.

ly recognized that state-building, the re-establishment of government functions after a conflict, should be nationally-owned and that the international community should play a supporting role. In practice, however, national ownership often translates into national elite leadership and international support often translates into internationally-dictated and implemented reform strategies.

The term rule of law has many shades of meaning, but it can be described through basic principles of rule of law:[3] For there to be rule of law, law should be disclosed (known), it should be applied in accordance with due process (predictable and transparent) and nobody should be above the law. That is, in a rule of law-based society, it should be possible for people to plan ahead and if a person is arrested s/he should be able to quickly find out why s/he is arrested and what process will be applied to her or him. Rule of law-based governance also ensures that there are checks and balances on abuses of power by government officials and others – nobody should be beyond the reach of the rule of law. This definition of rule of law includes a formal (minimalist) approach to rule of law that focuses on the legal and institutional framework for rule of law:

In a rule of law-based society, laws are adopted in a certain way and there are specific institutions that implement them in a pre-defined way. However, it *also* includes substantive or value-based components: For a rule of law-based society to function, it is not only necessary that laws are adopted and applied, they also have to enjoy public legitimacy and reflect shared values.

There is a difference between rule *by* law – a system where the leadership of a state uses law to impose their will, and rule *of* law – a system where the adoption of laws is regulated to promote its legitimacy and where one of the law's key functions is to limit the abuse of power. There is also a distinct difference between formal and codified law and what is

[3] For an overview of the development of the notion of rule of law, see Brian Z. Tamanaha, *On the Rule of Law. History, Politics and Theory* (UK: Cambridge University Press, 2004).

defined as informal and customary law: roughly simplified, the aim of the former is to strive toward non-discriminatory application with a focus on the rights and duties of the individual, while the latter uses bias (knowledge of the local context) and is focused largely on the needs of communities.[4]

Rule of law reform in countries emerging from conflict is a far from straightforward endeavor. At a technical level, rule of law reform includes justice reform; it is intertwined with aspects of disarmament, demobilization and reintegration processes; and it includes key aspects of security sector reform and civil administration reform. In this paper, rule of law reform is used as a framework concept for justice sector reform, security sector reform (including disarmament) and rule of law aspects of governance.

This author is inspired by what Jane Stromseth, David Wippman and Rosa Brooks call a synergistic[5] approach to rule of law. A synergistic approach to rule of law involves:

1. An ends-based and strategic approach. The focus should not be on reforming laws and institutions alone, but it should be on the ulti-

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[4] For more in-depth analysis, especially of customary law and informal dispute resolution mechanisms in Afghanistan, see Thomas Barfield, Neamat Nojumi and J. Alexander Their, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', at http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf (last visited 25-08-2008) and other USIP customary law resources relating to Afghanistan at http://www.usip.org/ruleoflaw/projects/ customary_law_afghanistan.html (last visited 25-08-2008). See also Sarah Gallaghan, *An Assessment of the Durability & Enforcement of Decisions in the Informal and Formal Justice Systems in Kabul: Based on NRC's Case Work in Kabul* (Kabul: Norwegian Refugee Council, 2007), and Rebecca Gang, *Observations on NRC Client Choices of Forum in Property Dispute Resolution in Kabul* (Kabul: Norwegian Refugee Council, 2006), 'Bridging Modernity and Tradition: Rule of Law and the Search for Justice', *Afghanistan Human Development Report 2007*, Centre for Policy and Human Development (Kabul University) and UNDP, 2007.

[5] Synergism, "in biological terms, refers to 'the action of two or more substances, organs or organisms to achieve an effect of which each is individually incapable". However, the term also has the theological meaning of "a theory that both human effort and divine grace are needed to achieve regeneration", Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, (Cambridge: Cambridge University Press 2006), pp. 80-81.

mate goals of building rule of law. This may involve a focus on cross-cutting issues that may challenge or contribute to building rule of law (informal structures, cultural biases, discrimination etc.).

2. An adaptive and dynamic approach. An adaptive approach builds on what already exists and on the perceptions and needs of ordinary people. It recognizes that wholesale imports of rule of law may clash with existing laws, legal culture and public perceptions of law. A dynamic approach recognizes that rule of law is a work-in-progress where new achievements always create new challenges.

3. A systemic approach. Rule of law reform cannot be done in a vacuum. It demands understanding of how institutions operate as a system. On the one hand, this means understanding that rule of law reform is deeply political and will be resisted by those who may lose out as a result of loss of impunity and increased government control and accountability. On the other hand, this means understanding that justice reform is an integral part of disarmament (promoting government monopoly on violence), security sector reform and civil administration reform, and that justice reform may be very short-term without a well-functioning civil society and media that act as watch dogs on government action.

When unpacking the three components of the synergistic approach to rule of law, Stromseth et al emphasize that a key to understanding rule of law reform is humility. It is about knowing that "[f]or all our sophistication, our understanding of how societies develop and change is still shallow".[6] This, and an understanding that every intervention, whether minimalist or expansive, whether civil or military, will have unintended consequences and bring to light challenges the interveners did not even know existed, should guide both the interventionist agendas and efforts to mend what was broken prior to or by the intervention.

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[6] Stromseth et al, *Can Might Make Rights?,* p. 81.

1.4 Previous Research and Methodological Considerations

This paper is multi- and cross- disciplinary. The project is founded in contemporary discussions about post-cold war and post-9/11 developments of international law, and changing approaches to humanitarian interventions and the use of force in international law.[7] It also draws on the vast academic scholarship on state-building and rule of law, and on the increasing amount of research on the ongoing state-building process and rule of law in Afghanistan.[8]

However, most of the up-to-date analysis of developments, including in specific sectors, in Afghanistan can only be found in non-academic sources.[9]

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[7] See, Anne Orford, *Reading Humanitarian Interventions: Human Rights and the Use of Force in International Law*, (New York: Cambridge University Press, 2003), Anne Orford (ed.), *International Law and its Others*, (Cambridge: Cambridge University Press, 2006), Karin van Hippel, *Democracy by Force: US Military Intervention in the Post-Cold War Era*, (Cambridge: Cambridge University Press, 2000). Taylor B Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure*, (Oxford: Oxford University Press, 2007) and Tarscision Gazzini, *The Changing Rules on the Use of Force in International Law*, (UK: Manchester University Press, 2005) and Garland H. Williams, *Engineering Peace. The Military Role in Postconflict Reconstruction* (Washington, D.C.: United States Institute for Peace, 2005).

[8] See, Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction*, (Oxford: Oxford University Press, 2005), James Doddins, Seth G Jones et al., *The UN's Role in Nation-Building: From the Congo to Iraq*, (Santa Monica: Rand Corporation, 2005) and Karin van Hippel, *Democracy by Force: US Military Intervention in the Post-Cold War Era*, (Cambridge: Cambridge University Press, 2000), Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (New York: Oxford University Press, 2008) and William Maley, *Rescuing Afghanistan*, (Australia: UNSW Press, 2006). Key sources on rule of law reform include, Stromseth, Wippman and Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, (2006) and Call, *Constructing Justice and Security after War* (2007). Rule of law reform is also addressed in the many guidelines and toolboxes developed by international governmental and non-governmental organizations; see the OHCHR rule of law tools at: http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx (last visited 18-07-2008) and the UN DDR tools, see at http://www.unddr.org/tools.php (last visited 18-07-2008), the United States Institute for Peace work on model criminal codes and serious crimes, see: http://www.usip.org/ruleoflaw/index.html (last visited 18-07-2008), the OECD-DAC SSR tools, see: http://www.oecd.org/document/33/0,3343,en_2649_34567_33800289_1_1_1_1,00.html (18-07-2008).

[9] Readily used sources include reports from think tanks such as the International Crisis Group; see: http://www.crisisgroup.org/home/index.cfm?id=1266 (last visited 18-07-2008) and Afghanistan Research and Evaluation Unit; see: http://www.areu.org.af (last visited 18-07-2008) and reports from human rights organizations, such as the Afghanistan Independent Human Rights Commission, http://www.aihrc.org.af/ (last visited 18-07-2008), the Afghanistan Justice Project, http://www.afghanistanjusticeproject.org/ (last visited 18-07-2008) and Human Rights Watch, http://www.hrw.org/doc?t=asia&c=afghan (last visited 18-07-2008).

The methodological inspiration for this research has been drawn from interdisciplinary legal research.[10] While the focus of this research is on law, it views law in context and in relation to politics and other relevant fields. The bulk of the research was conducted as desk research at the NATO Defense College in Rome. However, this research also makes use of the author's previous policy-related engagements on rule of law issues in Afghanistan. In addition, the author conducted two interviews in Brussels, five interviews in Rome, 21 interviews in Kabul (including one group interview) and four telephone interviews during the time period March to July 2008. The interview-based information is used as background information. On occasion, when an interviewee used language that is particularly descriptive or when a quote from an interviewee can be used to exemplify a dominant point of view s/he will be quoted. The interviews were semi-structured and open-ended. For reasons of confidentiality the identity of the persons interviewed will not be disclosed.

[10] The many different works of critical legal scholarship and socio-legal scholarship emphasize the need to analyze international law in relation to the patterns of inclusion and exclusion that it creates and in its specific historical, social and cultural contexts. See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester: Manchester University Press, 2000) and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2004).

CHAPTER TWO

CONFLICT AND STATE-BUILDING IN AFGHANISTAN

This chapter provides a brief overview of the recent conflicts and the last eight years of internationally-supported stabilization and state-building processes in Afghanistan. It aims to show some of the complexities of re-building the Afghan state, focusing particularly on questions of political leadership and local ownership of the adopted policies and strategies. The chapter is divided into three parts. First, it provides a brief introduction of conflict in Afghanistan. Second, it provides an overview of the military intervention and international military presence in Afghanistan. Third, it discusses the key steps of the state-building process, including recent efforts to consolidate the process.

2.1 Conflict in Afghanistan

The recent history of the Afghan nation is one of consecutive conflicts, failed reform processes and pervasive poverty. However, the primary motivation for international interventions in Afghanistan has never been the cause of the Afghan people; instead other political, military or strategic interests have guided interventions.[11] Afghanistan has been the battlefield for both imperial and cold war battles. Currently, Afghanistan is one of the many battlefields of the US-led war on terror; it is a site where the UN attempted to prove that a light footprint approach to state-building is more successful than heavy handed international involvement; it is where NATO continues to test its capabilities for out-of-area operations and crisis management; and it is where the European Union attempts to figure out if and how it is possible to develop a coherent European policy on development and security among its own institutions, with its Member States, and in coordination with NATO.

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[11] William Maley, *Rescuing Afghanistan*, (Australia: UNSW Press, 2006), p. 26.

The modern Afghan state was established in 1919 as a buffer state between Russian and British interests in central Asia.[12] Afghanistan is a multi-ethnic and sparsely populated nation with stark differences between rich and poor, urban elites and urban and rural poor. Power, governance and perceptions of justice remain firmly grounded in systems of patronage, tribal custom and religion. The power of the Kabul-based central governments is dependent on negotiations with local, often ethnic- or tribal-based leadership, and the success of the central government is dependent on its ability to woo local leadership and provide effective governance/rule of law, security and livelihoods to local populations. The extremely high level of illiteracy, lack of educated people and distrust of new and foreign ideas pose additional challenges to the promotion of governance and rule of law.

The ethnic and centre-periphery tensions in Afghan society have been compounded by decades of conflict. Since the Communist *coup d'état* in 1978, there has been more or less continuous conflict in Afghanistan. The Soviet Union invaded Afghanistan in 1979. The decade-long occupation was fiercely resisted by the commanders of the Afghan *mujahidin* (holy warriors) supported throughout Pakistan by the US and others, making Afghanistan one of many cold war battlegrounds. Many of the commanders, the Afghan "warlords",[13] continued to gain political and military

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[12] Rubin, Barnett R. *The Fragmentation of Afghanistan* (second edition). New Haven, Conn.: Yale University Press, 2002, 19. One of the most troublesome legacies of British colonial interests in Afghanistan is the 'Durand Line', which was drawn in 1893 as a border between Afghan territory and British India and cuts through what are now the Pashtun dominated areas in southern Afghanistan and northern Pakistan. Faced with a declining security situation, the Afghan government has repeatedly challenged the Pakistani government for failure to stop insurgents from crossing the border. The Tripartite Commission, a grouping of Afghan, Pakistani, US and NATO representatives established in 2003, has recognized the importance of cross-border infiltration. See Hodes and Sedra, 'The Search for Security in Post-Taliban Afghanistan', *Adelphi Papers* No. 391, 2007, pp.20-21.

[13] Antonio Giustozzi defines "warlords" as "military leaders who emerge to play a de facto political role, despite their lack of full legitimacy", Antonio Guistozzi, '"Good State" vs. "Bad Warlords"? A Critique of State-Building Strategies in Afghanistan', Working Paper, no. 51 (London: LSE Crisis States Programme, 2004). However, as Cyrus Hodes and Mark Sedra point out, "one person's warlord is another person's legitimate political leader", Cyrus Hodes and Mark Sedra, 'The Search for Security in Post-Taliban Afghanistan', Adelphi Papers No. 391, 2007, p. 10. Legitimacy may also vary over time, and access to public power can be used to legitimize warlords, the process of warlords-turned-democrats or warlord democratization is by now well known in Afghanistan and elsewhere, Barnett R Rubin, 'Peace-Building and State-Building in Afghanistan: Constructing Sovereignty for Whose Security?', Third World Quarterly, vol. 27, no. 1, 2008, pp. 177-185.

power over the subsequent periods of conflict and they remain actors feared by many and respected by some in Afghanistan. Ethnic, tribal and community belonging and social class dictate to large extent who will be feared, who will be respected and who will be ignored in Afghanistan. The decade-long, brutal occupation and the internationally supported resistance left hundreds of thousands dead and many more homeless.[14] However, the Soviet occupation also had an important effect on governance and rule of law structures: many government procedures and laws still in force in Afghanistan stem from this era.

The fragile peace and government established after Soviet withdrawal only survived till 1992, at which point it collapsed because of political disagreements and attacks from paramilitary factions. In the ensuing civil war, the *mujahidin* factions that had been strategically united in the resistance against the Soviet occupation turned their arms against one other.[15] The failure of the peace process after the withdrawal of the Soviet forces was in part due to lack of international support, but was also a result of the many open and latent conflicts in Afghan society. The anarchy of the civil war contributed to the initial successes of the Taliban, a predominantly Pashtun fundamentalist movement emerging from Afghan refugee camps on the Pakistani border. After a period of chaos and violence with multiple claims to power, the Taliban seemed to offer coherence, security and rule of law, albeit through harsh dictate. However, the Taliban's fundamentalist, ruthless and discriminatory governance and law soon put fear into the Afghan population.

The Taliban period also pushed Afghanistan further into political seclusion and the Afghan people further into poverty. The anarchy of the civil war and the seclusion of the 1990s Taliban regime enabled Usama bin

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[14] For overviews of war crimes in Afghanistan 1978-2001, see Casting Shadows—War Crimes and Crimes against Humanity, 1978–2001: Documentation and Analysis of Major Patterns of Abuse in Afghanistan (Afghanistan: The Afghan Justice Project, 2005), Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity (New York: Human Rights Watch, 2005) and Afghanistan: Addressing the Past to Secure the Future (London: Amnesty International, 2005).
[15] Ibid.

Laden's Al Qaeda network and international terrorist elements to base themselves in Afghanistan. After the Al Qaeda administered attacks on the US Embassies in Tanzania and Kenya, the US responded by air strikes against targets in Sudan and Afghanistan. Now, if not earlier, the link between the Taliban and Al Qaeda was confirmed and the Taliban-governed Afghanistan was increasingly viewed by the international community as not only a "failed state" but also a "rogue state" and potential threat to international peace and security.[16]

2.2 The Post-9/11 International Intervention in Afghanistan

The post-cold war era has opened up new avenues for UN-mandated humanitarian intervention, including, under exceptional circumstances, humanitarian interventions with military means.[17] During the 1990s, the number of UN peace-keeping operations grew rapidly, some resulting in extensive internationally governed state-building operations and some including stabilization support from NATO.[18] However, those critical of international interventions have asked whether the new interventionism of

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[16] Matthew Fielden and Jonathan Goodhand, 'Beyond the Taliban? The Afghan Conflict and United Nations Peacemaking', *Conflict, Security and Development*, 1:3, 2001, pp. 5-32. The Al Qaeda and Taliban Sanctions Committee was established by the UN Security Council in 1999. The UN Charter Ch. VII sanctions regime, including assets freeze, travel bans and arms embargos, has been developed in resolutions, UN Doc. S/RES/1269/1999S/Res/1333/2000, 1390/2002, 1455/2003, 1525/2004, 1617/2005, 1735/2006 and 1822/2008.

[17] Of necessity, these developments have also resulted in reconsiderations of the limit of international interventions. The considerations of the Canadian-funded International Commission on Intervention and State Sovereignty, which developed the doctrine of the responsibility to protect, may be the best example of efforts to develop guidelines for humanitarian interventions, including military humanitarian interventions. See http://iciss.ca/report-en.asp (last visited 18-07-2008) and http://www.crisisgroup.org/home/index.cfm?id=2561&l=1 (last visited 1807-2008).

[18] NATO's original *raison d'être* stems from the cold war period; it is a trans-Atlantic defense alliance whose primary objective has been to protect Europe and Western values. For example, NATO continues to lead peace-keeping missions in Kosovo, Bosnia and Herzegovina and Macedonia. NATO has assisted the African Union missions in Sudan and it is supporting the mission in Somalia. The NATO missions have both enhanced and identified stumbling blocks in NATO's relationships with the UN and EU; see David S Yost, *Enhancing NATO's Cooperation with International Organizations*, (Rome: NDC Forum Paper, 2003). The recent establishment of the UN Peace-Building Commission is an effort to bring together and develop the UN's and its partners work in this area. See at http://www.un.org/peace/peacebuilding/ (last visited, 25-08-2008).

the post-cold war era is really about humanitarianism or if instead the 1990s was an era in which "virtue began to run amok?".[19]

Afghanistan originally was not one of the countries where the international community chose to intervene, though the humanitarian situation in Afghanistan during the civil war and Taliban period would have merited keener international focus. The UN mediation between the warring factions and the sanctions against the Taliban was limited in scope compared to interventions in other similar contexts.[20] However, the attacks on the World Trade Centre and the Pentagon on 11 September 2001 re-focused the world's attention on Taliban-governed Afghanistan.[21] Osama bin Laden and Al Qaeda were immediately identified as prime suspects for the terrorist attacks. When he addressed the nation on the evening after the attacks, President Bush emphasized that the US would make no distinction between the terrorists that committed the attacks and those who harbored them. On 12 September, the Security Council adopted a resolution stating that the attacks amounted to "a threat to international peace and security" and called upon states to bring the perpetrators, organizers and sponsors of the attacks to justice.[22] Security Council Resolution 1368 (2001) implied that this was a UN Charter Ch. VII situation opening up mandatory measures, including the use of force. The subsequent resolution 1373 (2001) makes explicit reference to UN Charter Ch. VII before listing actions necessary to combat terrorism.[23] It is notable that the use of force is not explicitly included in

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[19] Alejandro Bandana, 'From Peacebuilding to State building: One Step Forward and Two Steps Back?', *Development*, Vol. 48, No.3*,* 2005, pp. 5-15.

[20] Fatima Ayub and Sari Kouvo, 'Righting the Course? Humanitarian Intervention, the War on Terror and the Future of Afghanistan', *International Affairs,* Vol. 84, No. 4, 2008, pp. 645-656.

[21] For international law analyses regarding the war on terror, see Helen Duffy, *The 'War on Terror' and the Framework of International Law* (UK: Cambridge University Press, 2005) and Michael N. Schmitt and Gian Luca Beruto, eds., *Terrorism and International Law: Challenges and Responses* (San Remo: International Institute of Humanitarian Law and European Center for Security Studies, 2002).

[22] UN Doc. S/Res/1368/2001.

[23] The UN Security Council resolution 1373 (2001) is considered a landmark resolution as the Security Council here evokes its legislative power and makes mandatory decisions for its members and non-members alike. For discussion, see Eric P.J. Myjer and Nigel D White, 'The Twin Towers Attack: An Unlimited Right to Self-Defense?', *Journal for Conflict and Security Law*, Vol. 7, No. 1, 2002, pp. 5-17.

this list. NATO reacted even more forcefully. On 12 September, the North Atlantic Council agreed that if it could be determined that the attack on the US was directed from abroad, "it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all".[24] A few weeks later, on 2 October, NATO was convinced that the attacks had been an armed attack directed from abroad on a NATO Member State, that it could be regarded as an attack against all NATO Member States, and that necessary actions could include the exercise of the collective right to self-defense.[25] On 7 October, as the Taliban had failed to adequately respond to US ultimatums, the US and the UK reported that, in evoking the right to self-defense under UN Charter Art. 51, they had launched a military attack against Afghanistan.[26] Operation Enduring Freedom was to become the first major step in the US-led war on terror. The US and its allies did not want to repeat Soviet mistakes by relying on a heavy-handed foreign military presence. Instead, the strategy was to use international forces for air strikes and to rely on some of the *mujahedin* commanders that they had befriended during the Soviet era for the ground offensive.[27]

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[24] NATO Press Release 124 (12 September 2001).

[25] NATO Press Statement (2 October 2001), at http://www.nato.int/docu/update/ 2001/1001/e1002a.htm (last visited 05-07-2008).

[26] See UN Doc. S/2001/946 and UN Doc. S/2001/947. The full text of the October 7, 2001 letter from the American government to the United Nations Security Council can be found at http://www.globalsecurity.org/military/library/news/2001/10/mil-011008-usia09.htm. The UN Charter Art 2 forbids UN member states to use force against the territorial integrity or political independence of another state. The exception to this principle is found in Art 51, which under certain circumstances allows for the use of force as an act of self-defense. For general discussions, see Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (UK: Manchester University Press, 2005) and Leslie C Green, *The Contemporary Law of Armed Conflict* (UK: Manchester Univeristy Press, 2000). For a specific discussion about the use of self defense to legitimize the intervention in Afghanistan, see Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense,* American Society of International Law (2002).

[27] This strategic alliance of the *mujahedin* factions is referred to as the Northern Alliance. Astri Suhrke, 'A Contradictory Mission? NATO from Stabilization to Combat in Afghanistan', *International Peacekeeping*, Vol. 15, No. 2, 2008, pp. 214-236. However, there were small numbers of US special operations forces that were co-located with the Northern Alliance, directed airstrikes, and were also involved in some ground combat. See Christopher M. Schnaubelt, 'Whither the RMA?' *Parameters* 37 (Autumn 2007), p. 99.

The Security Council did not sanction the attacks on Afghanistan, although it approved of them post facto.[28] A Security Council mandate is not necessary for actions of self-defense. The attacks enjoyed wide political support, as a response to the 9/11 terrorist attacks and because the international community had been seeking a solution to the 'Taliban problem'. Nevertheless, international lawyers continue to debate whether the link between the Taliban and Al Qaeda was such that the US and the UK could legitimately attack the unrecognized Taliban government in order to defend themselves against Al Qaeda and whether the US and UK responses were proportional to the damage caused to the US.[29]

At the time of the intervention, neither the US nor its allies had envisaged a longer term military intervention, but it quickly became apparent that ousting the Taliban regime would not bring stability to Afghanistan. The Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions (hereafter, the Bonn Agreement) adopted in Bonn in December 2001, also called for the establishment of the International Stabilization Assistance Force (ISAF). ISAF was established in December 2001 with a mandate to assist the Afghan Interim Authority in maintenance of security in Kabul and surrounding areas in order to ensure that the Interim Authority and UN personnel could operate in a secure environment.[30]

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[28] UN Doc. S/Res/1386/2001.

[29] Antonio Cassese emphasizes that a military action for self defense should not go on further in time than the aggression, Antonio Cassese, 'Terrorism is also Disrupting some Crucial Legal Categories of International Law', *European Journal of International Law*, Vol. 12, 2001, pp. 993-1001. See also Niaz A Shah, 'Self-defence and Pre-emption: International Law's Response to Terrorism', *Journal of Conflict and Security Law*, Vol. 12, No, 1, 2007, pp. 95-126. Judith Gardam notes that as there was a punitive element in the post-9/11 attack on Afghanistan, there should under international law be a proportionality between the original act and the punishment: Judith G Gardam, 'Proportionality and the War on Terror', *Nordic Journal of International Law*, Vol. 74, 2005, pp. 7-8.

[30] UN doc S/RES/1386 (2001).

The UN Security Council has regularly extended ISAF's mandate.[31] NATO took command over ISAF in 2003.[32] Of the five phases of the NATO-led ISAF deployment, the assessment, preparation and expansion phases are completed. The NATO-led ISAF mission has at the request of the Afghan government expanded beyond Kabul.[33] The expansion has taken place in five stages: in 2003 and 2004, ISAF deployed in the north of Afghanistan, in 2005 ISAF was expanded to the west of Afghanistan, and in 2006 ISAF expanded to the south and east. The stabilization and transition phases are ongoing. A first step in the transition was the transfer of security for Kabul city from ISAF to the Afghan National Security Force. As of 25 November 2008, ISAF consisted of approximately 52,000 persons. The total of international forces, Operation Enduring Freedom included, is 67,000. The fifth phase, redeployment, remains a distant goal. The conflict between the Afghan government and ISAF, on the one hand, and the Taliban insurgency, on the other hand, has escalated dramatically since 2005, to the extent that Taliban are now operating in the provinces around Kabul. However, the armed conflict with the Taliban insurgency is only one of many security threats in Afghanistan. Organized drug-related crime and local conflicts fuelled by lack of governance and rule of law are adding to a highly volatile security situation.

The US-led military intervention into Afghanistan enjoyed extensive public support in Afghanistan. The deployment of ISAF was also welcomed, as it was widely recognized that Afghan security forces were not able to ensure security in the early phases of the state-building process.

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[31] UN doc S/RES/1413 (2002), 1444 (2002), 1510 (2003), 1563 (2004), 1623 (2005), 1707 (2006) and 1776 (2007).

[32] The NATO-led ISAF has a complex decision making structure and it has been criticized for lacking a unified policy and coherent practices. Political decisions about ISAF should be shaped by the North Atlantic Council, but the political leadership of ISAF remains in the capitals of the troop-contributing nations. The operational plans are made at the Joint Force Command and tactical decisions are taken at ISAF headquarters in Kabul and by the five regional commands in Mazar-I Sharif, Herat, Jalalabad, Kandahar and Kabul.

[33] UN doc S/RES/1510 (2003). A consensus decision as taken by the North Atlantic Council to expand ISAF across Afghanistan, but it was left to individual member states to decide on extent and type of deployment.

However, the answers to questions about the legal and political legitimacy of an international military intervention change over time: the legal legitimacy of an intervention will need to be reconsidered as the military presence changes content and shape and there tends to be a best before date when it comes to the political legitimacy of an intervention.[34]

2.3 The post-9/11 State-Building Process in Afghanistan

State-building processes are never politically neutral or simple affairs. The early stages of a state-building process in particular are likely to involve harsh power struggles amongst national actors, but also tension between national and international interests and preferred strategies. As a result of this tension there is inevitably a somewhat awkward relationship between the interveners and the host nation and between support and reform. Although it is widely recognized that there is no one-size-fits-all approach to state-building and that each country situation is unique, international support is never unconditional: The international community enters sites for state-building not only with the aim to help rebuild what was destroyed by the conflict but with a reformist agenda and expectations that the result of the construction process will be a nation-state that has a strong central government, a democratically elected parliament, a constitution that confirms a commitment to human rights and gender equality and an economic system adapted to the demands of a liberal market economy. The expectations on what kind of state structure and what institutions should be construed are closely interlinked with priorities in development aid. After the initial phase of humanitarian assistance, long-term development assistance demands a constant negotiation of donor and host nation priorities. The expectations of the international community are not necessarily negative, but clear analysis and attention to detail is needed from both the national and international counterparts when negotiating between (some) national and (some) international interests.

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[34] Stromseth et al., *Can Might Make Rights?* 2006, Ch. 2. See also discussions about civilian casualties in Chapter four.

The state-building process in Afghanistan has certainly not been a neutral affair. It has been marked both by harsh power struggles amongst those emerging as leaders after the US-led military intervention and by extensive demands for reform by Afghanistan's international partners, reforms that have often resonated poorly with what is possible in Afghanistan. The Bonn Conference brought together a number of the formerly warring factions (excluding the Taliban): many of the Northern Alliance commanders managed to cling to power at Bonn with the help of a mix of entitlement, since they had been part of the US-led coalition that toppled the Taliban regime, and coercion, since they had the power to destabilize the region where they had their power bases.[35] The presence of possible spoilers in the government structures has contributed to the marginalization of rule of law and justice considerations in the state-building process. A focus on rule of law was considered to be potentially destabilizing.[36]

The role of the UN and the international community identified at and around of the time of the Bonn conference was one where the international civilian and military presences would support an Afghan-led state-building and stabilization process. The UN Assistance Mission for Afghanistan (UNAMA) would focus on assisting and building the capacity of the Afghan government. Lead nations were identified for different areas of the reform process. At the donors' conference in Tokyo in January 2002, the Group of Eight nations were identified as lead nations for security sector reform.[37] The political rationale for choosing a light

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[35] For illustrative articles on power-brokering at the Bonn conference, see 'Key Afghan Warlord Rejects Bonn Deal', *BBC News*, 6 December 2001, at http://news.bbc.co.uk/2/hi/south_asia/1694867.stm (last visited 18-07-2008), Scott Baldauf, 'Afghans Wary of Warlord Rule', *Christian Science Monitor*, 27 November 2001 (last visited 18-7-2008). See also Gossman, Patricia, 'Truth, Justice and Stability in Afghanistan,' in Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*. New York: Cambridge University Press, 2006.

[36] Interviews, Rome, April 2008.

[37] Japan became lead nation for disarmament; the US became lead nation for military reform; Germany became lead nation for police reform; Italy became lead nation for justice reform and the UK became lead nation for counter-narcotics. Hodes and Sedra, *The Search for Security in Post-Taliban Afghanistan*, 2007, p. 52.

footprint approach and emphasizing Afghan ownership are convincing: the UN's experiences of state-building seemed to suggest that national leadership and ownership was preferred. What was ignored by the light footprint approach was to what extent the professional leadership had been depleted and the capacity in institutions had eroded during the decades of conflict. As a result, the light footprint approach contributed to initiating a state-building process with few checks and balances and with many conflicting, often donor-driven, development agendas. The lack of coordination and overall strategy has also resulted in development initiatives remaining largely focused on Kabul and on regional capitals, while less accessible areas have remained without major development interventions. The focus on the Kabul and on regional capitals has been especially prevalent in the area of institutional reform, including governance and rule of law.

The implementation of the Bonn Agreement has reinforced the unfortunate combination of questionable Afghan leadership and lack of coherence in the international political and development agenda. The convening of the Emergency Loya Jirga, election of the Afghan Transitional Authority, the holding of the Constitutional Loya Jirga and later the presidential and parliamentary elections were marked by, on the one hand, the strategy to appease some of the major commanders and their ethnically- and regionally-based constituencies by integrating them into the ongoing political and development processes and on the other hand, lightweight and intrusive efforts to promote democracy and reform Afghan institutions. The choice of partners or the strategy of including possible spoilers in government structures has contributed to the marginalization of rule of law, especially transitional justice issues. Thus the careful balancing act between appeasing and reforming has tilted towards appeasing at any cost.

The Afghanistan Compact (2006) aimed to overcome some of the shortcomings of the Bonn process through an increased focus on accountability by the Afghan government and through increased donor coordination. Its focus is on areas previously marginalized in the state-building process, including rule of law, security, and aid effectiveness. The bench-

marks of the Afghanistan Compact are streamlined with the Afghanistan National Development Strategy, a comprehensive development framework formally adopted by the Afghan government and its international partners in Paris in June 2008.[38] The Joint Coordination and Monitoring Body, established under the Afghanistan Compact, was designed to be a high-level decision-making body that would provide high-level oversight of progress in the implementation of the political commitments of the Afghanistan Compact and the National Development Strategy.[39]

By the time of the adoption of the Afghanistan Compact, the governance and rule of law deficit was already taking its toll on security in Afghanistan. By 2006, it was becoming increasingly clear that the Taliban had not been defeated in 2001 but merely driven away. In the south and south-east of Afghanistan open conflict between Taliban and other anti-governmental groups versus ISAF and Afghan National Security Force became prevalent again. The inability of the Afghan government to provide security, the local population's perception of the Afghan National Security Force (especially the Afghan National Police) as a security threat, and the lack of progress in governance and rule of law have all undermined the public's trust in the Afghan government. With a more rigorous focus on issues of political leadership and on what kind of reform and development initiatives would yield the best results in Afghanistan, the state-building process could have unfolded differently.

Classic international law scholarship has been criticized for addressing the state as a "black box":[40] in other words, for giving more importance to the relations between the states and not developments with-

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[38] The Afghanistan National Development Strategy is a three volume document reproducing the Compact pillars – security, governance, rule of law and human rights and social and economic development – and developing elaborate sub-sector strategies for each theme and each government institution, see http://www.ands.gov.af/ (last visited, 10-11-2008).

[39] Joint Coordination and Monitoring Body Terms of Reference 2006. An elaborate system of consultative groups reporting to the Joint Coordination and Monitoring Body has been established to oversee the implementation of the benchmarks of the Afghanistan Compact and National Development Strategy.

[40] David Kennedy, 'When Renewal Repeats itself: Thinking against the Box', *International Journal of Law and Politics*, Vol. 32, pp. 335-500.

in the state. It can be argued that the approach to state-building in Afghanistan has reproduced this pattern. An important aim of state-building process has been to establish a national government and government structures that can serve as political and development partners for the international community, or that, at least, will not pose a threat to other states regardless of how it treats its own citizens. This *inter*-national and instrumentalist view of a government/state has resulted in insufficient attention being given to how the new Afghan leadership has engaged with its constituencies, and to the fact that while nation states derive their legitimacy from being acknowledged by other nation states, governments derive their legitimacy from being accepted and trusted by the people they represent. A government that does not prioritize consultations with its constituents is likely to promote policies and choose institutional frameworks that benefit a selected few, resulting in potentially negative consequences for long-term stability.

2.4 The Bucharest Summit and the Paris Conference: Shaping-Up the Stabilization and State-Building Process?

Having identified lessons from the Bonn Process and the first years of the implementation of the Afghanistan Compact, the international community has over the past few years taken a number of steps to strengthen its presence and impact in Afghanistan. However, the changing policies are being adopted in an atmosphere of increasing mutual disillusionment between the Afghan government and international actors and increasing frustration by the Afghan people with both their government and the international presence in Afghanistan. The disillusionment and frustration is comprehensible: in 2008, 2,500 people have reportedly lost their lives in the conflict. Although exact figures are not yet available, this could include up to 1,000 civilians.[41]

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[41] In July 2008, more than 260 civilians lost their lives in Afghanistan. This was a higher casualty rate than for any other month in the last six years. Prior to July 2008, the month with the highest number of civilian deaths was June 2007, with 253 reported fatalities. See ACBAR. *Statement on the Protection of Civilians in Afghanistan* (August 1, 2008).

At the NATO Summit in Bucharest (2-4 April 2008) a new policy vision for the ISAF mission was adopted. The International Conference in Support of Afghanistan organized by the French government in Paris (12 June 2008) reaffirmed the international community's commitments to Afghanistan, but also demanded increased accountability of both the Afghan government and the international community in Afghanistan.[42]

The Security Council's decision to extend the ISAF mandate and to expand the UNAMA mandate provides a mechanism for ensuring if not increased efforts by the Afghan government, at least increased coordination and consolidation of the international efforts.

The ISAF policy strategy adopted at the NATO Summit in Bucharest in April 2008 is ISAF's first unified policy strategy.[43] This policy statement affirms that Afghanistan is NATO's key priority and that NATO is making a long-term commitment to Afghanistan. Guiding principles for the NATO intervention include support to Afghan leadership, commitment to a comprehensive approach and coordination between civilian and military actors as well as increased engagement with Afghanistan's neighbors, especially Pakistan. For the purpose of this paper, it is the commitment to Afghan leadership and the comprehensive approach that is of particular interest. In ISAF's Strategic Vision it is noted that "[o]nly Afghan-led security forces and institutions can ensure rule of law in the long term" (para. 5). Enabling the Afghan National Army – and broader the Afghan National Security Force – to conduct independent security operations should enable ISAF to move to a role of training and mentoring and subsequently to exit Afghanistan. The strate-

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[42] For an overview of issues discussed at the Paris Conference, see http://www.diplomatie.gouv.fr/en/country-files_156/afghanistan_498/international-conference-in-support-of-afghanistan-paris-12th-june-2008_6366/index.html (last visited, 18-07-2008). The Paris conference was one in the line of many high-level conferences on Afghanistan.

[43] For an overview of issues discussed at the Bucharest Summit, see http://www.summitbucharest.ro/en/1.html (last visited, 18-07-2008) and Karl-Heinz Kamp, 'After the Summit: Long-Term Consequences for NATO', *NATO Research Paper* No. 37, May 2008. Afghanistan has also been an obvious topic at previous summits.

gic vision for increased Afghan leadership focuses primarily on building the capacity of the National Security Force to lead and conduct security operations, but ISAF is also tasked to "help strengthen Afghan institutions required to fully establish rule of law, protect human rights and promote our shared values, while respecting Afghan culture and traditions" (para. 5). Committing ISAF to helping to strengthen rule of law institutions is presumably based in the recognition that security sector reform cannot be done without a focus on accountability and justice reform, but it can also be seen as committing ISAF to helping in areas that are outside its security mandate. While the ISAF Strategic Vision does not explicitly mention rule of law when outlining the areas that will fall under UNAMA leadership, rule of law is presumably viewed as part of the "…coordination of the overall civilian effort, improved civil-military coordination, political leadership and governance" areas placed firmly under UNAMA control.

The Paris Conference focused on an analysis of the challenges to the state-building process and on identifying priorities. UNAMA had prepared a hard-hitting press statement for the conference, demanding greater coordination, coherence and aid effectiveness from the international community, but also demanding that the Afghan government demonstrate greater accountability and increased anti-corruption efforts.[44] The Paris Conference was preceded by a civil society meeting, and the conclusions of this meeting also emphasized increased aid effectiveness and increased attention to the nexus between impunity and human rights violations.[45] Justice reform was identified as a matter of urgency. The actual outcome document of the Paris conference was more diplomatic in its tone and, some argue, non-committal, but does reaffirm

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[44] UNAMA, Afghanistan to Forge 'New Deal' with International Community in Paris, *UNAMA Press Release*, 10 June 2008.

[45] See civil society, human rights and private sector recommendations of the International Civil Society and Private Sector Forum in Support of Afghanistan (24 May 2008), at http://www.diplomatie.gouv.fr/en/country-files_156/afghanistan_498/international-conference-in-support-of-afghanistan-paris-12th-june-2008_6366/international-civil-society-and-private-sector-forum-in-support-of-afghanistan-24th-may-2008_6367/final-civil-society-and-private-sector-recommendations_11422.html (last visited 16-07-2008).

a focus on a comprehensive approach and targeted efforts for economic development, aid effectiveness, institution-building (including in the area of rule of law) and anti-corruption.[46]

The comprehensive approach can be seen as having two basic components: first, it is based on a recognition that security cannot be ensured without equal attention to governance and development (substantive component); and, second, it is focused on enhancing cooperation between key civilian and military actors in Afghanistan (operational component). That is, the comprehensive approach is, on the one hand, an analytical tool *against* single-minded focus on security *or* governance *or* development and *for* an approach that views each sector as equally important and inter-linked and, on the other hand, a practical approach that aims to ensure that all relevant institutions share information and cooperate.

Several of the persons interviewed by this author emphasized that Bucharest and Paris provided "a nice bag of goods" and that "now we need to find out how to make use of them".[47] However, there was consensus that increased engagement (greater numbers of institutions and people involved) or increased coordination do not necessarily translate into better policies and action. One interviewee noted: "What we need in Afghanistan is a 'minimalistic approach'".[48] A number of interviewees expressed outright concern about the sudden "surge" to "save Afghanistan": a critical interviewee suggested that "the international community is increasing its focus on Afghanistan, not because we are committed to Afghanistan, but because we are committed to sharing the burden of failure".[49] The importance of more broadly defined Afghan leadership was emphasized. One interviewee noted "We [the international community] should not continue

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[46] Declaration of the International Conference in Support of Afghanistan issued under the Authority of the Three Co-Chairs President Nicolas Sarkozy, Hamid Karzai and Secretary-General Ban Ki-moon, 12 June 2008.
[47] Interview (Kabul, June 2008).
[48] Interview (Kabul, March 2008).
[49] Interview (Rome, March 2008).

to view the Afghan government as an entity needing guidance… As long as we do not treat the Afghan government as a sovereign government, we should not be surprised that the Afghan public believes that it is the international community and not the Afghan government that runs the country."[50] It was repeatedly emphasized that state-building can be assisted, but that the "real weight in state-building has to come from inside".[51]

[50] Interview (Kabul, June 2008).
[51] Interview (Brussels, May 2008).

CHAPTER THREE

RULE OF LAW AND STATE-BUILDING IN AFGHANISTAN

The previous chapter provided an overview of some of the major challenges of the stabilization and state-building process in Afghanistan, including the results of political decision-making and lack of understanding of existing and possible structures in Afghanistan. This chapter will provide a more detailed overview of rule of law-related reform processes in Afghanistan. The chapter aims to show the consequences of ad hoc and piecemeal approaches to rule of law reform, but also the consequences of reforms based on poor contextual knowledge and lack of local buy-in. The chapter is divided into three parts. The first part discusses rule of law reform in general terms. The second part discusses disarmament and transitional justice as core components of rule of law reform in a country emerging from conflict. The third part discusses justice, security sector and prison reform as the major building blocks of rule of law reform.

3.1 Toward Rule of Law in Afghanistan

Rule of law is a key component of a functioning state and as such a key component of state-building. Rule of law reform in countries emerging from long-term conflict is, as is noted in the UN Secretary General's landmark report on the issue, "a daunting, often overwhelming task".[52] Rule of law reform in countries like Afghanistan that are emerging from decades of conflict will involve disarmament, addressing legacies of the conflict (transitional justice) and governance, justice and security sector reform. Moreover, rule of law, whether approached from a formal perspective (laws, institutions) or a substantive perspective (values, practices),

[52] UN Doc. S/2004/616, para. 3.

cannot be brought by international agencies. Disarming, addressing legacies of the past, and reforming the justice system, have to be based on extensive knowledge of existing rule of law structures and grounded in peoples' trust in the emerging state and in national perceptions of justice. The international community can play an important supporting role, but a synergistic and ends-based rule of law reform process does demand national ownership, as this is the only way that a national rule of law culture can be built. However, not every national leadership is conducive to rule of law reform and national leadership does not equal peoples' ownership of reform processes. Lack of political will to rule of law reform on the part of a newly established government, is not uncommon.

Recent years have seen the development of an impressive amount of policy and scholarly work on rule of law reform in post-conflict societies.[53] Rule of law reform as part of state-building processes has tended to focus on analyzing and tackling the immediate consequences of conflict, and on rebuilding legal and institutional frameworks. These efforts typically include practical efforts to re-establish rule of law infrastructure through drafting laws, building police headquarters, court houses and prisons. The consequences of the conflict on the people's trust in formal institutions and the consequences of transition, including corruption and organized crime, often receive less attention.

Charles Call notes that "[b]ecause postwar crime rarely focuses on foreign personnel or threatens to reignite the war, it receives little attention from the international media. Yet postwar crime waves pose tremendous challenges for the reconstruction of state institutions, for the legitimizing of new democratizing regimes, and for the quality of justice and everyday life".[54] Comparative studies have shown that there is a rise in both economically motivated crimes (kidnappings, robberies, white-collar crime and gang-related violence) and domestic violence after conflict.[55] As noted by Paddy

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[53] See footnotes 7-8.
[54] Call, *Constructing Justice and Security after War*, 2007, p. 378.
[55] Call, *Constructing Justice and Security after War*, 2007, p. 378-382.

Ashdown, "[c]rime and corruption follow swiftly in the footsteps of war, like a deadly virus. And if the rule of law is not established very swiftly, it does not take very long before the criminality infects every corner of its host".[56]

The rule of law structures in Afghanistan, including the formal and informal justice sectors, the prison system and the security sector, have been severely damaged by the consecutive conflicts and repeated changes of government. The conflict-induced refugee flows have resulted in an exodus of educated and professional people from Afghanistan, and in an erosion of professional knowledge and institutional memory. The many changes of government and the effort by each government to leave its mark on the governance and justice systems have resulted in multiple ideas of governance and often conflicting laws co-existing within the Afghan government and justice institutions. For example, since the adoption of Afghanistan's first constitution in 1923, Afghanistan has gone through seven constitutional reforms.

While governance methods and the religious laws imposed by the Taliban were extreme, brutal and discriminatory, they were also only one more governance/rule of law structure forcibly imposed by a centralized government in Kabul, or in Kandahar in the case of the Taliban, whose power and legitimacy remained contested. The Taliban laws were also rarely codified, so they were easier to ignore (and overcome) after the conflict than the many reforms made during the Soviet period or in its immediate aftermath. From the perspective of coherent governance and rule of law reform, it is not the brutality of one regime that has the biggest impact, but the attempts by consecutive, short-lived governments to leave their mark on the governance and rule of law structures by plastering new policies, regulations and laws onto already fragmented governance and rule of law structures.

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[56] Paddy Ashdown, 'International Humanitarian Law, Justice and Reconciliation in a Changing World', *The Eight Hauser Lecture on Humanitarian Law*, New York, 3 March 2004, at http://www.nyuhr.org/docs/lordpaddyashdown.pdf (last visited 23-08-2008). When suggested for the post of Special Representative of the Secretary General in Afghanistan, Lord Ashdown included rule of law as one of the issues that would be his absolute priorities. See Financial Times, 12 February 2008.

When discussing rule of law and especially the challenge of reforming rule of law structures in Afghanistan, it is important to keep in mind that Afghanistan remains a fragmented nation where the power of the central government to impose rules and regulations remains contested. Governance and upholding rule of law and security has never been a consideration for the central government alone in Afghanistan. The power of central governments in Afghanistan has been (and continues to be) dependent on negotiations and tradeoffs with local power structures. Modern and institution-centered approaches to governance exist side by side and are impregnated with tribal governance structures that, although they lack a formal legal basis, are the primary source of authority in large parts of Afghanistan. In a similar vein, both government-centered (formal) and customary and community-based (informal) justice and security mechanisms continue to exist in parallel in Afghanistan. The formal and informal structures are also compounded into each other: formal institutions are marked by the networks and systems of allegiance existing in tribal/informal structures and the decisions by formal justice institutions are often colored by informal justice. Similarly, informal dispute resolution mechanisms can and do adapt to changing formal structures.

Afghanistan has certainly faced a post-conflict crime wave. Traditionally an opium-producing country, Afghanistan has re-emerged as one of the world's main poppy producers after the end of the Taliban regime. Today, Afghanistan is the world's main supplier of heroin; the drug economy (together with interests related to the drug economy) is fuelling corruption and organized crime. This will make rule of law reform more challenging, as there is no trust in the system and there are considerable economic and political interests in ensuring that a culture of impunity prevails.

3.2 Laying the Foundations for Justice: Disarmament and Transitional Justice

3.2.1 Transitional Justice

There is an increasing recognition amongst scholars and practi-

tioners that countries emerging from conflict need to come to terms with the history of violence and crime, if for no other reason than to ensure that the past is not repeated and that those who benefited from and committed crimes during the conflict will not continue to benefit unduly from the peace.[57] After three decades of war, Afghans and Afghan communities have suffered a wide range of war crimes and human rights violations ranging from indiscriminate bombings, summary executions, illegal arrests, disappearances, torture, sexual violence and massive displacements. The consequences of the conflict on the social and economic rights of Afghans include devastated lives and livelihoods and being deprived of education and health services. As noted above, political choices made around the time of the Bonn conference have empowered rather than marginalized some of the key culprits of the Afghan conflicts.[58]

The Afghanistan Independent Human Rights Commission has been a driving force behind transitional justice in Afghanistan. The Commission has interpreted the mandate it was given through the Bonn Agreement and the presidential decree establishing the Commission as including transitional justice. In 2004, the Commission conducted national consultations to identify how Afghans wanted past violations to be addressed. Through its central and regional offices the Commission docu-

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[57] For general overviews, see Kai Ambos, Judith Large and Marieke Wierda, eds. *Building a Future on Peace and Justice. Studies in Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice*, Springer Publications, Germany 2009; Naomi Roth-Arriaza and Javier Marriezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. New York: Cambridge University Press, 2006; Neil J. Kritz, ed., *Transitional Justice, Volumes 1-3,* US Institute for Peace Press, Washington D.C.1995; and Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective,* Cambridge University Press, US 2004. There is also an increasing number of thematic publications focusing on transitional justice, for example, Alex Borraine and Sue Valentine, ed., *Transitional Justice and Human Security,* International Centre for Transitional Justice, Cape Town 2006; Alexander Mayer-Reickh, Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies,* International Centre for Transitional Justice and Social Science Research Council, New York 2007; and Pablo de Greiff, ed., *The Handbook of Reparations,* International Centre for Transitional Justice and Oxford University Press, New York 2006.

[58] Patricia Gossman, 'Truth, Justice and Stability in Afghanistan', in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, edited by Naomi Roth-Arriaza and Javier Marriezcurrena (New York: Cambridge University Press, 2006); and Ahmad Nader Nadery, 'Peace of Justice? Transitional Justice in Afghanistan', *International Journal of Transitional Justice*, 2007, pp. 173-179.

mented the views of more than 6,000 ordinary Afghans from 32 of 34 provinces and from refugee populations in Iran and Pakistan. Its report, entitled *A Call for Justice*, was published in January 2005.[59] The consultation showed that ordinary people perceive that impunity is entrenched in Afghanistan, and that perpetrators have attained positions of power despite their continued involvement in violations. The report suggests an urgent need to break with the past and recommends a way forward, including an integrated approach to build trust in Afghanistan's institutions and recognize victims' needs and wishes. The consultation showed strong public support for holding criminals accountable for past crimes through prosecution. Removing war criminals from positions of power (vetting) was highlighted as the next best option.

In support of the Commission's consultation process and future documentation efforts, the UN Office of the High Commissioner for Human Rights undertook mapping of gross human rights violations and war crimes in Afghanistan from 1978 to 2001, based on existing UN documents and other documentation from outside Afghanistan. The report, which has never been published, was submitted by the UN High Commissioner for Human Rights, Louise Arbour, to President Karzai. It was also given to the Commission as a resource for future Afghan documentation. The Afghanistan Justice Project, an Afghan research group, and the Commission have both undertaken further documentation efforts in Afghanistan, the latter in the form of a conflict mapping exercise. Over the past year, Afghan and international media have given much attention to identified mass grave sites (many known to local communities). The focus on mass graves has resulted in a realization of the lack of accurate data on disappearances and other violations. Unlike in other transitional contexts, victims' groups working on issues such as disappearances are nonexistent in Afghanistan.

As a response to the *A Call for Justice* report, President Karzai appointed a committee to draft an action plan based on the recommenda-

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[59] *A Call for Justice: A Consultation on Past Human Rights Violations in Afghanistan*, Afghanistan Independent Human Rights Commission, 2005.

tions made in the report. The drafting committee included representatives of the office of President Karzai, the Afghanistan National Human Rights Commission, and UNAMA, and was supported by the European Union and the Netherlands. The Action Plan for Peace, Justice and Reconciliation drafted on the basis of the recommendations includes five measures focusing on acknowledgement of victims' suffering, documentation, institutional reform and criminal accountability.[60] The Action Plan was hotly debated by the Afghan government and the inclusion of references to criminal accountability for past human rights violations and war crimes was the most contested issue in the Action Plan. In December 2006, when President Karzai publicly launched the Action Plan, an ad hoc committee was established by the Afghan Parliament that drafted an amnesty bill that would ensure amnesty for all those who had been involved in the Afghan conflict during the previous 25 years. After slight modifications, the bill was adopted in March 2007, further complicating efforts to promote criminal accountability for past crimes in Afghanistan. Although the amnesty law does not read as a law and could probably be deemed contrary to Afghanistan's commitments under international law, it is an important political signal from certain groups in the parliament about their power. That is, although some high-level political will for establishing a transitional justice process existed in 2004-05, the more persuasive strategy of including many of the main culprits of the Afghan conflict into the government structures has put a lid on attempts to implement the Action Plan.

However, besides documentation and civil society initiatives, a number of criminal proceedings have taken place for crimes committed during the years of conflict. In 2004 low-level commander Abdullah Shah was found guilty of killing more than 20 people and sentenced to death. In 2005 Asadullah Sarwary, the head of the Afghan intelligence service dur-

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[60] The five key actions of the Action Plan included (1) according dignity to victims, including through commemoration and the building of memorials; (2) vetting human rights abusers from positions of power and encouraging institutional reform; (3) truth seeking; (4) reconciliation; and (5) expressing opposition to an amnesty and establishing a task force to make recommendations for an accountability mechanism. None of the key actions of the Action Plan have so far been implemented.

ing the Soviet era, was sentenced to death by Afghanistan's Primary Court of National and International Security and more recently by the Appeals Court. The UN Special Rapporteur on extrajudicial killing, Asma Jahangir, and others extensively criticized the execution of Abdullah Shah because of lack of due process. There were also persuasive rumors that Abdullah Shah's execution was politically motivated, and that he was executed for what he might reveal if he stayed alive. The court proceedings of Asadullah Sarwary also lacked due process, starting with the fact that Asadullah Sarwary had spent more than a decade in what could be defined as pre-trial detention and that the judge apparently had decided to convict him before hearing Asadullah Sarwary's defense. The fact that Abduallah Shah and Asadullah Sarwary were convicted, while other commanders and officials with "blood on their hands" have not even been indicted, may also be an example of some perpetrators being disposable (having no links to power), while others, through their networks of allegiance or their ability to destabilize the situation, enjoy de facto immunity from prosecution.

The persuasive culture of impunity can also be exemplified by the failed arrest of General Dostum in February 2008. General Dostum, Uzbek Commander and former leader of the Jumbish party, had allegedly beaten up and was holding hostage one of his former commanders. When the police tried to arrest Dostum in his Kabul home, Dostum's body guards managed to protect Dostum and the arrest failed.[61] In the aftermath of the failed arrest of General Dostum, President Karzai stated: "This culture of impunity has to stop. I can live with undue influence, because it is part of this arrangement we have. But we cannot tolerate and protect criminals, or the whole arrangement will lose its moral existence. We are running out of options".[62] The attempt to arrest General Dostum was viewed by some interviewees as an indication that he was falling out of favor, and losing his de facto immunity. An interesting twist is the reported destruction, allegedly on the demand of General Dostum, of the mass grave site in the

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[61] Kim Sengupta, 'Warlord under siege after "kidnap and torture" of former ally', *Independent*, March 11, 2008.
[62] Sengupta, 'Warlord under siege after "kidnap and torture" of former ally'.

Dasht-e Laili desert in the north-west of Afghanistan in 2008.[63] This mass grave is presumed to contain the remains of up to 2,000 prisoners of war who had surrendered to General Dostum during the US-led military intervention in December 2001. Late 2008, bulldozers were reportedly sent to dig up the remains of these prisoners of war, thus, destroying evidence of possible war crimes. The Afghan security forces were unable to protect the site, and the international military presence did not view it as their role to do so. The examples shows that as long as the Afghan government is less powerful than possible spoilers, and as long as it includes spoilers without a clear strategy or vision for how to exclude them, impunity will prevail and it will be difficult for the government to gain the trust of the people.

3.2.2 A Brief Note on Disarmament

Stabilization and state-building and efforts to promote rule of law and end impunity in countries emerging from conflict are likely to fail without the disarmament and disbanding of armed groups outside government control. Failure to disarm will have negative effects on efforts to promote rule of law-based governance and licit economic development – and it will contribute to the post-war crime wave.[64] Disarmament is intimately intertwined with the legitimacy and reform of governance and security structures and tends to be widely welcomed in countries emerging from armed conflict. Nevertheless, disarmament processes face both political and practical challenges.

From a political perspective, being armed and having access to militias enhances the bargaining position of politico-military actors, who

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[63] For an in-depth analysis of the mass grave site in the Dasht-e Laili desert and its destruction, see http://physiciansforumanrights.org/library/news-2008-12-22-afghanistan.htlm (last visited, 16-01-2009), http://afghanistanphrblog.org and http://afghanistanphrblog.org/resources (last visited, 16-01-2009). For background information, see also Babak Dehghanpisheh, John Barry and Roy Gutman, 'The Death Convoy of Afghanistan', *Newsweek*, 26 August 2002, at http://www.newsweek.com/id/65473 (last visited 16-01-2009).

[64] Charles T Call, 'The Mugging of a Success Story: Justice and Security Reform in El Salvador', in *Constructing Justice and Security after War*, edited by Charles T Call. (Washington: USIP Press, 2007), p. 38.

are unlikely to disarm without getting anything in return – such as political favors or protection provided by effective state security organizations. Amnesties for past crimes (although no longer considered accepted under international law) and positions of power are hard currency for peace negotiators. Local leaders (who tend to be among the less influential politico-military actors) are also unlikely to support disarmament unless they trust the new security arrangement and are convinced that economic opportunities will be available for them within the framework of a licit economy.

The practical challenges to disarmament are tied to how the different components of a disarmament, demobilization and reintegration process are balanced. Disarmament processes that do not enjoy adequate political support are likely to be biased in their implementation and to lack sufficient human and financial resources. These shortfalls usually result in bottlenecks, especially with regard to the establishment of economically sustainable alternatives that promote reintegration of former combatants.[65] As security tends to continue to be a concern after the end of a conflict, integrating former combatants into new or reformed government security forces or into private security companies are options for reintegration, but this demands attention to issues of vetting and the establishment of relevant legal frameworks for both government and private security institutions.

The Bonn Agreement stipulated that after the transfer of power, all mujahedin, Afghan armed forces and other armed forces would come under the control and command of the Interim Authority (para. V). The Afghanistan Compact included a stronger focus on disarmament and security sector reform (part 1 and annex 1(1)). The disarmament process was established after much delay, focusing initially only on Afghan Military Forces. No comprehensive assessment of the strength of Afghan Military Forces was done prior to the launching of the disarmament process and figures varied between 250,000 (as claimed by the Ministry of Defense) and 45-50,000 (as claimed by UNAMA) Afghan Military

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[65] Call, *Constructing Justice and Security after War* (2007), pp. 383-4.

Force soldiers.[66] The process of disarming the Afghan Military Forces has been followed by the ongoing process of disarming illegal armed groups. In May 2006 – one year after the program had begun – a spokesman for this second phase of disarmament stated that nearly 1,000 former militia commanders had been demobilized and 20,411 weapons of different types collected since the program began in June 2005.[67] However, there are still around 1,800 illegal armed groups in Afghanistan and recent community defense initiatives involve little but poorly hidden attempts to rearm militias in order to fill a security gap.[68]

Hence, after process of disarming Afghan Military Forces has ended and in the middle of the process of disarming illegal armed groups, Afghanistan is still littered with illegal weapons and armed groups and ad hoc strategies to address urgent security concerns contribute to re-arming certain groups and putting more weapons into circulation. As one interviewee pointed out, "a key to state-building is government monopoly on violence, there is no such thing in Afghanistan".[69] Commanders who have been disarmed (on paper) and who later have received government posts have been able to regain control of their forces. These government officials with links to illegal armed groups are able to use their positions as governors or police chiefs and their access to armed militias to engage in organized criminal activity, including the drug trade.[70] The lack of a government monopoly on violence and the corruption of governance structures by allowing individuals with known links to armed groups to hold public office have a decisive and negative impact on rule of law in Afghanistan. The legitimacy of the current Afghan government is undermined by failure to manage a shift from the "rule of the gun" to the "rule

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66 Hodes and Sedra, 2007, p. 84, *Getting Disarmament Back on Track*, ICG, 2003, p. 3.

67 Sayed Yaqub Ibrahimi**,** 'Afghan Disarmament a Never-Ending Process,' *Afghan Recovery Report* No. 215 (2006).

68 Julian E. Barnes, 'U.S. plans to train Afghanistan tribal militias', *Los Angeles Times*, October 10, 2008. See also Ann Scott Tyson, 'New Joint Effort Aims to Empower Afghan Tribes to Guard Themselves', *Washington Post*, March 31, 2008. See also Jessica Leeder, 'Kabul Wants Local Militias to Bolster Security', *The Globe and Mail*, October 31, 2008.

69 Interview (Kabul, June 2008).

70 Barbara Stapelton, 'A Means to What End? Why PRTs are Peripheral to the Bigger Political Challenges in Afghanistan', *Journal of Military and Strategic Studies, Fall 2007,* Vol. 10, Issue 1, p. 2.

of law". Prosecutors and judges are also unlikely to uphold principles of independence and due process if they fear reprisals from local strongmen or other armed individuals. Or, as noted by Rory Stewart, "[o]ur money and expertise, which have helped make the central bank and the Afghan National Army professional and competent, cannot prevent the widespread corruption in the police and legal system… No amount of legal training can help a judge faced with drug lords who are prepared to kill his family".[71]

3.3 Two Sides of the Same Coin: Justice and Security Sector Reform

3.3.1 Justice Sector Reform

Although all areas of rule of law and security sector reform are challenging, reforming legal frameworks and justice institutions and rebuilding peoples' confidence in the justice system may be amongst the most difficult tasks. In countries emerging from long-standing conflict the existing legal framework is often outdated, contradictory and forgotten – and judicial institutions, to the extent that they are functioning at all, lack independence and are unable to ensure due process and access to justice.[72] A consequence of dysfunctional, politicized and corrupt justice institutions is lack of public trust in these institutions: The population will not rely on the formal justice institutions to solve their disputes or ensure their rights.

Justice reform was, as one interviewee noted, "put in the freezer during the early years of the Bonn process".[73] There are several reasons

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[71] Rory Stewart, 'How to Save Afghanistan', *Time*, 17 July 2008. See at http://www.time.com/time/world/article/0,8599,1823753-2,00.html (last visited, 18-07-2008).

[72] UN Doc. S/2004/616. See also Stromseth et al., *Can Might Make Rights?* (US, 2006).

[73] Interview (Rome, June 2008). For an overview of rule of law reforms in Afghanistan during the Bonn process, see 'Assistance to Justice and Rule of Law in Afghanistan: A Strategic Analysis', *Centre for Humanitarian Dialogue* (Geneva, 2004), J. Alexander Their, 'Reestablishing the Judicial System in Afghanistan', *CDDRL/LISD Working Papers* (US, 2004) and Neamat Nojumi, Dyan Mazurama and Elizabeth Stites, 'Afghanistan's Systems of Justice: Formal, Traditional and Customary', *Feinstein's International Famine Center* (US: Tufts University, 2004).

for the insufficient attention to justice reform in the first years of the state-building process. The Judicial Reform Commission established under the Bonn Agreement never managed to become a vehicle for reform, nor did it effectively function as a coordination body for the key Afghan justice sector institutions. Cooperation and coordination between the three main justice sector institutions, the Supreme Court, the Attorney General's Office and the Ministry of Justice, was marked by factional politics and turf battles throughout the Bonn process. The commitment to upholding basic principles of rule of law, including impartiality and the premise that nobody is above the law, has also varied between the institutions. The constitution-making process was also marked by factional fighting and ethnic divides and the presence and influence of known criminals among the delegates.[74] The Constitutional Loya Jirga was used to strengthen personal powerbases and networks rather than to design a Constitution that would be useful as a foundational document for a more democratic Afghanistan. For example, the centralized system of government and extensive mandate of the head of state may not be the most effective form of government for an ethnically and regionally diverse and fragmented nation like Afghanistan.

The formal justice institutions and the Constitution have also failed to recognize the complex relationships between formal mechanisms of justice and community-based dispute resolution mechanisms. Reforms have predominantly focused on the formal justice institutions, without identifying and making use of strategies for legitimizing decisions by community-based decision making bodies.[75] The so-called informal justice mechanisms have been criticized for being biased (depending on the power structure in the community) and for applying gender discriminatory punishments. These mechanisms, although cer-

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[74] For analysis, please see, *Afghanistan: The Constitutional Loya Jirga*, International Crisis Group, Afghanistan Briefing, Kabul/Brussels, 12 December 2003. See also, *Reflections on the Constitutional Loya Jirga*, Afghan Organization of Human Rights and Environmental Protection (Kabul, 12 January 2004). Barnett R Rubin, 'Crafting a Constitution for Afghanistan', *Journal of Democracy*, Vol. 15, No. 3, 2004, pp. 5-19. Antonella Deledda, 'Afghanistan – The End of the Bonn Process', *Transitional Studies Review*, Vol. 13, No. 1, 2006, pp. 155-171.

[75] A number of organizations are actively working with informal dispute resolution mechanisms, including the Norwegian Refugee Council and the United States Institute for Peace.

tainly eroded, are focused on community cohesion and if carefully supported they may serve as a means for solving land and property disputes and other longstanding disputes that are paralyzing local community development.

Some of the reform initiatives undertaken during the first years of the Bonn process have further complicated the relationship between the justice and security sector institutions, especially the Attorney General's Office and the police. For example, the Interim Criminal Procedure Code sponsored by the Italian lead on justice was drafted without sufficient attention to the existing mandates of police and prosecutors and the dynamics between the two institutions. As a consequence, the interim criminal procedure code changed the traditional responsibilities of police and prosecutors without follow-up measures that would have ensured proper implementation of the new institutional mandates. In 2004 when the *interim* criminal procedure code was adopted there was a dire need for a functioning procedure code for criminal cases, but although there have been several attempts to draft a permanent criminal code no permanent code has been adopted.[76]

The lead nation and the UN's light foot print approach to state-building and development in Afghanistan resulted in donor driven and ad hoc reform initiatives that mainly focused on national-level initiatives and/or Kabul-based initiatives. For example, the Italian lead on justice focused more on individual development projects than on a coordinating function for justice reform.[77] Coordinating donor efforts in the justice sector was also not an easy task, as there has been no joint strategy. Although UNAMA played a role in enabling the drafting of the Constitution and

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[76] The United States Institute for Peace has been facilitating a process for the adoption of a permanent criminal code. In November 2008 the draft remained with the Law Reform Technical Working Group. Email exchange, 2008-11-17.

[77] Besides funding to justice initiatives by UN agencies, the Italian Justice Project Office has been the main vehicle for Italy's justice reform efforts that have focused on drafting of the interim criminal procedure code, the prison code and the juvenile criminal code, training of judges (largely through the International Development Law Organization, and, in the provinces, the International Institute of Higher Studies in Criminal Sciences, providing mentoring to the justice institutions, building courthouses, delivering cars, office equipment, laws etc. to courts throughout the country, establishment of the National Justice Training Centre, prison reform and reconstruction (through the United Nations Office on Drugs and Crime) and projects in Herat where Italy has its Provincial Reconstruction Team.

holding of the Constitutional Loya Jirga, it did not choose to engage the justice sector in a holistic manner. UNAMA became active in the justice sector only in 2005, but has beefed up its rule of law team considerably over the past year and has increased engagement via provincial justice coordinators at its field offices. The US – a key actor in security sector reform and core areas of justice reform – and Germany, the lead on police, and the UK, the lead on counter-narcotics, all have had an interest in justice reform, but have focused more on their own projects than on developing a coherent vision adapted to the Afghan context. The gap of clear leadership and coordination in justice reform between the Constitutional Loya Jirga and the strengthened focus on justice reform from 2005 onwards, did result in two years worth of ad hoc justice reforms, though their success was measured in terms of completion of projects rather than actual impact on contributing to rule of law and access to justice.

A few years into the Bonn process and after a change of Minister of Justice, efforts were made by the Ministry of Justice – supported by the United Nations Development Program Justice Project – to develop a coherent platform for justice reform in Afghanistan. *Justice for All: A 10-year Strategy for Justice Reform in Afghanistan* consisted of five dimensions: Reforming the laws; Making the institutions work; Reaching out to the people; Consulting with communities on traditional justice; and Cooperation with other government programs. The *Justice for All* strategy was unfortunately short-lived. The Cabinet discussed it in September 2005 and only a few months later the Afghanistan Compact was adopted with a new set of benchmarks for justice reform. The Compact makes more extensive and explicit references to justice reform, stating that justice reform was a "priority for the Afghan Government and the international community" and that the aim was to "ensure equal, fair and transparent access to justice for all based upon written codes with fair trials and enforceable verdicts". Measures would include:

> …completing legislative reforms for the public as well as the private sector; building the capacity of judicial institutions and personnel; promoting human rights and legal awareness; and rehabilitating judicial infrastructure.

The Compact also includes ambitious benchmarks for justice reform.[78] However, as opposed to the *Justice for All* strategy, the adoption of the Afghanistan Compact was not preceded by any public consultation. Nonetheless, the fact that the Compact included clear benchmarks was an improvement, although these benchmarks focused primarily on legal and institutional reforms and not on addressing the politicization of justice institutions, access to justice, public awareness, or informal dispute resolution.

The change of Minister of Justice in 2005, Chief Justice in 2006, and Attorney General in 2006 (and again in 2008), did create an opportunity for enhanced cooperation, which is a prerequisite for building a justice system. In order to kick start development of a National Justice Strategy that would operationalize the Compact benchmarks and become an integrated part of the Afghanistan National Development Strategy, the Italian government organized a high-level conference on rule of law in Afghanistan in July 2007.[79] According to several observers the strength of this conference was in the preparatory work, as the key justice institutions and other justice sector interlocutors under the leadership of UNAMA were enabled to develop sector strategies and to prioritize. However, the development of the National Justice Strategy has remained a rather top-heavy process through which the Afghan justice institutions and key international actors have negotiated for their priorities.

The National Development Strategy and, as part of it, the National Justice Strategy, were adopted at the Paris Conference. In support of the National Justice Strategy, a window for justice reform has been opened in

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[78] The justice benchmark in the Afghanistan Compact states that "by end-2010, (1) functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible; (2) review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end - 2006 and fully implemented by end-2010; (3) reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's office, the Ministry of the Interior and the National Directorate of Security); and (4) justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles".

[79] www.rolafghanistan.esteri.it/ConferenceRol/Menu/I_rapporti_bilaterali/Cooperazione+culturale/CanaleMultilaterale.htm (last visited, 17-07-2008).

the Afghanistan Reconstruction Trust Fund which should ensure funding for the Afghan government's justice sector priorities that are not dependent on donor priorities and funding cycles. Hence, seven years into the state-building process, during which a culture of impunity has become entrenched in the fragile institutional structures of Afghanistan, the Afghan government and its international partners finally have a political platform and a strategy for justice reform.

The current effort to strengthen coordination of the justice sector is accompanied by the increased knowledge that justice reform so far has brought nothing but "telephone justice".[80] That is, there is access to justice for those who have the contacts or the economic means to ensure that they can make their voices and claims heard. Or as stated by the UN Office on Drugs and Crime Country Director, Christian Gynna Oguz, "[p]owerful individuals are able to compromise the justice system through bribes and corruption, as well as implicit and explicit threats".[81] Gynna Oguz stressed that powerful individuals are able to intervene improperly in the justice process with a simple phone call. The prevalence of corruption in the justice sector was highlighted by several interviewees. One noted that "[c]orruption is a hot potato thrown between the Anti-Corruption Department, the Attorney General's Office and the Supreme Court. Every institution wants to take credit for taking forceful action against corruption, but in reality nobody's doing anything".[82] The lack of independence and the corruption in the justice system are severely harming the public's trust in the justice system, but the lack of access to justice in, for example, property rights cases is also putting a lid on people's/families' ability to plan their lives and future. The lack of access to justice and corruption is also a direct threat to security, as it affects the publics' trust in the government and consequently their support to the ongoing state-building and stabilization process.

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[80] Rahim Faiez, 'Afghanistan should target big drug traffickers with links to the government, U.N. says', *Associated Press*, 03/05/2008.
[81] Rahim Faiez, 'Afghanistan should target big drug traffickers with links to the government, U.N. says', *Associated Press*, 03/05/2008.
[82] Interview (Kabul, June 2008).

The early strategies for justice sector reform preferred by donors and implementing partners – focused on infrastructure, dissemination of laws and legal text books, and short-term training – failed to promote a culture of and access to justice. The efforts to strengthen the attention to rule of law in the later phases of the state-building process have yielded some positive policy results, most importantly the increased coordination and a unified funding structure for the justice sector. However, the fruits of this increased focus and coordination remain to be seen. The shortcomings of justice reform are also often viewed as originating in a lack of capacity (either the international community's lack of knowledge of the Afghan context or the lack of educated justice sector professionals in Afghanistan). Yet the lack of political will on behalf of both the Afghan government and the international community to promote a culture of justice where ordinary citizens have access to justice and are able to challenge abuses of power may be an equally valid explanation for the shortcomings. Political will for justice reform does not only entail nominal commitments to rule of law and supporting national plans for justice, it also involves being ready to take the hard and sometimes politically costly decisions needed to develop and honestly maintain a system of justice.

3.3.2 A Brief Note on Security Sector and Justice Reform

The framework of security sector reform developed largely as part of the systemic changes in many of the eastern bloc countries after the end of the cold war. Security sector reform is today a core component of any major crisis management or state-building initiative. Security sector reform is not limited to training and equipping national security forces, but includes security management and oversight bodies and justice and law enforcement institutions. In order to emphasize the holistic nature of security sector reform, frameworks such as security system reform, system wide or whole-of-government approach to security sector reform, multi-layered security governance or justice and security system reform have been developed.[83] What the

[83] *OECD DAC Handbook on Security System Reform. Supporting Security and Justice*, OECD DAC (2007).

broad based concepts for security sector reform are trying to convey is that development and security are intimately linked and that sustainable development of the security sector is unlikely to be managed without ensuring that the promotion of state monopoly of violence is done with due attention to governance and justice sector reform. Successful security sector reform should result in security forces with clearly delineated mandates (difference between military, police and intelligence), subject to civilian authority, conforming to national and international standards and enjoying popular support. Managing broad-based security sector reform with attention to the local political context (including how to deal with local resistance and spoilers) and implementing necessary balance between international expertise and local ownership in situations marked by continued instability and struggles for political power in a new administration remains challenging. Implementation of security sector reform is often criticized for being done without due attention to the local context and to accountability or to oversight mechanisms, through attention to civil society involvement.

The Bonn Agreement addressed security sector reform only indirectly. It emphasized the need for an international security force until such time as an Afghan security force is developed, and it demanded that "all mujahidin, Afghan armed forces and armed groups in the country shall come under the command and control of the Interim Authority, and be reorganized according to the requirements of the new Afghan security and armed forces".[84] The actual development of security sector reform, including reform of the Afghan National Police (including border police), the Afghan National Army and the National Security Directorate was compromised during the Bonn process: The continuing security challenges and the lack of international and national security forces forced the pace of the re-establishment of a national police force in particular. As a consequence, the focus of the reforms were not as much on a comprehensive census and verification process or on building credible institutions, but more on ensuring some (or any) form of security presence in provinces and districts.

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[84] Bonn Agreement, see preamble, para V1 and annex 1.

The lead nation approach of the Bonn process resulted in a fragmented and donor-driven approach to security sector reform and de-linked security sector reform from broader rule of law reform. The Afghan security sector institutions are directly involved in justice issues. The Ministry of Interior has extensive responsibilities in the area of criminal investigations and it is responsible for police lock-ups. However, as noted in the previous chapter, cooperation between the police and the Attorney General's office has been and continue to be scarce. In 2007 a commission was established with representatives from the Ministry of the Interior and the Attorney General's Office to ensure better cooperation between the two. After a few initial meetings, this commission remained dormant, since the Attorney General did not support reform efforts. After the recent change of Attorney General, efforts may be made to re-energize this commission. The Ministry of Defense has responsibility for the military court system and the high security detention facility at Pul-I Charki Prison. The National Security Directorate, which has had an operational role in the war on terror in Afghanistan and therefore had been held outside all justice reform efforts, does not only detain persons, but also has its own prosecutors and court system.

Conflicting donor approaches can be exemplified by the different ways in which the German lead on police reform and the US, who also has made sizable commitments to police reform, have approached police reform. Roughly simplified, the German approach has focused on substantial training for few police and the US has focused on short trainings for many.[85] The establishment of the Afghan National Army is often referred to as one of the successes of the security sector reform processes. The facts that the reform process had been led and implemented by one donor (the US) and that the army was reconstituted from scratch were major factors in the success.[86] The military process has also faced obstacles, including

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[85] Andrew Wilder, 'Cops or Robbers? The Struggle to Reform the Afghan National Police', *Afghanistan Research and Evaluation Unit* (Kabul, 2007) and *Reforming Afghanistan's Police*, International Crisis Group, Asia Report No. 138 (2007).

[86] The effort by the first Defense Minister Marshall Fahim to recast the Northern Alliance militias as Afghanistan's military force was rejected in favor of the complete reestablishment of the national army. Hodes and Sedra, 2007, p. 53.

high figures of desertion and lack of fiscal sustainability.[87] As opposed to the strategy chosen for the reform of the military, the Afghan National Police was created through the transformation of existing police structures. Disbanding existing police would have created a security vacuum and become very expensive. Hence, from day one, the police has been under huge pressure to serve as a security force – and often as a paramilitary security force.

The Afghanistan Compact and the Afghan National Development Strategy processes have strengthened the focus on security sector reform. However, the Afghanistan Compact and the Afghanistan National Development Strategy have reproduced the distinction between security sector reform and justice put in place during the Bonn process. The Bonn process did not view justice as part of the five pillars of security sector reform enabling rule of law/justice concerns to be separated from stabilization and security sector reform strategies. The lead nation approach resulted in a fragmented approach to rule of law and security sector reform in Afghanistan: it has hampered efforts to build necessary linkages between police and prosecutors and it has resulted in some areas – including detention/prisons – receiving next to no attention. While the Afghanistan Compact and the Afghanistan National Development Strategy process recognized the need to strengthen rule of law/justice, these documents continue to address justice reform as separate from security sector reform.

The fact that security sector and justice reform have been promoted on parallel tracks was stressed by many interviewees as one of the fundamental errors of rule of law reform as a whole. It was noted that in other than post-conflict settings it may be possible to separate security sector reform from justice reform, but that in post-conflict settings security forces are the first face of the government and their conduct is of crucial importance for building trust

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[87] The size of the national army has been a continuous source of debate. The Afghan Ministry of Defense had suggested a 200,000 strong military force, while the US and ISAF suggested a 50,000 strong military force. A compromise of 70, 000 soldiers was reached. See UN Doc. A/56/875-2/2002/878. At the ninth meeting of the Joint Coordination and Monitoring Board the number was increased to 134,000. See http://www.ands.gov.af/ands/jcmb/site/index.asp?page=j9 (last visited 2009-01-16).

in the government. As one interviewee noted: "Justice should never have been put outside security sector reform. In a crisis area [like Afghanistan] justice and rule of law cannot be seen as anything but security sector reform".[88] As another interviewee noted: "In fragile or failed states a corrupt security force is 'just' a corrupt security force; in conflict societies corrupt security forces are a security risk".[89] Several interviewees stressed that separating justice reform from security sector reform had negative impacts on both justice reform and security sector reform. One interviewee noted: "It is very naïve to think that a national security force can be established quickly and with no attention to accountability".[90] Another stressed: "We are trying to reform the police, but we feed into a corrupt justice system".[91]

3.3.3 The Role of Prison Reform

Prison reform is seldom a priority for a newly established government or donors to countries emerging from conflict. A new government will win no brownie points by tending to the situation in prisons before the basic needs of other citizens are met. For donors, supporting prison reform in situations where there is little security and rule of law will almost inevitably mean building infrastructure for places where people will face torture or other ill-treatment. However, prison reform is a key element of post-conflict rule of law reform and efforts to promote a government monopoly on the use of violence. Constructing and refurbishing prisons may be the most visible part of prison reform, but equally important is ensuring that adequate standards of due process and administration of justice are upheld, that prison guards are trained and receive reasonable salaries (adequate salary levels are also a precaution against corruption), and that national government and non-governmental entities develop monitoring capacities.[92]

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[88] Interview (Rome, June 2008).
[89] Interview (Rome, June 2008).
[90] Interview (Kabul, June 2008).
[91] Interview (Kabul, June 2008).
[92] Kari M Osland, *The Role of Prison Reform in Transitional Societies*, (OSLO: NUPI Report, 2005).

The Bonn Agreement does not mention prisons or detention issues. The Afghanistan Compact mentions prisons as part of rule of law reform, but no specific benchmarks or timelines were developed for prison reform. During the Bonn process, prison reform seemed to fall between the chairs of the German lead on police and the Italian lead on justice. The International Committee of the Red Cross, UN Office on Drugs and Crime and the Italian Justice Project Office have repeatedly called for attention to the physical conditions in prison as well as to broader questions of the administration of justice.[93] The National Justice Strategy includes prison reform, but prison reform is not part of the Afghanistan Reconstruction Trustfund justice fund.[94] As part of the Afghanistan Compact and the Afghanistan National Development Strategy implementation strategy, a Prison Reform Sub-Working Group co-chaired by the Ministry of Justice Central Prisons Directorate and UNAMA has been established. In addition to the earlier actors and donors to prison reform, the US State Department corrections program and the Provincial Reconstruction Teams are increasingly involved in refurbishing and supporting the construction of prisons. However, police lock-ups and district prisons continue to be ostensibly outside the reform process.

The Afghan government's commitment to improving the situation of prisoners or the conditions in prisons has been equally limited. During the first years of the Bonn process the responsibility for all *official* detention centers, other than the National Security Directorate and US detention centers, fell under the responsibility of the Ministry of the Interior. In 2003, the responsibility for and administration of prisons was shifted from Ministry of the Interior to the Ministry of Justice. Today, the Ministry of the Interior continues to manage police lock-ups, while the Ministry of Justice Central Prisons Directorate manages Pul-i Charki Prison, Afghanistan's main detention center, provincial prisons, and, to the extent that they func-

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[93] *The Provincial Prisons of Afghanistan: Technical Assessment and Recommendations Regarding the State of the Premises and of the Water and Sanitation Infrastructure*, ICRC (2005) and *Provincial Prison Overview*, Altai Consulting (undated).

[94] Afghanistan National Development Strategy, p. 66 and Appendix I, pillar 2.

tion, district prisons. In addition, the Ministry of Defense manages the newly established high-security wing of Pul-i Charki, where mainly returnees from Guantanamo and Bagram are held. The National Security Directorate detention centers, which some of the interviewees considered illegal, are managed separately by the National Security Directorate. The National Security Directorate is regulated by a secret decree issued by President Karzai and the Head of the Directorate reports directly to the President. Although the parliament should review and consider approval of all decrees adopted by the President before the parliamentary elections, it has not yet reviewed the decree regulating the National Security Directorate. While a certain level of non-transparency and secrecy can be expected from an intelligence service, secret laws are contrary to basic principles of rule of law and an anomaly in any legal system.

The dire need for prison reform and reform of the judicial process was emphasized by several interviewees. One interviewee noted: "There has been little attention to prisons or to the administration of justice over the past seven years.…But we have been putting more and more people into prisons, they are today overcrowded with people who should or should not be there".[95] Other interviewees referred to the recent riots in Pul-i Charki prison, where around 1,000 prisoners took control of some of the wings for a few days. The riot was allegedly triggered by a legitimate attempt by the prison authorities to search the prison and remove objects that the prisoners were not allowed to keep. Since Pul-i Charki prison holds a mix of pre-trial detainees, prisoners convicted for political activities and common criminal acts, as well as prisoners who should have been released but have not been released because of administrative lapses or because they have failed to pay necessary bribes, the riot quickly developed into an opportunity for prisoners to express their political views or general grievances.

The Taliban-led prison break in Kandahar Provincial Prison in June 2008 is another example of the poor situation in prisons. Although the

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[95] Interview (Kabul, June 2008).

Kandahar Provincial Prison had been recently refurbished by the Canadians and the prison guards were receiving training, the prison population of around 1,000 was a mix of pre-trial detainees, persons convicted of common crime and persons detained for their participation in anti-governmental activities. Some of the detainees had conducted a hunger strike just a month before the prison break in an attempt to draw attention to lack of due process and administration of justice. The prison break that freed the over 1,000 prisoners (the exact number is not known, because of poor administrative procedures in the prison) had been well planned and prepared and it was a serious blow to rule of law and security sector reform efforts in Kandahar province.

CHAPTER FOUR

THE ROLE OF INTERNATIONAL MILITARY ACTORS IN PROMOTING RULE OF LAW

The previous chapter provided an overview of rule of law reform in Afghanistan. This chapter will focus on the role of the international military presence, particularly the NATO-led ISAF mission, in promoting rule of law. Given the declining security situation, NATO/ISAF is increasingly at the forefront when the international effort in Afghanistan is judged, and military actors are also moving into new areas of state-building, such as rule of law reform. The aim of this chapter is, first, to discuss some of the ways in which ISAF is involved in rule of law, especially justice reform issues and, second, to focus on two areas where NATO/ISAF action may be undermining the legality and legitimacy of the international presence (civilian casualties and detention). This chapter is divided into two parts based on these aims.

4.1 ISAF and Rule of Law Reform

4.1.1 The Comprehensive Approach and Rule of Law Reform

NATO entered Afghanistan after the NATO Summit in Riga, where it was decided that NATO should develop pragmatic proposals to improve coherent application of its own crisis management instruments.[96] ISAF is one of NATO's first out-of-area operations and the center piece in its effort to recast itself as an efficient actor in the area of international crisis management. NATO entered Afghanistan, as one interviewee noted, in a defiant mode; it would succeed where others seemed to fail.[97]

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[96] For a discussion, see Martin Erdmann, 'A Comprehensive Approach to Modern Conflict: Afghanistan and Beyond', *Connections*, Vol. VI, No. 2, 2007, p. 81.
[97] Interview (Brussels, May 2008).

Making use of the Afghan theater as a test case is certainly a bold move. It is also one that has unearthed a number of NATO's shortcomings as a lead agency in crisis management. From a political point of view, there continues to be difference of opinion within NATO about the urgency and relevance for NATO or the ISAF mission. One interviewee noted that "NATO's ISAF military operation seems to lack the urgency, commitment and political will to win, but at least at present it is sufficient not to lose".[98] NATO's ISAF operation continues to be defined less by a coherent vision developed in cooperation with the Afghan government than by the policies and priorities of the different troop contributing nations. Several interviewees emphasized the lack of coherent approach, and the negative impact of the different levels of commitment and the different priorities within ISAF. One bluntly noted that "[i]t took NATO 30 years to get the same type of bullet, we should not expect it to take any less time for it to become a viable nation-building partner".[99]

The adoption of the ISAF Policy Vision ("Comprehensive Approach") at the NATO Bucharest Summit is an important step toward developing a more coherent approach for the ISAF mission. As Adam Kobieracki has noted, "NATO recognizes that its politico-military engagement in Afghanistan should be guided by a Comprehensive Approach that brings together NATO's military involvement in theater with the Alliance's wider diplomatic efforts.…These wider efforts encompass a range of initiatives and activities: assisting the Government of Afghanistan in strengthening its authority and presence across the country; facilitating the execution of Security Sector Reform by G-8 lead nations…; helping set the security conditions for implementing the Afghanistan National Development Strategy; and promoting intra-regional dialogue between Afghanistan and its neighbors".[100] The ISAF operational plan guides ISAF day-to-day operations and outlines ISAF's primary and supporting tasks. According to the Operational Plan, ISAF is fulfilling its assistance mission

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98 Interview (Brussels, May 2008).
99 Interview (Rome, April 2008).
100 Adam Kobieracki, 'The Comprehensive Approach: NATO Responses from an Operational Standpoint – The Case of Afghanistan', *Connections*, Vol. VI, No. 2, 2007, p. 87.

to the Afghan government through joint missions with and capacity-building for Afghanistan National Security Forces, support to disarmament of illegal armed groups and counter-narcotics operations, and through undertaking and facilitating reconstruction projects.

Several interviewees noted that the Comprehensive Approach remained an "aspiration" and that it had not "trickled down".[101] Although the comprehensive approach should primarily be a policy approach that emphasizes coordination, it may in theatre result in the military as an action oriented organization subsuming new areas of activity in situations where civilian actors are viewed as slow, inefficient or absent. Several interviewees on the military side did express frustration with the fact that the military was fulfilling its task, but "the civilians are not following".[102] There may be an inherent tension between a comprehensive approach, which seeks to bring together diplomacy, development and defense, and the efforts to clearly delimit spheres of action for military and civilians through humanitarian and civil military guidelines.[103]

In the course of the interviews it became obvious that interviewees on both the civilian and military side viewed the comprehensive approach as a primarily internationally led and owned strategy: NATO/ISAF should stabilize (to include bringing reform and reconstruction where others were unable to go) and UNAMA should state build. The Afghan government and Afghan realities were largely absent from discussions about the comprehensive approach.[104] This is also a point emphasized in the ENNA-BAAG (European and British networks of NGOs working on Afghanistan) briefing note on civil military cooperation in Afghanistan, which recommended that:

> Policy and practice of both the military and civilian agencies need to be more informed and inclusive of Afghan per-

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[101] Interviews (Kabul, June 2008).
[102] Interviews (Brussels, Rome and Kabul, 2008).
[103] *Aid and Civil Military Relations. Policy Briefing Paper,* BAAG-ENNA (2008).
[104] Interviews (Rome, Brussels and Kabul, 2008).

> spectives. Military operations are inadequately sensitive to Afghan social and cultural norms which define notions of an individual or community's security and dignity. Donors and humanitarian agencies need to invest more in cross-cultural translation of the humanitarian principles of neutrality, impartiality and independence, and in access negotiations with all parties in the conflict.[105]

One of the areas that are increasingly featuring as part of ISAF's and especially some of its troop contributing countries' visions for Afghanistan is rule of law. The importance of rule of law is recognized in the ISAF Policy Vision, and although not directly referred to in rule of law, some aspects of it are intimately intertwined with ISAF's supporting tasks. The fact that the military is getting involved in justice reform is also confirmed by NATO's quarterly report to the Security Council, which states that:

> From an ISAF perspective, there needs to be an enhanced coordination and cohesion of international efforts in the areas of judicial reform and the rule of law. Efforts are mainly concentrated in Kabul. In view of the lack of progress at the regional level, ISAF is embedding rule of law and justice reform into its legal architecture. ISAF has undertaken a nationwide survey of the situation, seeking data in every area related to judicial reform.[106]

The increased focus on rule of law and justice issues within ISAF is exemplified by the increase in legal and rule of law advisers within the mission. Legal advisers at NATO headquarters and at ISAF headquarters are tasked with addressing legal concerns that may arise from ISAF's engagement in Afghanistan. Over the past years, rule of law advisers have been added to the organizational structure of ISAF head-

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[105] *Aid and Civil Military Relations. Policy Briefing Paper,* BAAG-ENNA (2008).
[106] UN Doc. S/2007/494, para. 18.

quarters, regional commands and provincial reconstruction teams. For example, in the office of the Legal Adviser at ISAF headquarters a Rule of Law Adviser post was established in 2007.[107] The role of the Rule of Law Advisers is to coordinate ISAF activities in the area of rule of law between headquarters, regional commands and provincial reconstruction teams and, on behalf of ISAF, to participate in relevant rule of law/justice coordination mechanisms in Kabul.[108] There are also rule of law advisers at regional commands, and a number of provincial reconstruction teams have included advisers on legal matters and justice reform. Communication between the legal/rule of law units at different levels of ISAF remains limited, and several interviewees emphasized that they were not aware of who was in charge of rule of law issues at other regional commands or provincial reconstruction teams, and that the priorities in this area between different troop-contributing nations varied considerably.

At an operational level, rule of law issues continue to feature prominently in ISAF's supporting task in the area of security sector reform. ISAF has over the years expanded its engagement into security sector reform, including through troop-contributing police advisers deployed at provincial reconstruction teams and cooperation with the European Union Police Mission. The expansion of ISAF has also led to a development of its engagement with the Afghan military. NATO started to deploy Operational Mobile Liaison Teams, equivalent to the Coalition Embedded Training Teams, mentoring and working with the Afghan military.[109] ISAF has also recently stepped up its counter-narcotics operations.[110]

The direct involvement of ISAF in justice reform is less evident. Most interviewees, including military interviewees, emphasize that inter-

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[107] Interview (Kabul, June 2008).
[108] The Rule of Law Adviser at ISAF headquarters has, for example, been responsible for coordinating the ISAF Quarterly Rule of Law Assessment. ISAF Rule of Law Assessment (Jan-March 2008) [Unpublished document].
[109] Hodes and Sedra, 2007, p. 56.
[110] See 'NATO News' at: http://www.nato.int/docu/update/2008/10-october/e1010b.html.

ventions in the justice sector (with the possible exceptions of aspects of military justice reform) should be civilian-led. Most of the interviewees also stressed that justice is best delivered by the national government and civilians – not by the military and concerns were expressed that the military for the sake of expediency would become involved in justice reform. One interviewee noted bluntly that "the military, at least the US military, will get involved, it is unavoidable".[111] Part of the reason why the military is moving into rule of law is that it does not think that civilians are working fast enough. Or, as one interviewee noted: "In my view the military has been clear about what they are trained to do and what they can do, but they end up doing more when nobody else is operating in their area".[112] Hence, the military is stepping into a perceived vacuum. The military is taking action when "nobody else is doing it".[113] However, the perception that there is a "vacuum" and that "nothing is happening" can be deceptive: The majority of the international military and civilian personnel stay a very limited time in Afghanistan, cooperate with and build long-term relationships predominantly with other internationals. Consequently less may be happening because processes initiated by internationals are often slowed down by quick staff turnovers, and as the day-to-day work done by Afghan legal professionals (which is far from perfect, but which has a decisive impact on the lives of the people who are arrested and prosecuted or who are seeking access to justice) is overlooked.

ISAF's engagement in rule of law can be viewed as exemplifying the tensions of incorporating new tasks into military structures or promoting coordination between civil and military organizations and developing comprehensive visions, but without due attention to what is desirable and possible in Afghanistan. It is certainly true that rule of law has been marginalized in Afghanistan and that "enough it not being done". However, as has been noted, the current shortcomings are not only due to insufficient programming, but also to insufficient political will and commitment to justice and to

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111 Interview (Kabul, June 2008).
112 Interview (Kabul, March 2008)
113 Interview (Kabul, March 2008).

a lack of efforts to promote a culture of rule of law that would focus on access to justice and recourse in cases of abuse of power. The military may be able to engage (although it is an expensive choice) in supporting the infrastructure of security sector and justice reform, but its engagement may also further compound the political balancing of the interests of stability and justice.

4.1.2 The Provincial Reconstruction Teams and Rule of Law

The ISAF expansion, especially to the north and west of the country, was done through the establishment of provincial reconstruction teams (PRTs). Since the development of the PRT concept and the establishment of the first PRTs, several international conferences and reports have been published to further develop the concept and analyze the progress made by PRTs to promote governance, development and security. PRTs were introduced to Afghanistan at a time when it was presumed that the worst of the conflict was over and that the role of ISAF was to do peace-keeping and support the interim Afghan government at regional, provincial and district levels. The early PRTs were relatively small and the civilian components were usually only a few persons strong. As a consequence, the design of these PRTs was often too small to be able to ensure security (besides protecting themselves) in the event of a major security threat developing, and possessed too few civilian resources to be able to contribute substantially to governance and development (without the military being involved in these tasks as well). Boldly put, the vision of the early PRTs seemed to be that security was to be ensured with the mere presence of a handful of military components and governance/rule of law would be a consequence of talking to government and security sector officials, enabling governors to visit far away districts, carrying out infrastructure projects, and as one interviewee noted, "doing feel good development initiatives".[114] Barbara Stapelton notes that breaking the vicious circle of declining security and the governance/rule of law crisis in Afghanistan lay beyond the limited capacity and resources of the PRTs.[115]

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[114] Interview (Kabul, June 2008).
[115] Stapelton (2007).

One challenge facing the NATO PRTs is that neither NATO nor the ISAF Command has had authority over the orientation and work of specific PRTs. Policy guidance on PRTs was recently adopted by NATO, but the PRTs continue to carry the flag and reflect the priorities of their troop-contributing nations. Or, as one interviewee noted, "[t]here is no PRT *chief* at ISAF or anywhere else".[116] Although NATO can collect best practice and suggest priorities for PRTs, it cannot dictate what PRTs should or should not do. The lack of a unified approach has resulted in PRTs being showcases "demonstrating a particular nation's desire to participate in an important NATO mission".[117] However, it can also be argued that the lack of coherence mirrors the diversity of Afghanistan: the Norwegian-led PRT in Faryab would probably be less successful if it borrowed the approaches of the UK-led PRT in Helmand or the US-led PRT in Ghazni instead of relying on its own, regionally-adapted approaches. Similarly, the Dutch-led PRT in Uruzgan should probably not attempt to copy the approaches of the New Zealand-led PRT in Bamyan.

Over the years the PRT concept has developed considerably. The military component of the PRTs deployed in the south of Afghanistan is much more sizable. There is also a growing recognition that supporting governance, rule of law, and security sector reform in Afghanistan demands considerable political and technical skills. As a consequence, the civilian components of PRTs have also expanded and diversified. The expansion of PRTs and the channeling of development funding through PRTs has not been self-evident. The involvement of PRTs in reconstruction and development resulted in heated debates amongst civil society actors and service-delivering NGOs about a mixing of civil and military agendas that would lower the quality of development and endanger the security of civilian development actors. In 2008, under the aegis of UNAMA, Guidelines for the Interaction and Coordination of Humanitarian Actors and Military Actors in Afghanistan were adopted,

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[116] Interview (Kabul, June 2008).
[117] Paul Gallis, "NATO in Afghanistan: A Test of the Transatlantic Alliance", *Connections* Vol. VI, No. 3, p. 29.

stating that military staff of PRTs should wear uniform at all times, should ensure that their security sector reform and reconstruction activities are in line with national priorities, coordinated with the Provincial Development Plans and with the work of other actors, and that local resources are used to the extent possible.

PRTs can be viewed as microcosms of the comprehensive approach. That is, the PRT concept is premised on the understanding that a military approach alone cannot bring long-term stability to Afghanistan and efforts have been made to integrate civil capabilities into predominantly military structures of PRTs and to ensure cooperation and coordination between PRTs and all relevant actors in the provinces where they operate. Over the past few years, new legal adviser positions have been established within several PRTs. These legal advisers are part of the growing civilian teams of PRTs traditionally consisting of political, development and police advisers.

Designing the work of PRT rule of law positions has not been self-evident. The lack of coherent strategies for justice reform and the complexities of the Afghan justice system did, as some interviewees suggested, leave early rule of law advisers grasping for a well-defined mission.[118] The development of the national justice strategy and the strengthening of the rule of law capacity at ISAF headquarters and at some of the regional commands have enabled the rule of law advisers to become part of the information flow and they now receive information about the national process.[119] Some interviewees also stressed that although the competences needed of a lawyer supporting rule of law reform efforts and giving legal advice to a PRT are very different, the military tends to view lawyers with a "one-size-fits-all" attitude.[120] PRT rule of law advisers have, according to some interviewees, come to function as the PRT lawyer, dealing with reparations and other legal claims that may face the

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[118] Interviews (Kabul, June 2008) and telephone interview (June 2008).
[119] Interview (Kabul, June 2008) and telephone interview (June 2008).
[120] Interview (Rome, April 2008) and interview (Kabul, June 2008).

PRTs and being the PRT interlocutor with both the formal and informal justice systems.[121] That is, fulfilling the tasks of rule of law adviser demands considerable knowledge legal issues relating to international military interventions in third countries, institution-building, failed justice systems or mixed formal and informal justice systems. Surprisingly, the link between PRTs justice and security sector reform activities was not strongly emphasized in any of the interviews. It would seem that rule of law advisers could contribute considerably to ensuring that PRT security sector reform activities are in line with and contribute to strengthening the link between police and justice sector.

4.2 The Protection of Civilians and the Issue of Detention

4.2.1. Legality, Legitimacy and the Protection of Civilians

In chapter two it was noted that although the legality of an international military presence may not be in question, its legitimacy may have a best before date. Even when legitimate, lengthy interventions can become perceived as foreign occupation by the host nation's government and its people. The international military presence in Afghanistan, including the Operation Enduring Freedom and ISAF, has enjoyed considerable legitimacy. However, the continued legitimacy of these missions is intimately intertwined with whether the Afghan government is viewed as legitimate and how the military operations are conducted. If ISAF troops are viewed as supporting corrupt government officials, or if they are conducting joint military missions with Afghanistan National Security Forces that are known to be involved in criminal activities, the legitimacy of ISAF troops will erode.

With the increase of conflict in the south and south-east of the country, and the increased involvement of Operation Enduring Freedom

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[121] Telephone interviews (June, 2008).

and ISAF forces in direct military conflict, the issue of civilian casualties has emerged as a key issue undermining a positive public perception of the international military presence. The issue of civilian casualties has already for some years resulted in criticism from international human rights organizations and been used in Taliban propaganda.[122] After his visit to Afghanistan in June 2008, the UN Special Rapporteur drew special attention to civilian casualties that are a result of night raids and firing at vehicles or persons passing by, and the continued presence of military contractors with no clear chain of command in Afghanistan.[123] In his advance report, the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Killings noted that as many as 200 civilians may have been killed during the three first months of 2008 in joint international and Afghan operations.[124] A 2008 Human Rights Watch report has showed that civilian casualties have been minimal in planned military operations, but that civilian casualties continue to occur when air support is called in to support ongoing ground forces in combat situations.[125] Over the course of 2008, as a result of repeated incidents with a high number of civilian casualties, President Karzai joined the chorus of those who in increasingly harsh language are drawing attention to military operations resulting in civilian casualties. After a US attack in Western Afghanistan killed over 50 civilians, President Karzai stated that "civilian deaths and arbitrary decisions to search people's houses have reached an unacceptable level".[126]

Although international forces have, as the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Killings has noted, taken the issue of pro-

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[122] *Taliban Propaganda: Winning the War of Words*, International Crisis Group, Asia Report No. 158 (2008), *Afghanistan: Civilian Deaths from Airstrikes*, Human Rights Watch (2008); and *Afghanistan: The US Should Investigate Civilian Deaths*, Human Rights Watch (2007).

[123] For a discussion about the use of local commanders in support of military operations, see Hodes and Sedra, *The Search for Security in Post-Taliban Afghanistan*, 2007, p. 12.

[124] UN Doc. A/HRC/8/3/Add.6, para. 4.

[125] *"Troops in Contact": Airstrikes and Civilian Deaths in Afghanistan,* Human Rights Watch (New York, 2008).

[126] http://news.bbc.co.uk/2/hi/south_asia/6615781.stm (last visited, 2008-07-21). President Karzai also reacted against civilian casualties in Helmand province in June 2008. See http://news.bbc.co.uk/2/hi/south_asia/6615781.stm (last visited, 2008-07-21).

tection of civilians with "great seriousness of intent and adherence to the applicable law",[127] NATO's response to the Special Rapporteur's report was, according to several interviewees, surprisingly harsh and defensive.[128] The NATO press release stated that the report was unsubstantiated and focused too much on the international forces and too little on Taliban indifference to civilian casualties.

The current conflict in Afghanistan is identified as a non-international armed conflict. Hence, in fulfilling its mission, ISAF should ensure that it complies with international humanitarian law, including on issues relating to the protection of civilians. As a minimum, ISAF should comply with Common Article 3 of the Geneva Conventions and with Additional Protocol II on protection of civilians in non-international armed conflict. As ISAF is one of NATO's first out-of-area operations and a showcase for NATO's ability to successfully command crisis management operations, it is likely that NATO should set its standards higher than minimal protection and aim for the standard of protection included in Additional Protocol I on protection of civilians in international armed conflicts.

According to Common Article 3, civilians and combatants who have laid down their arms should under all circumstances be treated humanely and they should not be subjected to any violent act or any form of attack on their dignity. Furthermore, Article 13 of Additional Protocol II states that "[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations" and that "[t]he civilian population….shall not be the object of attack". Additional Protocol I goes slightly further as it introduces the protection of civilians as a key concern in the planning of military attacks and introduces a principle of proportionality.[129] While it is recognized that civilians

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[127] UN Doc. A/HRC/8/3/Add.6, para. 5.

[128] Interviews (Kabul, June 2008).

[129] The principle of proportionality included in Additional Protocol I, Article 51(5)(b) states that "…an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". The principle of proportionality is not directly applicable to non-international armed conflict. Taliban are attacking and hiding amongst civilian populations. See *Afghanistan. All who are not friends, are enemies: Taleban abuses against civilians*, Amnesty International, ASA 11/001/2007.

may occasionally be killed during military operations, the principle of proportionality places a duty on combatants to choose means of attack that avoid or minimize damage to civilians and that military operations that may cause disproportional harm to civilians should be aborted (Art. 57, para. 2(b)). The International Committee of the Red Cross and many human rights organizations have asserted that there can never be any justifications for civilian casualties and that Protocol II can be interpreted as including an equitable protection of civilians as is included in Protocol I.

It probably surprises no-one that civilian casualties occur and that civilian property is destroyed in the conflict in Afghanistan, especially as the Taliban insurgents show considerable disregard for life and property. ISAF is also not alone: it is conducting missions together with Afghanistan National Security Forces who are less well trained and possibly also have less developed knowledge of international humanitarian law. However, from the perspective of NATO's efforts to become an efficient and responsible actor in the area of civilian crisis management, neither of these recognitions can serve as an excuse.[130] As the UN Special Rapporteur has written, "[t]he international forces operating in Afghanistan have a responsibility to make sure that there is a coherent, unified system of accountability which Afghans and others can follow. However messy this system may be on the inside, composed as it must be of multiple mandates and of disparate national military justice systems, it is essential that those pieces add up to a coherent whole".[131]

Although efforts have been made by the Afghanistan Independent Human Rights Commission and other organizations, there is currently no unified strategy for accountability or reparations within NATO/ISAF or between NATO/ISAF, Operation Enduring Freedom and the Afghan gov-

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[130] In its response to the UN Special Rapporteur, ISAF stressed that it is "…open to practical suggestions on improving transparency but due account needs to be taken of the sheer difficulty of the process of following up such incidents, which occur in an active insurgency where ascertaining facts and gathering evidence is difficult. Accusations that ISAF has killed civilians very often come from an opponent who uses misinformation as a part of his standard tactics", see ISAF Press Statement (2008).

[131] UN Doc. A/HRC/8/3/Add.6, para. 7

ernment. There are, as one interviewee noted, "as many policies as there are nations in ISAF".[132] The continuing prevalence of civilian casualties and the lack of a coherent reparations strategy are affecting the legitimacy of the international military mission. This is creating practical problems, as reparations may vary from community to community, depending on what flag the local provincial reconstruction team carries. Ultimately, it can affect the success of the stabilization mission.

4.2.2 The Question of Detainees

During the Taliban regime, Afghanistan was one of the safe havens of Al Qaeda and other terrorist groups, but the current Afghan government has become a key partner in the US-led war on terror. The concern of both the international community and the Afghan government with regard to terrorist threats in Afghanistan is certainly legitimate. However, indiscriminate arrests, the extended detention of illegal enemy combatants and the perceived exemptions of these detainees from the protection foreseen for detainees in the Geneva Conventions have had implications for the legitimacy of Operation Enduring Freedom both internationally and in Afghanistan.[133] The lowering of human rights standards and humanitarian law safeguards by the US and its allies in the war on terror will have long-term effects on national legislations and may have long-term effects on the legitimacy of international law. The development of the National Security Directorate, the Afghan intelligence service, into a non-transparent and, from a legal perspective, questionable institution can, in part, be explained by its role as a key partner in the fight against terrorism. Yet the lack of and disregard for evidence in the trials against Afghan returnees from Bagram and Guantanamo can, in part, be explained by the fact that evidence was never secured for these detainees and that Afghan defense lawyers are

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[132] Interview (Kabul, June 2008).

[133] The Geneva Convention does not demand that detainees be defined as prisoners of war, which has enabled the US to establish the category of Illegal Enemy Combatants. The US has not ratified Protocol 1, which would grant prisoners of war status to guerilla groups and terrorists.

unlikely to be able to question the US soldiers who were responsible for the initial detention and interrogation.[134]

Questions of what rules should apply if ISAF arrests a person and what ISAF should do with detainees have also been pressing issues for ISAF and its troop-contributing nations. One interviewee stressed that "[n]o issue has more potential to damage the alliance purposes and undermine cooperation against terrorism than the treatment of prisoners".[135] The consequences of bad intelligence and false reporting may be devastating not only for the individuals detained, but also for perceptions about the military operations. In the first years of ISAF, before identification of existing legislation and adoption of the Interim Criminal Procedure Code and the Constitution, "nobody", as one interviewee pointed out, "really knew when persons could be arrested, how long they could be arrested for, what legal processes would apply to them or where they should be held".[136]

When NATO took command of ISAF, efforts were initially made to develop a coherent detention policy for ISAF. However, the policy decided upon was to allow ISAF troop contributing nations to keep detainees for 96 hours and to outline how detainees should be treated in the ISAF Operational Plan. After the 96 hours, it is up to each troop-contributing state to decide what to do with the detainees. The strategies chosen by the different troop-contributing nations wary widely; many do not make any arrests either because they have no reasons to do so or because arrests are made by the Afghanistan National Security Forces they are conducting operations with. A number of the troop-contributing countries that operate in the conflict-ridden areas have signed bilateral memoranda of understanding with the Afghan government according to which detainees are to be handed over to Afghan authorities.

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[134] *Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan,* Human Rights First (April 2008).
[135] Interview (Rome, May 2008).
[136] Interview (Rome, May 2008).

Amnesty International reviewed the memorandums of understanding of the British, Canadian, Danish, Dutch and Norwegian governments and has identified the following common elements in the memorandums of understanding:[137]

- focus on the handover of detainees by respective NATO/ISAF states to unspecified "Afghan authorities";
- provide that Afghan authorities will accept the transfer of detainees from detaining country forces, and Afghan authorities will keep records of transferred detainees;
- provide that the signatories treat detainees in accordance with international law including human rights and humanitarian law (the UK only specifies human rights law);
- provide that representatives of the respective ISAF state, the International Committee for the Red Cross, the Afghanistan Independent Human Rights Commission have access to the detainees after they have been handed over (the Dutch add relevant UN bodies to this list, and the Norwegian MoU limits it to the human rights commission);
- provide that the ISAF state will be notified prior to the initiation of legal proceedings against release or transfer to a third country of the detainee (with the exception of Canada);
- provide that no person transferred will be subject to the death penalty.

From the perspective that NATO and ISAF are in Afghanistan to support the Afghan government, which since 2005 is a fully sovereign government, the decision to hand over detainees may seem self-evident. However, from the perspective of international law this decision is less obvious. As noted above, Common Article 3 of the Geneva Conventions applies to all parties in the con-

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[137] *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?* Amnesty International (November 2007), pp. 11-13.

flict and it demands that persons detained in the course of an armed conflict be treated humanely. In addition, in the case of Afghanistan and ISAF troop-contributing nations the International Covenant of Civil and Political Rights and the International Convention against Torture are also applicable. In times of public emergency, states party to these conventions can make some rights subject to derogation, but the right to freedom from torture and other ill-treatment is a non-derogable right.[138] Torture, whether during armed conflict or in times of peace, is also a crime of universal jurisdiction, i.e. perpetrators of torture can be prosecuted for their crimes in the country where they reside even if the crimes were committed elsewhere. As the prohibition against torture is a non-derogable right it is also under the principle of *non-refoulement* prohibited to transfer detainees to a country where they may risk torture or other ill-treatment.[139] The memorandums of understanding referred to above do obviously seek assurances from the Afghan government that the detainees be treated in accordance with international law and standards. These so-called diplomatic assurances have been criticized by human rights organizations for being inefficient.[140] In order to show the illegality of the handover of detainees in Afghanistan, Canadian Amnesty International, in cooperation with the British Colombia Civil Liberties Association, sued the Canadian government for handing over detainees to the Afghan authorities. As a response to the legal proceedings, the Canadian government renegotiated their agreement with the Afghan government to include more extensive monitoring. Amnesty International and the British Colombia Civil Liberties association have continued to stress that any handover of detainees to Afghan authorities is unacceptable and that monitoring will not suffice to make Afghan detention practices satisfactory.[141]

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[138] International Covenant for Civil and Political Rights art. 4 and Convention against Torture art 7.
[139] Article 3(1) of the Convention against Torture states: "No state shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Moreover, Article 3(2) requires a sending government to take into consideration the existence of gross, flagrant or mass violations of human rights when assessing the risk of torture. Under Article 1 of the Convention against Torture, the obligations of State Parties also extend to official complicity in, consent or acquiescence to acts of torture. Article 4 of the Convention against Torture requires all State Parties to prohibit participation and complicity in torture.
[140] See *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?* Amnesty International (November 2007).
[141] *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?* Amnesty International (November 2007). See also Murray Brewster, 'Canadians hear six claims of torture from Afghans', *Globe and Mail (Toronto),* 8 June 2007.

CONCLUSIONS

The aim of this paper was to situate rule of law reform within the framework of the state-building process in Afghanistan and to discuss whether ongoing rule of law reforms, including those undertaken by international military actors, such as ISAF, are likely to contribute to the promotion of rule of law in Afghanistan. This paper has largely focused on macro level initiatives. The shortcoming of this focus is that it may actually hide the immense void between policy, practice and on the ground realities in Afghanistan. The benefit of this approach is that systemic changes rather than the success of individual projects are viewed as markers of change.

Throughout this paper, the author has emphasized that political decisions taken and prioritizations made early on in the international intervention in Afghanistan have contributed to the short-comings and failures of the ensuing process. No peace agreement was attempted after the US-led military intervention. Instead, a power sharing agreement was implemented and Afghanistan was described as a post-conflict country before attempts were made to solve the many conflicts remaining in Afghanistan. The rationale for quick and dirty power-sharing and for identifying Afghanistan as a post-conflict success was political: the US and its closest allies did not wish to engage in a long term state-building effort and it was considered that the deployment of a sizable international peacekeeping might interfere with the Operation Enduring Freedom's counter-terrorism efforts. Having drawn lessons from its attempts to establish internationally-led interim administrations, the UN was reluctant to engage in anything but a light footprint state-building effort in Afghanistan.

However, the international community's presence in Afghanistan was light in regard to providing decisive political will on key issues such as rule of law, coherent policies, country knowledge and resources; it was never light in persistent demands for specific reforms and institutional changes. This has created a situation where international actors have sup-

ported political pluralism in name only, as their main counterparts have been self-proclaimed leaders, possible spoilers and those who speak the language of the international community. The elites and Kabul-centered state-building process has left large parts of rural Afghanistan to fend for themselves resulting in mounting resentment against the international presence and decreasing legitimacy of the Kabul-based government. The void between the centre and the peripheries also marks development and reform strategies. Donors and development agencies have attempted to force their priorities into the government's reform strategies while both the international community and the Afghan government have failed to give adequate attention to local contexts and to what would work in the multi-ethnic, fragmented, poor and sparsely populated area that is today called the Islamic Republic of Afghanistan.

In current stabilization and state-building efforts, including the ongoing efforts in Afghanistan, the focus is on the immediate post-conflict or transitional phase and not on facing up to the new challenges that the transition may bring. The immediate post-conflict or transitional phase does pose considerable political and practical challenges, but changing power structures, rule of law vacuums, an influx of international funding and possible public disillusionment due to unfulfilled expectations can also lead to crime waves and corruption and an increase in violence. The political decisions made and the lack of focus on rule of law, including security sector reform, during the early years of the state-building process in Afghanistan have undoubtedly contributed to the boom of organized drug-related criminality and corruption in Afghanistan. The compromised disarmament process and a culture of impunity have also contributed to the declining legitimacy of the government and a near complete lack of human security.

It is in this context, a context marked by a marginalization of justice concerns, that donors over the past two years have turned their attention to rule of law reform, especially an increased focus on justice and police reform. The adoption of the Afghanistan National Development Strategy and the strong focus on justice in the National Justice Strategy are

steps towards an increased focus on rule of law, at least in the sense that there are now coherent policies for justice and security sector reform in Afghanistan. However, the Afghanistan National Development Strategy and the National Justice Strategy are strategies developed for a post-conflict country with a more or less equal level of government presence and development in all parts of the country. They are not suitable strategies for a country returning to conflict and with extreme discrepancies between government presence and development among different parts of the country. The National Justice Strategy also lacks the important focus on both justice *and* security sector reform that is necessary for the conflict and post-conflict state. Justice and security are always intimately entwined, but even more so in countries emerging from conflict where discrepancies between justice and security sector reform can contribute to the establishment of a corrupt and criminal security force and a marginalized justice sector that does not muster to assert its independence vis-à-vis the political and security sector structures. This is certainly the case in Afghanistan, where links between police and organized crime are prevalent and where the judiciary (sometimes because of corruption and sometimes because of security risks) is complicit in systems of patronage.

In her analysis of rule of law reform, this author has been inspired by the synergistic approach to rule of law reform developed by Jane Stromseth et al. According to the synergistic approach to rule of law reform in post-conflict or fragile situations, rule of law reform needs to be related to the overall state-building process and address the political constraints on rule of law (systemic approach); be focused not only on formal components of rule of law, but on the complex task of establishing a rule of law-based society that enjoys wide public legitimacy (ends based and strategic approach); and take into consideration the laws, processes and institutions that already exist, focusing on reforming these while recognizing that every change (however necessary) is likely to bring with it new challenges (adaptive and dynamic approach). If rule of law reform is approached as an integral part of other reform processes, as a process that is equally technical, political and cultural, and that it is intrinsically national (and often local), then it is possible that rule of law reforms will become

sustainable. The sustainability of rule of law reforms is dependent on reforms being efficient, practical, and accepted.

Reconstructing a rule of law-based society is obviously not an easy task, especially not in situations with weak existing rule of law framework and little public legitimacy for formal rule of law institutions and for what can be perceived as foreign ideas, as is the case in Afghanistan. However, rule of law reform in Afghanistan has largely been focused on the formal aspects of rule of law or what could be described as technical rule of law reform, while largely ignoring the political and value-based dimension of rule of law. The keynote speech type commitments to rule of law have been interpreted as political commitments to rule of law, although it has all too often been evident that the international community has failed to demand accountability of the Afghan government on issues of rule of law and justice, and that the Afghan government has failed to take a decisive stand on justice related matters. The focus has also been on *bringing* rule of law to Afghanistan rather than on analyzing to what extent existing frameworks can be adapted to serve both the needs of international relations and access to justice for Afghans. Undoubtedly the Afghan justice sector was eroded or non-existent after the fall of the Taliban regime, but the lack of attention to and analysis of existing frameworks and the lack of focus on working with changing and updating legal practice through working with legal practitioners has led to justice reform efforts (drafting of laws, building and refurbishing court houses and short-term trainings of justice sector professionals) that have advanced on one track, while actual legal practice, whether in formal or informal institutions, have advanced on another track.

The lack of coordination by the UN and the failure by lead nations and later key partners to support their Afghan counterparts in leading the rule of law reform process have contributed to the lack of focus on and failure to develop bottom up knowledge about Afghan legal systems. However, ensuring national ownership and local leadership of the rule of law reform processes, and ensuring that support efforts actually contribute to changing legal practices, access to justice, and human security, is a tricky process in a context like Afghanistan. The current politico-legal leadership (govern-

ment and parliament) of Afghanistan is not considered representative of the Afghan people and public legitimacy is on the decline. The parliament (or strong components of the parliament) has on occasion used its position as the legislator to further its own interests without a focus on long-term consequences of rule of law. For example, the Amnesty Bill adopted by the parliament in March 2007, which with a few exceptions provides self-amnesty for all those involved in the Afghan conflict, has not furthered reconciliation, the stated aim of the bill, but rather further entrenched a popular understanding that the political leadership are mainly in it for themselves. The top-level misuses of power are reproduced in the system, where low salaries, unclear career advancement possibilities, nepotism and corruption undermine the commitment of justice sector officials.

After Rome, Bucharest and Paris, *we* may, as one interviewee noted, be in a position where we can "connect all the dots" of the rule of law reform process. However, the "dots" that are being connected – now also increasingly by the international military presence – are those focusing on what are perceived to be necessary technical connections and not necessarily those that would ensure access to justice and recourse in cases of abuse of power for ordinary Afghan citizens. Although rule of law is now a prioritized goal, it remains marginal and a non-integral part of political and security priorities. There are obviously technical components that need strengthening, including the relationship between prosecutors and police, but in the current context a focus on technical aspects without an adequate political will to shift toward a rule of law reform strategy centered on ending misuse of power and building a rule of law culture that also encompasses the security sectors is likely to have very few positive long-term effects.

It is easier to identify lessons than to learn them. The legitimacy crisis of the international presence and government, and the extreme security challenges (including organized crime, ethnic tensions, and insurgency) that Afghanistan faces does make it very difficult to prioritize changes. However, in the course of writing this paper a number of issues have crystallized themselves as particularly important:

- **A political commitment to rule of law that goes beyond words would have a radical impact on decision-making by both the Afghan government and its international partners.** The gradual move of justice and security sector reform from the margins to the center of the state-building process was, as has been noted earlier, based on recognition that a lawless state is not much of a state. However, lack of capacity arguments continue to be accepted as excuses for the rule of law deficit in decisions on the side of the Afghan government and stability arguments continue to be accepted as an excuse for the international community's failure to demand accountability from the Afghan government and uphold international legal standards in Afghanistan. Unless the current commitment to justice and security sector programming is coupled with an equal political commitment to rule of law and a readiness to take decisive stands against patterns of abuse and violations of individual human rights it is unlikely that there will be a lasting effect on rule of law in Afghanistan.

- **Efficient rule of law interventions, whether in the justice or in the security sector, should be forceful, based on local needs, and minimalist.** The recently adopted national justice and security sector strategies of the Afghanistan National Development Strategy are important insofar as they can ensure coherence between the Afghan government's and the international community's efforts in the area of justice and security sector reform. However, in many respects the strategies remain far removed from what is possible in remote and more often than not insecure provinces and districts of Afghanistan. Hence, it is important, but remains a task for the future, to turn these strategies into reform initiatives that correspond to local needs: if reform initiatives are to be implementable in the current context they should focus on what will make a change for individuals seeking justice and/or security and they should be minimalist.

- **Impunity is a security concern**. The culture of impunity whether for past or present crimes should be addressed as a security concern. The lack of rule of law and corruption within rule of law institutions affects the public perception of the government and its international partners. Attempting to address the culture of impunity does demand that those of Afghanistan's partners that have a stake in rule of law reform align their political and development strategies and demand accountability from the Afghan government. High profile prosecutions focusing on past or present war crimes, organized crime or major corruption charges might help restore the legitimacy of the current government's rule of law efforts. The success of such prosecutions is dependent on if the prosecutions are viewed as legally sound and not politically motivated.

- **Justice reform should be national- and civilian-led.** It is repeatedly stressed that the ongoing conflicts in Afghanistan cannot be solved with military means alone, but this does not mean that the military should seek to fulfill *all* other roles. Justice reform is one of the areas that should remain national and civilian-led. However, the increased mixing of civilian and military components in military operations does inevitably render the line between civilian and military engagements more fluid. Furthermore, the perception that the military has to fill a vacuum easily results in mission creep or the assumption of inappropriate roles. It is of crucial importance that ISAF and its troop-contributing nations commanding PRTs take clear decisions regarding their involvement in justice and security sector reform programs. Involvement in justice reform should also take into account the local populations' views on ISAF and PRTs, whom are often perceived as lacking in transparency. This perception is also colored by the issue of civilian casualties.

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