

REBUILDING AFGHANISTAN

A Framework for Establishing Security and the Rule of Law

*Findings from a Roundtable on
“Rebuilding Afghanistan:
Establishing Security and Rule of Law”*

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Key Points

- A three-pronged approach should be taken to the question of applicable law and legal authority: (1) the customary system should function in most of the country, (2) the formal pre-1978 legal system should apply in Kabul and a few major cities, and (3) the international community should provide direct assistance to Afghan authorities in the handling of a very limited number of specific major crimes.
- Operational planning and resource allocation for administration of justice should track this three-tiered approach, focusing on reconstructing the formal legal system in the capital and key cities.
- A 'ready roster' of available legal personnel, in Afghanistan and in the diaspora, should immediately be compiled.
- A technical commission on judicial affairs should be promptly established, to:
 - clarify the codes and laws to be applied;
 - determine any updating or revision that may be needed;
 - determine the personnel, infrastructure and equipment requirements for the formal justice system in selected cities;
 - manage the 'ready roster'; and
 - prepare candidate lists of personnel for appointment by the transitional administration.
- A national police force may advance national cohesion in the long term, but no effort should be made to establish such a national force in the short term, relying instead on strengthening and developing the various local police forces until an overall political decision is made which specifies the structure, composition and organization of a national police service. Ethnic diversification of police forces in the capital should be a priority in the short term.
- Immediate refresher training for judges and prosecutors, as well as police and penal system officials, will be essential.
- A multinational force will need to create the stability and security required for this re-establishment of the rule of law to move forward.

Introduction

On November 19, 2001, the United States Institute of Peace (USIP) convened a roundtable discussion on "Rebuilding Afghanistan: Establishing Security and the Rule of Law." Participants in the discussion included experts on Afghan law and legal traditions; practitioners and specialists on such issues as post-conflict administration of justice, civilian policing, institution- and capacity-building, technical legal assistance programs, the role of peace-keeping forces in the administration of justice, and the investigation and prosecution of

terrorism; and members of the NGO and policy communities. The event was organized in recognition that the process of political transition, reconstruction and recovery in Afghanistan will involve enormous challenges for the people of Afghanistan and for the international community.

The report that follows is based on the November 19 conference and additional consultations. A version of this report was provided in advance to the negotiators at the UN Talks on Afghanistan held in Bonn, Germany November 26 - December 5. Although stabilization and economic development of the country requires rebuilding of the entire legal infrastructure of Afghanistan, the most urgent need is the establishment of fundamental law and order to enable the transition process to proceed. As a consequence, the primary focus of the conference and this report is on the immediate needs of the criminal justice system in the short term.

A Three-Pronged Allocation of Legal Authority

In the areas of common crimes and ordinary disputes, customary and formal systems of justice, run solely by Afghans, should be respectively maintained and re-established in the immediate phase. Initially, administration of justice should be heavily weighted in favor of the use of the customary system, with the formal system applying only in the major urban areas, as was the case prior to the eruption of civil strife in Afghanistan more than twenty years ago. Authority in Afghanistan has historically been decentralized, and attempts to impose strong federal power have generally been unsuccessful. In proceeding in the initial phase, a degree sensitivity to the possible need for regional variations will be required, recognizing that the best plan for one major city, such as Kabul, may not be equally applicable to another such as Kandahar. In the initial phase, administration of justice in Afghanistan should be addressed by three systems of authority, as follows:

(1) In most of Afghanistan, customary systems have long regulated the vast majority of disputes and served the needs of most aspects of both civil and criminal justice. These systems, which vary somewhat depending on region and tribal area and are based on tribal custom and Sharia, have continued to function reasonably well and maintain some legal order even as the formal system of justice effectively was stalled during the last twenty-five years of war. The formal, Kabul-based legal system has historically been difficult to implement in these areas. Indeed, even when in effect in the 1970s, the laws and jurisdiction of the formal system of justice did not command nearly the same level of respect or adherence in the rural areas as did the traditional systems such as the "Qadi courts" and arbitration by respected local members of the community. As a consequence, no attempt should be made to impose any other legal system or structure on the rural areas of the country. It is not evident that it is needed, and it would not work.

(2) In Kabul and a handful of the major cities (likely including Herat, Mazar-e Sharif, and Jalalabad), the formal legal system that was in effect prior to Taliban rule should be re-instituted. It is in the urban centers that this system has functioned historically and would more likely be accepted. The legal foundations already exist in an extensive body of laws and codes enacted primarily in the 1960s and 1970s.¹ Many of these laws and structures remained technically in effect during the ensuing years, even while the system fell into

disrepair. Many of the former personnel of the formal justice system should be quickly brought back into the system, as discussed below.

Some experts suggest that certain types of conflict may prove difficult to manage through the traditional mechanisms of dispute resolution and should be considered for adjudication by the formal system. Property disputes, for example, especially those relating to water rights and irrigable land, can be expected to proliferate as millions of displaced Afghans attempt to reclaim their property.² For the reasons stated above, however, this should probably be a second-choice option: the formal system should be used only if the customary system is unable to resolve such conflicts.

(3) Finally, a very limited number of crimes may be too complex or sensitive to be addressed in the immediate phase through the customary or formal systems of justice, yet too important to ignore. These are crimes which, if left unaddressed, can have a significant destabilizing effect and impede progress under the transitional government. As a consequence, several participants in the November 19 meeting suggested that it will be necessary for international actors to take responsibility for these few areas, which would likely include: war crimes, retaliatory killings, terrorism, transnational organized crime (including trafficking in weapons, drugs and people), and crimes committed by members of any multinational force or UN civilian mission that may be deployed. A minority of participants suggested that local actors should have authority over all categories of crimes, with international experts serving in an advisory capacity only. The latter group felt that issues of sovereignty, language and culture would make such an assumption of executive authority by outsiders untenable.

The exercise of this international jurisdiction would be significantly reduced by making it prospective only, dealing with (and hopefully deterring) new incidents of these crimes. The Afghan reconciliation process will likely require the development of appropriate mechanisms to deal with past commission of these major crimes, but this issue should not be included in the limited mandate of the international prosecution function described here.

In many instances, the nature of these major crimes is such that other countries can assert jurisdiction, rather than relying on prosecution of the cases through an international military or civilian panel in Afghanistan. Crimes such as war crimes, terrorism and trafficking generally cross borders or are subject to universal jurisdiction, thus enabling other countries to assume the task of dealing with some of these crimes.³

Operational Implication of the Three-Tiered Approach

International assistance in the next 6-12 months should be focused on reinvigoration of the institutions of the formal legal system in the major cities. A nation-wide system of approximately 216 district, province and central courts existed previously, employing 1,000-1,200 professional personnel, but assistance should be restricted in the initial phase to the rehabilitation of the system in only a few cities.⁴ The kind and level of assistance may vary significantly between these cities. Limited technical assistance may be needed in the rural areas in matters such as land disputes, but that may well prove unnecessary and should

simply be monitored by Afghan authorities in the early phase of the transition. The extent to which a centralized legal system is later implemented nationwide will ultimately be a function of decisions to be made by Afghans regarding the degree of autonomy or control of the regions of the country.

While practical realities will likely necessitate this heavy reliance on local approaches and personnel for law enforcement, this approach carries potential risks as well. One is the risk of facilitating fragmentation at a time when Afghanistan seeks greater unity. In addition, this approach can produce a reliance on local warlords for law enforcement and the administration of justice, at least in the short term. Supporting these individuals, many of whom may be responsible for a variety of abuses against the local population, may undermine the effectiveness of a new transitional administration. It may also undermine the efforts by the transitional administration and the international community to combat organized crime, terrorism and drug trafficking.

For all three tracks for the administration of justice, it will be necessary to put in place some process of monitoring to ensure that both the customary and formal systems of justice conform to basic international standards of human rights to which Afghanistan is subject.

Establishing Peace and Stability

It is imperative that a level of stability and security be established in order to create the opportunity for the administration of justice and reconstruction to move forward. Participants urged that a multinational force should be created to oversee and maintain demilitarization of the major cities so that conditions are conducive for an interim Afghan administration to operate. It was suggested that perhaps one country, i.e., Turkey, should be assigned a city (such as Kabul) to avoid the difficulties inherent in meshing forces from multiple countries to control one city. The multinational force will also need to assist in keeping the key roads remain open and unrestricted, in order to facilitate the delivery of humanitarian assistance, the resumption of trade and the return of refugees and displaced persons.

Notwithstanding the desire for most actors in the Afghan and international community for a minimal role for such a multinational force, a functioning all-Afghan system will require time to be put in place. In the emergency phase, effective fulfillment of even a minimal mandate will require some arrest and detention by the multinational force of individuals whose actions can threaten peace and security, pending restoration of, and transfer to, the Afghan judicial system. Careful consideration needs to be given to the way in which this law enforcement function will be carried out by the multinational force, as well as to ensuring some level of consistency in the exercise of this function both within and among regions of the country.

The ability of the multinational force to accomplish the tasks noted above will depend on coordination with the coalition forces still conducting the military campaign in Afghanistan. In addition, both of these forms of international intervention will need to be coordinated with a third: the delivery of humanitarian assistance and aid in national reconstruction. Participants identified various potential conflicts between these three international

roles; a concerted effort will be needed to minimize these instances.

Judicial Personnel

By limiting efforts to reconstitute the formal legal system to the major cities, personnel requirements will be much more manageable. Although rapid staffing of the legal system in key cities will be a significant undertaking, it is probably an achievable one.⁵

A large number of judges, lawyers, prosecutors, and professors are currently in Pakistan or elsewhere and are said to be willing to return. One Afghan lawyers association in Pakistan is reported to have some 250 members, for example. In order to do so, however, they would need stability and peace in Afghanistan, so that local warlords could not threaten and coerce them, as well as reasonable salaries. (Salaries may also need to take into account the requirements of those supporting families remaining in Western countries.) A 'ready roster' therefore should be prepared of Afghans in the diaspora who would be willing to return to work within, and be employed by, an Afghan multi-party government. A database of all such individuals, their professional training and experience should be compiled immediately. Advertisements and announcements in relevant countries of the diaspora should provide qualified individuals with relevant contact information for inclusion in the database. These returning Afghans should not be made employees of the UN; rather, the UN or the international community should play a supporting role to ensure that the necessary conditions exist to enable them to come back and carry out their functions, including providing funding to bolster any salaries as needed.⁶

Under Afghan law, the appointment of judges is assigned to the head of the country, who in turn may delegate this function to the Minister of Justice. The process of recruitment and selection should be assisted by the Technical Commission, described below.

Technical Commission on Judicial Affairs

A Technical Commission on Judicial Affairs should be promptly established to prepare for the efficient restoration of the rule of law. This would be a technical body, without power of appointment. It would be apolitical, comprised of a small number of Afghan legal experts and perhaps 2-3 non-Afghan scholars of Islamic law and international law.⁷ Its tasks would include:

- clarification of the codes and laws to be applied;
- determination of any updating or revision that may be needed;⁸
- articulation of the personnel requirements for each designated city;
- management of the 'ready roster'; and
- preparation of candidate lists of personnel for appointment by the head of the transitional administration, Minister of Justice, or other responsible official of the transitional administration.

Policing and Detention

Afghanistan's police force has historically not had a large national enforcement capacity, but rather has only exercised de facto authority in a small percentage of the country.⁹ For the reasons stated previously with respect to the three-pronged allocation of authority, reliance on existing local mechanisms for law enforcement functions will be necessary. Attempts to impose a singular national police force probably should not be attempted in the initial phase, particularly given the potential of police deployments of the wrong composition to aggravate ethnic tensions in Afghanistan. If the decision is made to rely on local forces for policing in the short term, some immediate effort to incorporate diverse ethnic and religious groups into the police forces of each city, to the extent possible, is advisable as a means to curb abuses and provide a sense of safety and security to the minority populations of those areas. Over the medium to long term, it was suggested, the recruitment and training of an ethnically diversified and integrated national police force for deployment throughout the country may have an important unifying function.

In the short term, two priorities need to inform decisions made with respect to policing: order-maintenance and ensuring conformity of police forces with human rights standards. Attention to both aspects is necessary if the police are to contribute to a sense of security and stability on the part of the Afghan citizenry, and not to a sense of insecurity. Fear of either crime and continued violence on the one hand, or abuses by police on the other, will undermine the efforts of the transitional administration.

Under standard ratios of police to population, it was estimated that approximately 3,000 police may be needed in Kabul. The actual number of officers required, however, may be significantly less and can only be determined after conducting a thorough security assessment. In order to ensure stability and confidence in the transition, it will be necessary to diversify the police force in the capital, rather than leaving the task to Northern Alliance police forces. Again, some number of former police officers, admittedly with rudimentary training, can be recruited from the diaspora.

In determining personnel requirements, the precise functions of police in the immediate phase need to be clarified. It is assumed that most police will be needed to simply patrol and maintain order. Basic skills training will be critical to the development of a working police force. A smaller number will require additional training in order to investigate crimes.

There is a critical need to establish the respective authority of different actors in the law enforcement system - in all three proposed components of that system - to arrest and detain suspected criminals.

Especially in light of the limited support in Afghanistan for law enforcement performed by outsiders, international actors should be assigned a limited role for a minimum amount of time to fill the gap in local capacity during the emergency phase. There is significant debate over the options, which include: a military police or constabulary to deal with civil disturbances and armed groups; international police with executive authority; international police assistance limited to monitoring or mentoring and advising local police; and a more

limited advisory and training function. This is an area in need of further consideration. If the decision is to have internationals assuming policing powers in the main cities, rather than, or in addition to, relying on local forces, they will require executive authority, arms, interpreters, an applicable law, a full court system and corrections facilities.¹⁰

Some participants suggested that any system to establish a police force in the cities or throughout the countryside must include a mechanism for vetting and exclusion of persons involved in atrocities and other abuses during the past decades of civil war. A number of additional experts consulted believe such vetting to be crucial, arguing that allowing such individuals to assume positions, especially senior positions, in the new police forces would undermine the basic mission of the police, giving citizens cause for fear and insecurity rather than a sense of security from crime.

A mechanism of police monitoring needs to be put in place, as has been the case in many post-conflict countries. This mechanism is advisable regardless of whether policing is left to local forces or taken on by international forces. Various options exist, including the presence of international civilian police monitors who would have powers of decertification - i.e., authority to remove local commanders if they fail to observe international standards of human rights and local laws, or fail to ensure that their subordinates uphold these standards. Alternatively, this monitoring function might be assigned to international civilian police or designated international or local non-governmental organizations, who would monitor for human rights abuses but not have authority to decertify; rather, they would report their findings on an ongoing basis to the Afghan interim administration, which would have the authority to take action.¹¹ The challenge with both approaches is securing qualified monitors who understand how to identify violations of international standards of human rights and have experience in this regard.

Mechanisms and personnel for border patrol need to be established. This will be essential to control illegal trafficking, combat terrorism, and facilitate international relief efforts and refugee repatriation. Afghanistan's neighbors and international personnel can assist local authorities in this border control function. Over time, this should expand to include implementation of a customs regime, both to regulate the transfer of goods and to generate revenue to finance this policing function.

Finally, although many prisons and jails exist within the country, an assessment of the state of the penal system is necessary before designing any system for detention. The penal system is an essential component of the criminal justice system, but is too often ignored by both donors and locals in establishing post-conflict priorities. If law and order is to be rapidly established, those committing a variety of crimes will need to be properly detained in appropriate facilities; deferring attention to this element can undermine the credibility of the criminal justice system in the transition.

Training

Immediate refresher training for judges and prosecutors will be essential. There is a critical need for short-term training for all aspects of the judicial system to upgrade the skills of

people who have not worked for many years. It would be welcomed. Many of these former legal officials could participate in a train-the-trainers program to develop a new cadre of trainers and professionals, because there are not enough existing legal professionals, in Afghanistan or the diaspora, to fill the positions needed. There was general consensus that a legitimate function for the international community would be to send experts who could act as advisors for these training processes.

In the long-defunct Afghan police academy,¹² a corps of senior officers received professional police training. Germany played a lead role in the design of the curricula and running of the academy, with professional instruction from Egyptian and Turkish police as well. The international community should play a role in the rebuilding of the police academy and the training of officers, with immediate outreach to those countries that have played this role in the past. Many older former officers would likely be qualified and willing to play a role in developing the new police academy.

Long-Term: Institutional Capacity Building

Although the focus should first be on the immediate needs, the nature of institution-building requires that the international community provide adequate assistance and funding to ensure that all critical areas are covered. These include the following:

- Training programs/institutes for judges, prosecutors, defense attorneys, corrections officials and police
- Resurrection of the University of Kabul law faculty
- Reinstitution of professional legal associations
- Establishment and development of appropriate human rights institutions
- Legislative reform
- Capacity building in the Ministry of Justice

Finally, it is critical to consult with Afghan experts to determine priorities. It is also critical to have careful coordination among donors so as not to create conflicting programs, unnecessary programs or to overwhelm the interim administration with well-intentioned but misplaced efforts.

**“Rebuilding Afghanistan: Establishing Security and Rule of Law”
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Notes

¹ These include the Criminal Code (1976); the Law on Criminal Procedure (1965, amended 1967, 1973); the Civil Code (1973); the Law on the Judiciary and the Administration of Justice (19xx); the Law on Saranwali (Prosecution) (1966); and the Law on Police and Gendarmes (1973).

² Although a land registry reportedly exists in Afghanistan, it is said to be inadequate to resolve these disputes, particularly after so many years of war and displacement. It was suggested that a cadastral survey be undertaken, which will likely take several years to complete.

³ If these major crimes are to be placed under the jurisdiction of international actors, a number of issues must be considered and resolved. For example, how will organized crime - which often involves a series of common crimes - be defined and identified in such a way that it can be carved out for international investigation and prosecution? How and when will crimes be identified as being part of "organized crime" and thus go to international authorities? What sector of the international community should handle such crimes? The multinational military force? A civilian police force and judiciary with executive authority? In either case, what laws will apply? Will a stand-alone mini-criminal code be devised? What criminal procedures will apply? If the military is tasked, will a special code and procedure code be devised or will each country use its own military's code and procedure code? Will any attempt be made to use the applicable law of Afghanistan?

⁴ The number of districts has varied at different times, as regimes have expanded and consolidated them, and has reportedly increased in recent years. Given the enormous population shifts as a result of years of conflict, new decisions will likely be appropriate with respect to the number and allocation of judicial districts in the country.

⁵ One former legal official has estimated that approximately 200 judges, prosecutors and defense counsel will eventually be needed to establish a fully functioning judicial system in Kabul, with significantly fewer needed in the other cities. Although on-the-ground assessments will be necessary in the coming weeks, a much smaller number will presumably be sufficient to deal with the priority needs of law enforcement and criminal justice in the emergency phase. The burden on the court system will obviously be in direct relation to the capacity of the police to maintain law and order.

⁶ Under UN rules, Afghans who are nationals of other countries could be employed as UN "international staff" and paid accordingly, while returning refugees and those who remained in the country could not. In other post-conflict missions, it was noted, this stratification and substantial salary differentials has produced some resentment towards returning expatriates.

⁷ A copy of this report was provided to the negotiators at the UN Talks on Afghanistan in advance of the Bonn meeting. The final agreement adopted on December 5 provides: "The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Article II (2).

⁸ This may include a review of Afghan codes and laws for any major areas of conflict with current international standards, which can be accomplished fairly quickly. In this regard, it should be noted that Afghanistan is a party to the International Covenant on Civil and Political Rights and other

relevant treaties. Should conditions require it, a formal derogation under the terms of the Covenant by the transitional government may be warranted, allowing the justice system to suspend full compliance with selected rights requirements during the transitional period while maintaining the goal of full compliance as the transition proceeds.

⁹ While a gendarmerie also previously existed in Afghanistan, such a force did not exist in the contemporary Western sense of the term; rather, it has been reported that gendarmes primarily provided security at key buildings and intersections.

¹⁰ The use of formed police units (e.g., constabulary forces, gendarmes, carabinieri, military police) is a useful tool for these functions because of their dual police and military capabilities. Such forces would need to operate in close cooperation and communication with the multinational military force. A common language points to exploring the possibility of drawing such formed police units from the same forces deploying military troops, so long as these can themselves be expected to uphold international standards of human rights.

¹¹ Based on previous experience, the challenge with the latter model is that it could place representatives of the international community in the difficult position of monitoring and identifying human rights abuses taking place in their presence without any assurance that their report will result in any action. One option to address this concern would be to establish a specific procedure for the handling of such reports of abuses, which could be incorporated into any agreement establishing the monitoring function.

¹² The Northern Alliance has reportedly been operating a police academy in the northern town of Dashtak.

